

UDC: 34.04(597)

TRANSPLANTING COMMON LAW PRECEDENTS: AN APPROPRIATE SOLUTION FOR DEFECTS OF LEGISLATION IN VIETNAM, *(part 2)*

*Thi Mai Hanh Do**, PhD
Hochiminh City Law University, Vietnam

Abstract:

Vietnam is in the midst of legal and judicial reforms as it attempts to construct an appropriate framework for a successful market-based economy. It is increasingly likely that as its legal system has been changed to complement a market economy, an added degree of unpredictability has entered the situation, particularly due to the degree of legal transplantation involved. Vietnam has imported legal rules from the Civil Law and the Common Law, altering its legal system and blurring previously clear structural lines. Further change can be anticipated, and with due consideration, welcomed.

Recently, the Vietnamese government has been planning to borrow Common Law precedents as a solution to fill the gaps in its sources of law, which have traditionally been of legislative origin. These sources include Codes, Laws, Ordinances, Decrees, Resolutions, and Circulars. Precedents and customary laws, on the other hand, have not been officially recognized. Partly due to the acceptance of a single source of law i.e. legislation, the application of law in Vietnam is critically evaluated not to be consistent, uniform and effective. Further, a lack of adequate legal interpretation, the uncertainty and the deficiency of the legislation constitute shortcomings of the legal system.

Precedents are major sources of law in the Common Law system which is one of the most pre-eminent legal families in the world. As sources of law, precedents are usually considered to possess merits that make the legal system certain, consistent, fair, predictable and stable. Therefore, with those strengths, precedents can supply the certainty and stability which legislation lacks.

Several factors favour the integration of precedents. Beside the need for Vietnam to counter the weakness of its legislation and the apparent strengths offered by precedents to fill legislative gaps are the readiness of Vietnam for judicial reform and the strong possibility of success of legal transplants whose success has elsewhere generally been confirmed. These provide strong motives for Vietnam to transplant precedents into its legal system. Therefore, the introduction of the Common Law precedents is completely an appropriate solution for defects of the Vietnamese legislation.

* Ph, D, Law Faculty, University of Wollongong, Australia; a lecturer of International Law Faculty, Hochiminh City Law University.

Strengths of Common Law precedents which can address weakness of legislation in Vietnam

In the Common Law, legal rules mainly lie in precedents which are created from concrete cases by superior courts.² Precedents remain as a basis for legal development³ via their roles in law-making and law-interpreting in the Common Law. In Common

Law, judges do not simply apply the available rules (which inevitably fail to cover all situations) but also create new rules on the basis of the existing rules to ensure a resolution of the case before them.⁴ Thus it appears that precedents have several strengths which can address the inadequacy of legal interpretation, the lack of certainty of written law, and gaps in legislation in Vietnam.

Precedents, functioning in statutory interpretation, were considered to occur along with the existence of 'the guides for the interpretation of legislation' in the sixteenth century.⁵ Indeed, 'when the courts have interpreted an Act, of any section or word of it, that interpretation is a precedent in subsequent cases'.⁶ Vermeesch and Lindgren evaluate the value of 'judicial interpretation' as follows:

It is an important function because a court's decision on the meaning of a particular piece of legislation is a precedent which will be considered when reading an Act so that "the law" on the matter dealt with in the statute is to be found in the Act as interpreted by the court.⁷

From this, it can be said that, precedents can address the issue of inadequacy of legal interpretation in Vietnam which the current Standing Committee of National Assembly does not completely carry out. In addition, the proposition that the superior courts will take charge of the duty of legal interpretation is likely to be compatible with the fact that guidance documents (Cong Van) issued by the Vietnamese Supreme Court are always valuable as a legal interpretation regardless of their having no legal validity. If precedents were recognized as a source of law in Vietnam, the problem of inadequacy of legal interpretation would be solved.

² David and Brierley, above n 7, 358.

³ Denis Keenan, *Smith and Keenan's English Law* (9th ed, 1989) 9.

⁴ Frederick Schauer, 'Is the Common Law Law?' (1989) 77 *California Law Review* 455, 455; David and Brierley, above n 7, 361.

⁵ O Hood Phillips and A H Hudson, *O Hood Phillips' First Book of English Law* (8th ed, 1988) 134.

⁶ Hood Phillips and Hudson, above n 88, 137.

⁷ R B Vermeesch and K Lindgren, *Business Law of Australia* (11th ed, 2005) 68.

In Common Law, the demand for statutory interpretation generally arises from defects of legislative process such as ‘ambiguity’ due to carelessness in the drafting of statute law which usually hinges on two or more meanings of a word used,⁸ or ‘the imperfection of language and draftsmen’ that allows people to understand words in different ways;⁹ and the ‘uncertainty’ of fact situations which require the courts to identify whether the case in hand satisfies those fact situations.¹⁰ Adams and Brownsword simply note that interpretation is essential when ambiguity exists in a statute.¹¹ This function is also based on the view that ‘such interpretation raises an issue of law, not of fact’.¹² However, it is necessary to note that interpreting law, in this context, means the courts ‘ascertain the intention of Parliament’¹³ or ‘ascertain the meaning’¹⁴ of statute law.

Like the Common Law, Vietnam also has the issue of ambiguity of law which has resulted from the generalized structure of written laws. Ambiguity created by the generalized nature of Vietnam’s written law is the primary cause of inconsistency in applying law. Thus, using precedents which contain facts, details or interpretation may help overcome this issue.

Another perspective is that precedents can still help fill the gap of the written law via their law-making role. This role is typical because courts usually create the law by developing precedents, a ‘major’ source of law in the Common Law.¹⁵ Judges will decide in cases where legislation is silent, and where there is no precedent to deal with the case in hand. In addition, precedents are still created when there is no ‘pre-existing statute’ and existing precedents are out of date.¹⁶ As a result, judges have to make law (precedents) if there is a gap in the legal system.¹⁷ According to Zander, this activity undertaken in the absence of precedents or where existing precedents are outdated, ‘adds something new to the existing corpus of the law’ and so it is ‘making law’.¹⁸

⁸ Ronald Walker and Richard Ward, *Walker and Walker's English Legal System* (7th ed, 1994) see also John N. Adams and Roger Brownsword, *Understanding Law* (2nd ed, 1999) 78.

⁹ Hood Phillips and Hudson, above n 88, above n 2, 133–4; see also Adams and Brownsword, above n 91, 82.

¹⁰ Walker and Ward, above n 91, 33.

¹¹ Adams and Brownsword, above n 91, 77.

¹² Vermeesch and Lindgren, above n 90, 68.

¹³ Walker and Ward, above n 91, 34.

¹⁴ Christopher Enright, *Studying Law* (1995) 297.

¹⁵ See Kiralfy, above n 78, 263.

¹⁶ Callie Harvey, *Foundations of Australian Law* (2007) 87.

¹⁷ Zenon Bankowski, D Neil MacCormick and Geoffrey Marshall, 'Precedent in the United Kingdom' in D Neil MacCormick and Robert S Summers (eds), *Interpreting Precedents: A Comparative Study* (1997) 332–3.

¹⁸ Michael Zander, *The Law-Making Process* (6th ed, 2004) 298–9.

As mentioned above, gaps in written law are a serious issue in Vietnam. Creating and applying precedents must be a necessary supplement to address this issue. Judges can create solutions to decide cases by precedents where the legislature provides no applicable law. As a result, precedents might be valuable sources of law which help maintain the continuity and effectiveness of the Vietnamese legal system in terms of solving the inadequacy of legal interpretation, the uncertainty and gaps in legislation.

Moreover, legal transplants are considered to be methods for improving national legal systems. Following this, up to the year of 2020, the Common Law precedents will be legalized in Vietnam.¹⁹ This is also a motive to boost the confidence of Vietnam in transplanting precedents into its legal system.

An overview of legal transplant

It can be said that the phenomenon of legal transplants is still controversial in many aspects such as terms and concepts, theories and the possibility of success. In other words, legal transplants remain at the centre of debate with the existence of many different points of view. However, there are many cases of successful legal transplants which could be achieved regardless of differences in terms of legal tradition or distant geography. Additionally, major theories on legal transplants also maintain the possibility of successful legal transplantation in circumstances where a number of conditions are met.

Terms and concepts

There is a plethora of terms to express the phenomena by which a country applies laws or legal rules learnt or imported or imitated or transferred or copied from a foreign legal system. They include ‘legal transplant’, ‘legal transplantation’, ‘diffusion’, ‘transposition’, ‘legal irritant’, ‘legal borrowing’, ‘imitation’, ‘legal transfer’ to name but a few.²⁰

¹⁹ Politburo Resolution No 49 NQ/TW dated 2 June, 2005 on the Strategy of Judicial Reform up to 2020 , Part II, Point 2 and sub-point 2.2.

²⁰ From these terms, Peerenboom draws other terms for the above-mentioned phenomenon, including, ‘legal translation, legal transformation, legal convergence/divergence/differentiation, selective adaptation, and institutional monocropping’: see Peerenboom, Randall Peerenboom, 'A Methodology for Successful Legal Transplants: A Working Outline' in *Comparative Law Workshop on Alternative Dispute Resolution* (2008) 3. Twinning supplements these with other terms, which are ‘spread, transfer, import/export, reception, circulation, mixing, and transfrontier mobility’: William Twining, 'Diffusion and Globalisation Discourse' (2006) 47 *Harvard International Law Journal* 507, 510.

There are several ways to define legal transplants in comparative field. According to Watson,²¹ a legal transplant is ‘the moving of a rule or a system of law from one country to another or from one people to another’. A similar definition of legal transplant given by Miller is ‘the movement of laws and legal institutions between states’.²²

Garoupa and Ogus²³ supply yet another way to define legal transplant: ‘unilateral changes of a legal order by which one jurisdiction imports legal norms from another jurisdiction’. Furthermore, legal transplants are understood as ‘a form’, ‘a result’ of legal change²⁴ and ‘a means of law reforms and modernization’.²⁵

It is impossible to deny that a variety of terms are used for the same phenomenon²⁶ of a transfer of laws or rules from one country to another country. In spite of the popularity of the term ‘legal transplants’, every scholar, based on her or his individual viewpoint or focus, freely selects a term for the phenomenon. In this paper, the writer prefers to use the term ‘legal transplant’ rather than others because it is currently so common to many scholars.

A brief literature review of legal transplants

The phenomenon of legal transplants is not a new topic but was examined long ago in the writings of legal scholars such as Montesquieu,²⁷ Pound²⁸ and Albert.²⁹ Among those works, *The Spirit of Laws* written by Montesquieu is the earliest on legal transplants.³⁰ His proposition in this work is that the transferability of national law is unusual because each country has its own features which suit its

²¹ Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1993) 21.

²² Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine, Examples to explain the Transplant Process' (2003) 51 *The American Journal of Comparative Law* 839, 839.

²³ Nuno Garoupa and Anthony Ogus, 'A Strategic Interpretation of Legal Transplants' (2006) 35 *Journal of Legal Studies* 339, 344.

²⁴ Respectively see Alan Watson, 'Comparative Law and Legal Change' (1978) 37(2) *Cambridge Law Journal* 313, 321; Jan M Smits, 'On Successful Legal Transplants In A Future Ius Europaeum' in Andrew Harding and Esin Orucu (eds), *Comparative Law in The 21st Century* (2002) 139.

²⁵ Esin Örüçü, 'Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition' (2003) 4(1) *Netherlands Comparative Law Association* 1, 6.

²⁶ Esin Örüçü, 'Law as Transposition' (2002) 51 *International and Comparative Law Quarterly* 205, 205.

²⁷ Charles De Secondat Baron De Montesquieu, *The Spirit of Laws* (1914).

²⁸ Roscoe Pound, 'The Theory of Judicial Decision' (1923) 36(6) *Harvard Law Review* 641.

²⁹ Albert Kocourek, 'Factors in the Reception of Law' (1935-1936) 10 *Tulane Law Review* 209.

³⁰ Spencer Weber Waller, 'Neo-Realism and the International Harmonization of Law: Lessons From Antitrust' (1993-1994) 42 *Kansas Law Review* 557, 562.

people.³¹ This view is followed³² and even becomes a premise upon which Kahn-Freund later builds his theory of legal transplants.

According to Twining,³³ there were following Montesquieu several writings by Gabriel Tarde, Sir Henry Maine, and Max Webber that analyze this topic but these focused on ‘cultural anthropology’ rather than law. Then, in 1953, Paul Koschaker’s research on the reception of Roman law in Medieval Europe inspired other scholars to study this topic.³⁴ The phenomenon of legal transplants was studied and discussed by several scholars by 1959.³⁵

A revival of interest came about in the 1970s, when Beckstrom³⁶ and Watson³⁷ published their works, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia* (1973) and *Legal Transplants: An Approach to Comparative Law* (1974) respectively. Also in 1974, Kahn-Freund³⁸ released an article *On Uses and Misuses of Comparative Law* concerning legal transplants. Watson’s 1976 article, *Legal Transplants and Law Reform*, argues with Kahn-Freund on the viability of legal transplants and concurrently identifies his own theory of legal transplants.

These works formed a foundation for later research on legal transplants.³⁹ For instance, in Italy, Rodolfo Sacco focuses on the theory of legal transplants in his book *Introduction to Comparative Law* in 1980.⁴⁰ In 1988, in France, Eric Agostini⁴¹ studied the cases of Japan and Turkey, where the Civil Law tradition was imported, differentiating between ‘assimilation and adaptation’ in importing law, and distinguished between ‘borrowing’ and ‘receiving’ law. In Germany, the *Schriften zur europaischen Recht und Verfassungsgeschichte* largely contained the analysis and synthesis of legal transplants in the Civil Law tradition, was edited by Reinhard Zimmermann, Reiner

³¹ Montesquieu, above n 110, 7.

³² See, Waller, above n 113, 564.

³³ See William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism* 1, 8.

³⁴ Twining, 'Diffusion of Law', above n 116, 8.

³⁵ Twining, 'Diffusion of Law', above n 116, 5.

³⁶ John H Beckstrom, 'Transplantation of Legal Systems: An Early Report on the Reception of Western Law in Ethiopia' (1973) 21 *The American Journal of Comparative Law* 557.

³⁷ Alan Watson, *Legal Transplants* (1974).

³⁸ O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *The Modern Law Review* 1.

³⁹ John Henry Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common law' (1981) 17 *Stanford Journal of International Law* 357, 369; Ugo Mattei, 'Why the Wind Changed: Intellectual Leadership in Western Law' (1994) 42 *The American Journal of Comparative Law* 195, 551.

⁴⁰ See Mattei, above n 122, 197.

⁴¹ Eric Agostini, *Droit Compare* (1988): Cited in Mattei, above n 122, 196.

Schulze and Elmar Wadle.⁴² Those works are simply some prominent examples of the literature on legal transplants.

Due to the growing number of legal scholars interested in the phenomenon of legal transplants,⁴³ it has become an important subject of contemporary Comparative Law.⁴⁴ Since 1990, at the Thirteenth Congress of the International Academy of Comparative law, it has been officially recognized as a discipline of Comparative Law.⁴⁵ Although there are various viewpoints and opinions, the arguments of Watson and Kahn-Freund appear to be acknowledged by other legal scholars as the fundamental theories of legal transplants.⁴⁶ For instance, Nicholson⁴⁷ used Watson's theory 'as a guide' to find that the American slave law was imported from English legal system. Similarly, Teubner, based his work in *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences* on Kahn-Freund's theory and confirmed that 'not all legal institutions are culturally embedded; some are insulated from culture and society'.⁴⁸ From this, he concludes the degree of the closeness in the relationship between a legal rule and its 'social system' will be a determinant as to the successful borrowing of that legal rule.⁴⁹ The theories on legal transplants of Watson and Kahn-Freund, thus, are presented below.

⁴² Mattei, above n 122, 196.

⁴³ Many scholars continue to publish their works on legal transplants; e.g.: Paul Edward Geller, 'Legal Transplants in International Copyright: Some Problems of Method' (1994-1995) 13 *Pacific Basin Law Journal* 199; Pierre Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 *European Economic Review* 165; Helen Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *International and Comparative Law Quarterly* 659.

⁴⁴ See Waller, above n 113, 562; William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 *The American Journal of Comparative Law* 489, 490; Jan M Smits, 'Import and Export of Legal Models: The Dutch Experience' (2003) 13 *Transnational Law and Contemporary Problems* 551, 551; Mattei, above n 122, 196.

⁴⁵ Mattei, above n 122, 196.

⁴⁶ Steven J Heim, 'Predicting Legal Transplant: The Case of Servitudes in the Russian Federation' (1996) 6 *Transnational Law and Contemporary Problems* 187, 192-3; Lorraine M McDonough, 'The Transferability of Labor Law: Can An American Transplant Take Root in British Soil?' (1992) 13 *Comparative Labor Law Journal* 504, 504 and 508; Mattei, above n 122, 196; Ewald, above n 127, 490; Bradley J Nicholson, 'Legal Borrowing and the Origins of Slave Law in the British Colonies' (1994) 38 *the American Journal of Legal History* 38, 41; Örucü, 'Law as Transposition', above n 109, 206; Hideki Kanda and Curtis J Milhaupt, 'Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51 *The American Journal of Comparative Law* 887, 889.

⁴⁷ See Nicholson, 'Legal Borrowing', above n 129, 41.

⁴⁸ See Smits, 'On Successful Legal Transplants', above n 107, 145

⁴⁹ See Smits, 'On Successful Legal Transplants', above n 107, 145

Theories of Watson and Kahn-Freund – major theories on legal transplants confirm the successful possibility of legal transplants

The theory of Alan Watson

Watson is a Scottish comparative legal historian.⁵⁰ Before publishing his first book *Legal Transplants* in 1974, he had already written many works on legal transplant theory and related issues.⁵¹

The main theme of Watson's theory of legal transplants is that foreign legal rules or institutions can be transplanted into a recipient country, regardless of differences in features between the donor and the recipient countries. There are three main reasons he gives to support this theory: (1) legal borrowings have been a common method to develop the laws of many nations; (2) A state's law does not rely on its society; and (3) the proposed transplant is always a good idea conceived by law makers.

Watson is very optimistic and confident in affirming his theory on the viability of legal transplants. He asserts that the popularity of legal transplants as an effective tool for legal developments is recorded throughout history.⁵² Legal transplants are primary sources for legal developments in many countries in the world.⁵³ A frequent example is the private law of Western countries which was achieved by the use of legal transplants from the Roman Civil Law and English Common Law.⁵⁴

Watson's argument is that 'the transplanting of legal rule is socially easy. Whatever opposition there might be from the bar or legislature, it remains true that legal rules move easily and are accepted into the system without too great difficulty'.⁵⁵ This view flows partly from his viewpoint that there is almost no connection between the state's law and its society.⁵⁶ Accordingly, law is an independent element in a social structure with its own 'life and vitality'.⁵⁷ If that connection was intimate, legal

⁵⁰ Eric Stein, 'Uses, Misuses - and Nonuses of Comparative Law' (1977-1978) 72(2) *NorthWestern University Law Review* 198, 198.

⁵¹ Loukas A Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform - Some Fundamental Observations' (2000) 34 *The International Lawyer* 1055, 1065, footnote no 69; Ewald, above n 127, 489, footnote no 1.

⁵² Watson, 'Legal Transplants: An Approach', above n 104, 95.

⁵³ See Öricü, 'Law as Transposition', above n 109, 222; See Watson, 'Legal Transplants: An Approach', above n 104, 95; Alan Watson, 'Aspects of Reception of Law' (1996) 44 *The American Journal of Comparative Law* 335, 335.

⁵⁴ Watson, 'Legal Transplants: An Approach', above n 104, 95.

⁵⁵ Watson, 'Legal Transplants: An Approach', above n 104, 95-6.

⁵⁶ See Watson, 'Comparative Law', above n 107, 314-5; Heim, above n 129, 192

⁵⁷ Watson, 'Comparative Law', above n 107, 314.

transplantations would be more difficult and have a shorter presence.⁵⁸ Thus, Watson disagrees with the ‘mirror theories’ of law, where the law is conceived not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and moulded by economy and society. This is the theme of every chapter and verse.⁵⁹

However, Watson partly concedes the existence of a relationship between the law and its society to a certain degree.⁶⁰ As a result, he admits it is more difficult for legal transplants to succeed if the proposed rules are not appropriate to the political circumstance of the recipient country.⁶¹ However, this point does not influence Watson’s argument on the likelihood of successful legal transplants because from ancient times, historical evidence proves that legal borrowings among countries have been increasingly common.⁶²

The loose connection between the states’ law and its society means legal rules are not embedded in their society. Instead, legal rules ‘operate on the level of idea’.⁶³ As a result, any country, even if different from the donor country in terms of politics, economy or environment, can successfully borrow a proposed transplant. Like a tree, it can easily take root and grow up in various lands. Thus Watson affirms that foreign law can be borrowed even in circumstances where the environment and politics of the donor differ greatly from those of the receiving country.⁶⁴ A legal transplant can succeed even when it is borrowed from a state ‘at a much higher level of development and of a different political complexion’.⁶⁵ He gives some examples to illustrate where differences in environmental and political context between the giving and receiving countries, such as, between Germany and mediaeval Scotland in the fifth century,⁶⁶ or France and Japan in 1882. However, those differences have not inhibited successful legal transplant.⁶⁷

⁵⁸ Watson, ‘Comparative Law’, above n 107, 315; Heim, above n 129, 192.

⁵⁹ According to Ewald, the theories mirror of law was initiated by Lawrence Friedman, an American legal historian: Ewald, above n 127, 492, cited from Lawrence M Friedman, *A History of American Law* (3rd ed, 2005) 595.

⁶⁰ Watson, ‘Comparative Law’, above n 107, 321; Waller, above n 113, 566

⁶¹ Alan Watson, ‘Legal Transplants and Law Reform’ (1976) 92 *The Law Quarterly Review* 79, 81.

⁶² Watson, ‘Legal Transplants: An Approach’, above n 104, 21 and 95.

⁶³ Watson, ‘Comparative Law’, above n 107, 315.

⁶⁴ Watson, ‘Legal Transplants: An Approach’, above n 104, 99; Watson, ‘Legal Transplants and Law Reform’, above n 144, 79; Stein, above n 133, 202

⁶⁵ Watson, ‘Legal Transplants and Law Reform’, above n 144, 79.

⁶⁶ Watson, ‘Legal Transplants: An Approach’, above n 104, 99.

⁶⁷ Watson, ‘Legal Transplants and Law Reform’, above n 144, 82.

Watson also emphasizes that there is no requirement for the recipient country to understand the law and political framework of the country where the proposed rules originate. On the other hand, he also comments that such knowledge, if obtained, is useful for the receiving law makers.⁶⁸ As an illustration that there is no requirement for knowledge of the political context of donor state, he cites Japan's importing criminal and civil codes because their 'desire for them, not their knowledge of the French or German political context of the legal rules, or any similarity of the political context in those nations as compared with what existed in Japan'.⁶⁹

Instead, legal transplants can be carried out successfully if supported by the value of those proposed rules. Watson calls a proposed rule 'the idea'⁷⁰ or that which is implicitly a 'good' idea.⁷¹ According to him, the proposed rule is the idea that law makers select to transplant. The law makers choose that idea because they recognize it as beneficial to their country.⁷²

Watson puts more weight on the idea itself than on its relationship with political and environmental circumstances in its original country. Accordingly, observation of the idea and its impacts on the politics and environment of the recipient country will be needed to evaluate the viability of that idea. Putting this another way, the possible effectiveness as well as the possible effects of that idea on the recipient country are carefully examined before the transplant proceeds. The success of a legal transplant will be greater if the negative impacts on the political, social, economic circumstances of the recipient country are predicted to be negligible, and indeed this later proves to be the case.⁷³ Through such ongoing thorough observation subsequent to the introduction of a legal transplant, advantages and disadvantages of an application of the idea in the receiving state are always easier to recognize than in the original country.⁷⁴

Accordingly, Watson also makes the point that the application of a rule can be different in donor and recipient countries.⁷⁵ Modifications are usually possible to make

⁶⁸ Watson, 'Legal Transplants and Law Reform', above n 144, 79; Stein, above n 133, 202; McDonough, above n 129, 508.

⁶⁹ Watson, 'Legal Transplants and Law Reform', above n 144, 83.

⁷⁰ Watson, 'Comparative Law', above n 107, 315.

⁷¹ Heim, above n 129, 193; Mistelis, above n 134, 1066.

⁷² See, Watson, 'Comparative Law', above n 107, 315; Örüçü, 'Law as Transposition', above n 109, 219.

⁷³ See Watson, 'Legal Transplants and Law Reform', above n 144, 81; McDonough, above n 129, 508.

⁷⁴ See Watson, 'Legal Transplants and Law Reform', above n 144, 82.

⁷⁵ Watson, 'Comparative Law', above n 107, 316

that transplanted rule appropriate to the recipient environment.⁷⁶ This is a ‘natural consequence’ of legal transplants to accommodate the new domestic socio-political context.⁷⁷ Consequently, the degree of modification varies from country to country, depending on specific characteristics of every particular recipient legal system.

In sum, the main content of Watson’s theory is that legal transplants can be successfully carried out between countries which have different political, social and environmental circumstances. The viability of a particular legal transplant lies in the strength of the transplanted rule, i.e: as ‘a good idea’ which is acknowledged by law makers, and its adaptation to the political, environmental and social situation of the receiving country. An understanding of the legal or political structure of the donor country is not necessary. However, an examination of possible impacts which the proposed rule might cause in the domestic context of the recipient country is indispensable. As a result, the application of the transplanted rule might be adjusted from country to country as best fits the domestic context. Watson’s theory flows from his view that the law does not depend heavily upon the society where it is created. Thus, he emphasizes an examination on the socio-political contexts of the recipient country rather than that of the donor.

Theory of Kahn-Freund

Otto Kahn-Freund was an English legal comparator and formerly Professor of Comparative Law at Oxford.⁷⁸ In an article *On Uses and Misuses of Comparative Law*,⁷⁹ he incidentally delivers a theory on legal transplants. The main theme of this theory can be described as follows. The level of success of a legal transplant depends upon the extent of the relationship between a proposed rule with its original country. If this relationship is loose, there is strong possibility of successful legal transplant. If this relationship is very close, the recipient country must have a similar socio-political context to that of the donor country. Therefore, in Kahn-Freund’s theory, the socio-political context of both donor and recipient countries must carefully be examined to decide the viability of legal transplants.

⁷⁶ Watson, ‘Comparative Law’, above n 107, 313.

⁷⁷ See McDonough, above n 129, 509; See Watson, ‘Comparative Law’, above n 107, 313.

⁷⁸ Stein, above n 133, 198.

⁷⁹ Kahn-Freund, above n 121.

Kahn-Freund's theory of legal transplants is built on the view of the close relationship between the law and its originating state as developed by Montesquieu in his famous work *The Spirit of Law*.⁸⁰ According to Montesquieu, the law of one country generally attaches to specific factors that belong only to that country, such as the people, the government, politics, climate, soil and origin. This correlation is expressed in the words of Montesquieu as follows:

Law in general is human reason, inasmuch as it governs all the inhabitants of the earth. The political and civil laws of each nation ought to be only the particular cases in which human reason is applied.

They should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another.

They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institution.

They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered. 81

Following this reasoning, specific legal rules or institutions are possibly effective in their origin country but might be weaker or even wither in other countries with different socio-political contexts. Thus, Montesquieu views legal transplants as virtually impossible because 'it was only in the most exceptional cases that the institutions of one country could serve those of another at all'.⁸²

Kahn-Freund follows Montesquieu in the view that the law is an indispensable part of a society where it is created to meet the requirements of the particular social,

⁸⁰ Watson, 'Legal Transplants and Law Reform', above n 144, 79.

⁸¹ Montesquieu, above n 110, 7.

⁸² Kahn-Freund, above n 121, 6.

political and environmental context of that country.⁸³ As a result, Montesquieu and Kahn-Freund support the ‘mirror theories of law’ which Watson rejects.⁸⁴ On the other hand, Kahn-Freund indicates that there is currently an important change from the time of Montesquieu, more than two hundred years earlier. Although all the factors Montesquieu mentioned still retain their value, the political factor has become more important while ‘environmental factors’ including geography, economy, society and culture have diminished importance.⁸⁵

Kahn-Freund partly agrees with Montesquieu on the impossibility of legal transplants. He states people ‘cannot take for granted that rules or institutions are transplantable’ and emphasizes that legal borrowings might be rebuffed if they are applied in the environment which is different from that of their original country.⁸⁶ However, Kahn-Freund does not insist on the impossibility of legal transplants, rather he concedes that ‘there are degrees of transferability’.⁸⁷ He argues that the possibility depends on ‘how far does this rule or institution owe its existence or its continued existence to a distribution of power in the foreign country which we do not share’.⁸⁸ As Ewald explains, ‘legal institutions may be more-or-less embedded in a nation’s life, and therefore more-or-less readily transplantable from one legal system to another; but nevertheless at one end of the spectrum law is so deeply embedded that transplantation is in effect impossible’.⁸⁹ Accordingly, in Kahn-Freund’s theory, a legal transplant can only be successfully carried out ‘under proper circumstances’.⁹⁰ If the proposed rule is not connected too closely to the socio-political context of its country, successful legal transplants can be achieved and vice versa.

Moreover, increasing opportunity for legal transplants flows from the trends toward industrialization, urbanization and increased communication which have boosted

⁸³ See Heim, above n 129, 195; see Kahn-Freund, above n 121, 27.

⁸⁴ See Ewald, above n 127, 492.

⁸⁵ Kahn-Freund, above n 121, 8.

⁸⁶ Kahn-Freund, above n 121, 27; Putting it another way, Kahn-Freund agrees that a legal rule which was created in a certain country might be shrivelled or inappropriate in another country with different ‘power structure’: Heim, above n 129, 196: cited in Norman S Marsh, ‘Comparative Law and Law Reform’ (1977) 41 *Rabel Zeitschrift für ausländisches und internationales Privatrecht* 649, 664.

⁸⁷ Kahn-Freund, above n 121, 6.

⁸⁸ Kahn-Freund, above n 121, 12.

⁸⁹ Ewald, above n 127, 495.

⁹⁰ Kahn-Freund, above n 121, 6; McDonough, above n 129, 505.

integration in economy, society, and culture among countries in the world. These changes certainly create more opportunities for legal transplants.⁹¹

Furthermore, Kahn-Freund analyses the impediments militating against legal transplants, namely ‘purely’ political factors.⁹² He identifies three main political factors which condition relations between the proposed rule and ‘the socio-political structure’ of its original country. These relations directly influence the viability of legal transplants.⁹³

Firstly, the differentiations between the communist and the non-communist world and between dictatorships and democracies are factors which obstruct the viability of legal transplants in contemporary time more than in that of the Montesquieu’s time.⁹⁴ In every country the particular roles of citizens, social groups and the legislature will interact differently. These differences are ‘the bricks and mortar of an imposing wall which prevents the transfer of law’.⁹⁵ Kahn-Freund picks up the example of the ‘wall’ between the Federal Republic of Germany and the German Democratic Republic, highlighting the different decisions concerning legal and institutional transplantations in those countries although they were essentially the same in terms of culture and language, and until the aftermath of World War II, shared a common political heritage and, for some years, borders. The difference response and transplants were a consequence not of social and environmental factors but of ‘the purely political’ factors.⁹⁶

Secondly, ‘underestimated’ disparities in forms of democratic government also obstruct legal transplants.⁹⁷ In a presidential system⁹⁸ (such as that of the United States) or a parliamentary system⁹⁹ (such as that of Britain), the separation of powers among legislative, executive and judicial are different. The responsibilities among bodies of

⁹¹ Kahn-Freund, above n 121, 8; Stein, above n 133, 199.

⁹² See Kahn-Freund, above n 121, 11–2; Waller, above n 113, 564; McDonough, above n 129, 506.

⁹³ Heim, above n 129, 196.

⁹⁴ See Kahn-Freund, above n 121, 11; McDonough, above n 129, 506.

⁹⁵ McDonough, above n 129, 506.

⁹⁶ Kahn-Freund, above n 121, 11.

⁹⁷ Kahn-Freund, above n 121, 12; McDonough, above n 129, 506.

⁹⁸ ‘A presidential system is a system of government where an executive branch exists and *presides* (hence the name) separately from the legislature, to which it is not accountable and which cannot, in normal circumstances, dismiss it’: *Presidential System* <http://en.wikipedia.org/wiki/Presidential_system> at 24th June 2009.

⁹⁹ ‘A parliamentary system is a system of government wherein the ministers of the executive branch are drawn from the legislature, and are accountable to that body, such that the executive and legislative branches are intertwined. In such a system, the head of government is both *de facto* chief executive and chief legislator’: *Parliamentary System* <http://en.wikipedia.org/wiki/Parliamentary_system> at 24th June 2009.

powers in making law are divided differently from country to country.¹⁰⁰ This issue leads to differences in the connection between law and its state.

Finally, the influence of ‘organized groups’ in creating and maintaining law is considered to be the most important political factors in affecting legal transplants.¹⁰¹ Organized groups, in Kahn-Freund words, are understood as follows:

And if I say “organized groups” I am not only thinking of groups representing economic interests: big business, agriculture, trade unions, consumer organizations, but equally of organized cultural, interests, religious, charitable, etc. All these share in the political power, and the extent of their influence and the way it is exercised varies from country to country.¹⁰²

In order to illustrate of the impact of ‘organized groups’, Kahn-Freund takes as an example the rejection of the institution of English jury in European countries in the nineteenth century, which resulted from the objections by legal professions.¹⁰³

Kahn-Freund concludes two ‘steps’ need to be examined to assess the viability of a legal transplant.¹⁰⁴ First, the extent of the connection between the proposed rule with its country’s socio-political structure, as informed by the three political factors outlined above.

Second, a comparison of the socio-political and environmental context of both donor and recipient countries is vital.¹⁰⁵ After these two steps are carried out, ‘the closer the connection between the legal rule and the socio-political environment of the donating State, the closer the socio-political environments of the two states must be for the legal transplant to be viable’.¹⁰⁶ Kahn-Freund takes as an example the way in which the model of the Conseil d’État, a specific institution of the French law was successfully transplanted to some continental countries due to the similarities in socio-political conditions between the donor and recipient countries.¹⁰⁷

It is undeniable that, on the one hand, Kahn-Freund’s theory of legal transplants is based on the viewpoint of Montesquieu of the close correlation between the law and its

¹⁰⁰ See Kahn-Freund, above n 121, 12.

¹⁰¹ See Kahn-Freund, above n 121, 12; McDonough, above n 129, 506.

¹⁰² Kahn-Freund, above n 121, 12.

¹⁰³ Kahn-Freund, above n 121, 17.

¹⁰⁴ Heim, above n 129, 196.

¹⁰⁵ McDonough, above n 129, 507.

¹⁰⁶ Heim, above n 129, 196; See Kahn-Freund, above n 121, 12.

¹⁰⁷ See Kahn-Freund, above n 121, 18

state. On the other hand, Kahn-Freund creates a neutral point which is different from the insistence of Montesquieu of the inability of legal transplants. In Kahn-Freund's theory, legal transplants are not completely unable to be carried out, but to be able to occur under 'proper circumstances'. The proper circumstances must fall into one of two following propositions. First, if the relationship between a transplanted rule and its origin country is not close, there is higher possibility of legal transplants. Second, if there is closer relationship between a transplanted rule with its origin country, the closer 'social-political' environments of the donor and recipient countries are required for a successful legal transplants.

Confirmation of Watson's theory

The theory of Watson has largely convinced me. It offers encouragement and support for countries who are implementing processes of legal transplants to reach their goals such as addressing legal issues or improving their legal system. The approach of this theory is that the possibility of legal transplants is very great if a transplanted rule is not 'inimical' to the recipient country.

Compared with Kahn-Freund's theory, Watson's theory provides more feasible guidelines to assess the viability of legal transplants. The key point in Watson's theory is the focus on the possible impacts of a proposed rule transplant — to anticipate whether it benefits or damages the recipient environment — as a main determinant for the applicability of that transplant. This point reflects the important role of the functionality of transplanted law which many scholars agree is one of the most important criterion for successful legal transplants.

Moreover, the acceptance of modification of application of the transplanted rule is also another strong point in Watson's theory. Following this, it is not a failure of a legal transplant but a process of adaptation of the transplanted rule towards the recipient environment.

Due to defects of Watson's theory, namely the unrealistic view that legal transplants are 'easy' tasks and the unimportance of the knowledge of the transplanted rule with its law system, it should be combined with two factors from the theory of Kahn-Freund. They are contemplation of the 'degrees of transferability' and obtaining

knowledge of the legal system of transplanted law. Both factors will fill the gap in Watson's theory and make it more effective in evaluating the applicability of legal transplants.

Conclusion:

Three main factors are identified as supporting the borrowing of Common Law precedents as an appropriate solution addressing defects of legislation in Vietnam. Firstly, there is a real need for transplanting Common Law precedents to address defects of written law which generally arise from concerns about the inadequacy of legal interpretation, the problem of uncertainty in law, and deficiency of legislation. Due to these points, Vietnam is targeting the transplant of Common Law precedents to supply sources of law.¹⁰⁸

Secondly, the functionality of precedents when it is applied in the Vietnamese legal system is clearly identified. Their essential roles in law-making and law-interpreting in the Common Law appear to be a proper solution which can fill the gap in legal interpretation, improve the certainty of written laws, and overcoming the deficiency and inconsistency of written law.

Third, theories of legal transplants of Watson and Freund generally confirm possibility of successful transplants although this possibility requires different conditions according to each author. At least, this is a theoretical basis for anticipating success of applying precedents in the Vietnamese legal system. Furthermore, borrowing precedents can proceed at an advantageous time, that is when Vietnam is in the process of judicial and legal reforms. For instance, it is quite possible for Vietnam to change its court structure and produce an effective reporting, both of which are required for the viability of Common Law precedents.

Moreover, Watson's theory of legal transplants allows modification in applying transplanted law. This is considered to be a process of adaptation of the transplanted rule to the new environment. Thus, Vietnam is not forced to imitate all aspects of the application of Common Law precedents which may not complement the legislative rules

¹⁰⁸ The point of application of precedent is regulated at the Politburo Resolution No. 49: Part II, point 2 and sub-point 2.2, Politburo Resolution No 49 NQ/TW dated 2 June, 2005 on the Strategy of Judicial Reform up to 2020

of Vietnam. For example, recognition of the law-making role of judges may not be carried out in this period due to article 83 of the Constitution 1992, i.e. the National Assembly is the unique legislative body. As a result, this factor increases feasibility of the transplants of precedents in Vietnam to fill gaps where law is silent or ambiguous.

In sum, borrowing Common Law precedents can convincingly be an effective solution for addressing the gaps of Vietnamese legislation. It appears that the possibility of success of this legal transplant is great when there is evidence proving that Vietnam can create an adaptive environment for the viability of Common Law precedents in its legal system. I would like to borrow a statement which accurately expresses and explains the aim and significance of legal transplants to support my point, that is

The more positivist the legal system and the more nationalist the country, the less efficient the law. Those who think that state-imposed law and state-recognized judge-made law are the only positive law are not able, when having to resolve a concrete dispute, to benefit from rules laid down elsewhere.¹⁰⁹

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¹⁰⁹ Jan Smits, 'A European Private Law as a Mixed Legal System: Towards a *Ius Commune* through the Free Movement of Legal Rules' (1998) 5 *Maastricht Journal of European and Comparative Law* 328, 336.

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