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ON USES AND MISUSES OF COMPARATIVE LAW *

I

IT is my privilege and my pleasure to give today the second of these Annual Lectures delivered in honour of Lord Chorley. I do not think it was ever contemplated that they should form a coherent series. Each lecture is to stand by itself. Yet on re-reading the lecture Professor Hart gave last year [1] I could not help noticing a link between what he said and what I propose to say today. He reminded us most eloquently that new slogans do not necessarily denote new movements. That which is now called " demystification " comprises things which existed long before the word was invented and became fashionable. But in the process of becoming fashionable a thing gets distorted, and is liable to be misused. Comparative law has also become fashionable—though most assuredly in very different quarters—and the enthusiasm for one like the passion for the other may conceal the difficulties inherent in that which is so effectively put before the public eye.

I am most anxious to emphasise at the outset that none of my remarks this afternoon will in the least be a criticism of comparative law as an academic discipline. I welcome without reservation the growth of comparative law research and the increasing significance of the subject in the teaching programmes of the universities—I do not intend to cast the slightest doubt on the utility of this development and all I want to say about it is that in my submission it has not gone far enough.

My concern is not with comparative law as a tool of research or as a tool of education, but with comparative law as a tool of law reform. What are the uses and what are the misuses of foreign models in the process of law making? What conditions must be

* This is the second *Chorley Lecture* delivered at the London School of Economics on June 26, 1973.

[1] Hart, " Bentham and the Demystification of the Law," (1973) 36 M.L.R. 2.

fulfilled in order to make it desirable or even to make it possible for those who prepare new legislation to avail themselves of rules or institutions developed in foreign countries? These are the questions I have asked myself—it goes without saying that I cannot answer them in this lecture. The best I can hope to do is to contribute some ideas towards the solution of this problem.

II

The future legal historian, looking back at the development of British legislation in the twentieth century will note that, to a degree unknown in previous times, the law has become open to foreign influences. The Law Commissions Act of 1965 [2] imposes upon the Law Commission and the Scottish Law Commission the obligation " to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions," and no one can doubt that the commissions have fulfilled it. More than that, it is clear that this was not a futile exercise and that many of the Reports and the Working Papers published by the commissions [3] bear witness to the utility of the comparative method in the legislative process.

But even before the Law Commissions were created legal developments overseas had increasingly become relevant to law making and law reform in this country. Nor is it now exclusively in those areas of legislation in which the Law Commission participates that law makers look abroad for new ideas and for new techniques: recent events in the law governing labour relations are an example.

On the whole, and subject to limitations I shall have to discuss, this tendency should be welcomed. To appreciate its significance, it is perhaps useful to distinguish between three purposes pursued by those who use foreign patterns of law in the process of law making. Foreign legal systems may be considered first, with the object of preparing the international unification of the law, secondly, with the object of giving adequate legal effect to a social change shared by the foreign country with one's own country, and thirdly, with the object of promoting at home a social change which foreign law is designed either to express or to produce.

(a) Examples of legislation—especially in the field of commercial law—passed with the object of international unification are numerous, and their number will grow more rapidly as a result of the entry of the United Kingdom into the European Communities. Transport

[2] s. 3 (1) (*f*).

[3] This is visible in many of the published Working Papers, especially those on Family Law, see also Working Paper No. 47 on Injuries to Unborn Children (1973). It can also be seen in some of the formal Reports, especially the one on Interpretation of Statutes (Law Commission No. 21; Scottish Law Commission No. 11).

by sea,[4] by road,[5] by air [6] and by rail,[7] and the sale of goods [8] have been regulated to some extent by such international legislation. And in the very different areas of the conflict of laws, including such matters as the form of wills,[9] the adoption of children,[10] and the recognition of foreign divorces,[11] we see similar phenomena. Our membership in the EEC has immediately involved important adjustments of the law to foreign patterns: in some respects, for example in the law of competition and monopoly, it was the automatic result of the Treaty and law made under the Treaty [12] becoming part of English law through the European Communities Act,[13] in others it resulted from explicit provisions of that Act, for example in company law.[14] As soon as the United Kingdom accedes to the Convention concluded by the six original community members on civil jurisdiction and on the recognition of foreign judgments,[15] some of the very basic principles of English law on the jurisdiction of the courts will be adjusted to internationally agreed standards. These examples have been chosen at random. By and large, the use of foreign patterns for the purpose of unification does not touch the line beyond which the use of foreign law ceases to be desirable or possible. I said " by and large " because even such projected unifying legislation may hit obstacles, whether they be economic,

[4] Carriage of Goods by Sea Act 1971, taking the place of the Carriage of Goods by Sea Act 1924. The latter gave effect to the internationally agreed " Hague Rules," the former gives effect to the Hague Rules as amended by the Brussels Protocol of 1968.

[5] Carriage of Goods by Road Act 1965, giving effect to the Geneva Convention on the Contract for the International Carriage of Goods by Road of 1956.

[6] Carriage by Air Act 1961, taking the place of the Carriage by Air Act 1932. The latter gave effect to the Warsaw Convention of 1929, the former gives effect to that Convention as amended by the Hague Protocol of 1955. Also the Carriage by Air (Supplementary Provisions) Act 1962, which gives effect to the Guadalajara Convention of 1961.

[7] Carriage by Railway Act 1972. Convention concerning Carriage of Passengers and Luggage by Rail (C.I.V.) and Convention concerning Carriage of Goods by Rail (C.I.M.), both of February 25, 1961. The Additional Convention to the C.I.V. is set out in the Schedule to the Act.

[8] Uniform Laws on International Sales Act 1967, which gives effect to the Hague Conventions of 1964 on a Uniform Law of Sale of Goods and on a Uniform Law on the Formation of Contracts for the Sale of Goods. The preparation of the unification of this important branch of commercial law was largely due to the work of the International Institute for the Unification of Private Law in Rome (Unidroit). See R. H. Graveson, E. J. Cohn, and Diana Graveson, *The Uniform Laws on International Sales Act 1967*, Butterworth 1968.

[9] The Wills Act 1963 gives effect to the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions of 1961.

[10] Adoption Act 1968, giving effect to a similar Hague Convention on Adoption of Children of 1965.

[11] Recognition of Divorces and Legal Separations Act 1971, giving effect to a similar Hague Convention on Recognition of Divorces and Legal Separations of 1968.

[12] Art. 85 *et seq.* of the Treaty of Rome; Regulation No. 17.

[13] European Communities Act 1972, s. 2 (1).

[14] s. 9.

[15] Convention of September 27, 1968, on Jurisdiction and Enforcement of Civil and Commercial Judgments, Annex to Bulletin No. 2 of 1969 of the European Communities. Protocol of June 3, 1971, concerning the Interpretation by the Court of Justice of this Convention, Annex to Bulletin No. 7 of 1971.

cultural or political. The refusal of this country to sign the Geneva Conventions of 1930 and 1931 on bills of exchange and cheques [16] was an example. Here, in a matter so very remote from the sociological and cultural essentials of life, the legal profession resisted unification of law, and this for two reasons: In the first place this very matter had been codified by the Bills of Exchange Act 1882, one of the most successful codifications ever attempted in this country which, with or without some modifications, had been taken over in many parts of the common law world, including the United States. The fact that the law had been systematically reformed and codified created something like a vested intellectual interest which was opposed to the adoption of the common code being prepared on the Continent.[17] Paraphrasing Maitland we may say that codified law is tough law. In the second place, the Geneva Codes ran counter to one of the accepted shibboleths of the legal profession—that you cannot validate a forgery [18]—and this is precisely what the Continental pattern of negotiable instruments law involves, of course for the benefit of the bona fide purchaser, the holder in due course. Thus the resistance to the Geneva Codes of 1930 and 1931 was compounded of a desire to keep intact that which had fairly recently been accomplished and the resolve not touch that which was felt to express an ancient tradition. Here, then, we have the remarkable phenomenon that a nation as prominent in international finance as in international maritime transport is ready to adjust to international standards its law of bills of lading, but not its law of bills of exchange. The explanation, let it be noted, is in the ideology and in the power of the legal profession.

(b) It is, secondly, in the field of family law that we find the principal examples of legislative achievements and proposals partly based on foreign patterns with a view to the adjustment of the law to social change. The law of Australia and even more so that of New Zealand had, as is generally known, a very strong influence

[16] Convention providing a Uniform Law of Bills of Exchange and Promissory Notes of June 7, 1930, 143 League of Nations Series 257; Convention for the Settlement of certain Conflicts of Law in Connection with Bills of Exchange and Promissory Notes of June 7, 1930, *ibid.* 317; Convention providing a Uniform Law for Cheques of March 19, 1931, *ibid.* 355; Convention providing for the Settlement of certain Conflicts of Law in Connection with Cheques of March 19, 1931, *ibid.* 409.

[17] This is clearly expressed by the draftsman of the Act of 1882, Sir Mackenzie Chalmers, in the Preface of 1926 to the ninth edition of his work on the subject, printed in the 11th ed. of Chalmers' *Bills of Exchange*, 1947, at pp. xlvi *et seq.* That these observations referred to a previous draft convention (of 1912) does not affect the point made in the text. Chalmers was rightly conscious of having achieved a high level of rationalisation of the law. This he did not want to jettison, and for this reason (among others) he opposed the acceptance of the common code then in preparation on the Continent.

[18] That it was this which " struck at the root of the principles of the English law of negotiable instruments " is left in no doubt by Gutteridge, *The Unification of the Law of Bills of Exchange*, B.Y.B.I.L. Vol. 12 (1931), 13, 19. The contrast is illustrated by *Embiricos* v. *Anglo-Austrian Bank* [1905] 1 K.B. 677.

on the recent reform of the divorce law—I shall come back to this in a moment.[19] The current discussion on matrimonial property belongs to the same category: the admirable Working Paper which the Law Commission [20] has produced in this matter comprises a detailed study of foreign patterns of legislation, and not by any means only legislation of common law countries.

(c) Nor do we, thirdly, lack examples for the use of foreign legal patterns for the purpose of producing rather than responding to social change at home—examples as different in character as restrictions on the freedom to strike,[21] the encouragement of complaints against maladministration,[22] and the suppression of racial discrimination.[23] William Graham Sumner was no doubt guilty of oversimplification when he said that " stateways cannot alter folkways," [24] but we cannot be surprised that it is this use of foreign models as instruments of social or cultural change which raises most sharply the problem I am discussing—the problem of transplantation.

III

As soon as one mentions the word " transplantation " one conjures up inevitably the image of those often complicated and sometimes hazardous surgical operations by which part of a human body is transferred from one human being to another. We speak of transplanting the cornea of an eye, the transplanting of a kidney, even the transplanting of the heart. But no one ever says that the carburettor or a wheel is transplanted from one car to another, though here too part of an entity which serves a purpose is taken out of one specimen and inserted into another specimen of the same species. Transferring part of a living organism and transferring part of a mechanism are comparable in purpose, but in nothing else. This is a platitude—we do not need to formulate it in philosophical terms, and I have no desire to venture into the well trodden but to me inaccessible fields in which the vitalists struggle with the mechanists and in which the concept of " wholeness " or " *Ganzheit* " is set up as a god to be worshipped or as an idol to be destroyed. Our insight into the difference between the kidney

[19] See below Part VII on the Divorce Reform Act 1969.

[20] Published Working Paper No. 42: Family Property Law (October 26, 1971); see now also the Law Commission's Report No. 52: First Report on Family Property Law: a New Approach, 1973.

[21] Industrial Relations Act 1971.

[22] Parliamentary Commissioner Act 1967, see esp. s. 5 (1) (*a*). The Parliamentary Commissioner differs of course in vital respects from the Scandinavian Ombudsman, but there is no doubt that the Scandinavian pattern has influenced the Act.

[23] Race Relations Act 1968. The influence of the American Civil Rights Act 1964 is obvious. See Hepple, *Race, Jobs and the Law in Britain*, 2nd ed., 1970; Lester and Bindman, *Race and Law*, 1972, both in the Penguin Series: Law and Society.

[24] See Ball, Simpson, and Ikeda, " Law and Social Change: Sumner Reconsidered," (1962) 68 American Journal of Sociology 532. I owe this reference to Professor Boris I. Bittker, Law School, Yale University.

and the carburettor is elementary and intuitive, but it is also very practical from the point of view of the lawmaker contemplating the use of foreign models. It makes sense to ask whether the kidney can be " adjusted " to the new body or whether the new body will " reject " it—to ask these questions about the carburettor is ridiculous. Do these questions of adjustment and rejection arise in the situation in which we are interested here, the transplantation or transfer of foreign institutions? Do they belong to the category of the kidney or to that of the carburettor?

All that I shall have to say during the remainder of this lecture is based on the assumption that as a class they belong to neither. In the metaphorical language I am using, the kidney and the carburettor are the terminal points of a continuum, and any given legal rule or institution may be found at a different point of it. In some cases the only question is whether the job of mechanical insertion has been properly performed and, if it has been, the new piece of machinery will work, one thinks of situations like the adjustment of a shipowner's liability to international standards.[25] But there are degrees of transferability. In most cases one must ask what chances there are that the new law will be adjusted to the home environment and what are the risks that it will be rejected. The chance and, inversely, the risk, may be smaller or larger, and the magnitude of this chance and of this risk determine the point on the scale at which we have to place the foreign law.

Are there any criteria, any yardsticks, designed to help the lawmaker in this enterprise? Are there any principles which may assist us in measuring the degree to which a foreign institution can be " naturalised "? Can we do something to trace the line which separates the use of the comparative method in lawmaking from its misuse?

IV

Before trying to give a very tentative and incomplete answer to this obviously very difficult question, I find it useful to remind you of the very distinct and explicit views on this problem of transplanting legal institutions which were expressed by the first of all comparative lawyers. In Montesquieu's opinion it was only in the most exceptional cases that the institutions of one country could serve those of another at all. In words which for more than two centuries have sounded a warning to all comparative lawyers he said:

> " *Les lois politiques et civiles de chaque nation . . . doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un grand hazard si celles d'une nation peuvent convenir à une autre.*" [26]

[25] See *supra*, note 4.
[26] *Esprit des Lois*, Book I, Chap. 3 (*Des lois positives*).

" *Un grand hazard* "—it is a great coincidence, a concatenation of circumstances which we can by no means take for granted that an organ of a living body fits into another, as we do take it for granted that parts of a mechanism are interchangeable. In Montesquieu's view legislative transplantation was much closer to the organic than to the mechanical terminus of our continuum.

This observation applied not only to " *les lois civiles*," the private law governing the relations between the citizens, but also to *les lois politiques*, the constitutional, administrative, judicial arrangements, the law governing procedure, in short the public law —a conclusion which was to be decisive for Montesquieu's entire political and jurisprudential thinking and determining his place in the history of political ideas.

What, then, were the forces which linked the law so closely to its environment that it could hardly ever change its habitat? Montesquieu's environmental criteria which determine " *l'esprit des lois* " and permeate the whole work are to some extent geographical, such as above all the climate, but also the fertility of the soil, the size and the geographical position of a country. Other factors are sociological and economic, such as *le* " *genre de vie des peuple, laboureurs, chasseurs ou pasteurs*," the wealth of the people, their " number " (which must refer to the density of population) their trade. Still others are cultural: the religion of the people and what he calls " *leurs inclinations, . . . leur moeurs, . . . leurs manières.*" But in this celebrated catalogue of national characteristics we also find purely political elements: " *la nature et . . . (le) principe du gouvernement qui est établi, ou qu'on veut établir*,"—as an example he mentions " *le degré de liberté que la constitution peut souffrir*," clearly an anticipated reference to the political characteristics of the English constitution developed in a subsequent chapter.[27] And he concludes by emphasising the influence which the various laws of a country have on each other, and the extent to which all laws are influenced by their origin, the purpose of the law maker, " *l'ordre des choses sur lesquelles elles sont établies.*" In a later, programmatic and decisive [28] passage of the work the catalogue appears in an abbreviated form which again shows " *l'esprit des lois* " as a compound of physical, cultural, and political ingredients: " *le climat, la religion, les lois, les maximes du gouvernement, les exemples des choses passées, les moeurs, les manières.*" One sees that the political factor is here formulated in terms of principles rather than of institutions.[29]

[27] Book XI, Chap. 6 (*De la constitution d'Angleterre*).

[28] Book XIX, Chap. 4 (*Ce que c'est l'esprit en général*). The factors mentioned in the text are those " *d'où il se forme un esprit général qui en résulte.*" Robert Shackleton, *Montesquieu, A Critical Biography*, O.U.P. 1961, pp. 316 *et seq.* calls this " perhaps the most significant chapter of the whole work."

[29] Montesquieu adds the—in our context significant—observation that the more potent one factor is in a given country, the less important are the others. What he puts in terms of space (country) can also be put in terms of time (period).

V

Montesquieu's list of environmental factors has not lost its validity in the course of the more than two hundred years since he wrote it—at least not entirely, and in particular not in the relations between the so-called developed and the so-called developing nations or countries. But I submit—and this is my central thesis—that in these 200 years the geographical, the economic and social, and the cultural elements have greatly lost, but that the political factors have equally greatly gained in importance. The process of economic, social, cultural assimilation or integration among the developed countries (and also the dominant classes of the developing countries) has been accompanied by a process of political differentiation. It is this dual development of cultural and social assimilation and political differentiation which compels us to shift the emphasis of Montesquieu's test in order to find some workable criterion that can be used to determine how far a legal institution is transplantable, what is its place in the continuum to which I have referred.

For me here to give chapter and verse for what I have called the process of assimilation or integration is quite unnecessary—it would be an insult to my audience if I did: the matter is too obvious. Montesquieu's insistence on climatic factors may still occasionally be justified even as between the legal systems of developed countries: legislation on water is central to the South Western States of the United States such as Arizona and New Mexico—it is equally central to the law of the Netherlands: a surviving example to show that Montesquieu's attitude to climatic factors militating against transplantation has retained some of its utility.[30] So has his emphasis on sociological determinants of the law: a recent decision of the House of Lords has reminded us that legislation prohibiting discrimination by reason of " national origin " may have a very different meaning in a country like the United States with a long tradition of immigration and in the demographic context of Great Britain which in its Race Relations Act of 1968 took over the wording of the American Civil Rights Act of 1964.[31] But these are exceptional situations. Generally

[30] It may be doubted whether this example illustrates the situations which Montesquieu had in mind when he referred to climate as one of the determinants of *l'esprit des lois*. In Book XIX, Chap. 4, he says: " *La nature et le climat dominent presque seuls sur las sauvages* " which does not however exclude the possibility of their influence in conditions of more advanced civilisation. See for the role of climate and other physical causes in Montesquieu's system in general Shackleton, *loc. cit.*, Chap. XIV.

[31] *Ealing London Borough Council* v. *Race Relations Board* [1972] A.C. 342. The phrase " colour, race, or ethnic or national origins " occurred at first in sections 1, 5 and 6 of the Race Relations Act 1965. The first of these sections was repealed by the Race Relations Act 1968, s. 28 (8), where, however, the same phrase is used to define " discrimination " (s. 1). The formula used in the United States Civil Rights Act 1964, Public Law 88–352 is " race, color, religion or national origin " (see *e.g.* s. 201 (*a*), 202, 301 (*a*),, 601). In s. 703 (which refers to employment, union membership etc.) the phrase is " race, color, religion, sex, or national origin."

speaking Montesquieu could not have written the way he did about geographical or economic or sociological and cultural factors in a world in which over wide areas only a tiny proportion of the gainfully employed population works on the land, and in which in the developed countries most people earn their living in industry, commerce and public service in ways almost indistinguishable from one country to another. Nor could he have envisaged that, owing to the evolution of trade, of mass production and of advertising, their manner of spending what they have earned would become equally uniform. In all industrialised countries the legal problems arising from employment have become as similar as those arising from housing: the blocks of flats in which so many people live look very much alike in Manchester or Leningrad, in Cincinatti or Buenos Aires, in Yokohama or in Düsseldorf. And the assimilation of economic conditions has been paralleled by the growing uniformity of the cultural environment—not only through the diminishing role of religion in people's lives but also through the central place occupied by the mass media. Would Montesquieu have written about cultural diversities the way he did, had he been able to anticipate that everywhere people read the same kind of newspaper every morning, look at the same kind of television pictures every night, and worship the same kind of film stars and football teams everywhere? Industrialisation, urbanisation, and the development of communications have greatly reduced the environmental obstacles to legal transplantation—and nothing has contributed more to this than the greater ease with which people move from place to place. If anyone doubts that this flattening out of economic and cultural diversity is reflected in the law, let him consider the role played in society by the law of tort. Civil delictual liability centred in Montesquieu's day around situations arising from personal relations: rivalry, whether sexual or commercial, family ties, ties of neighbourhood, and of course the attitude of the law to such personal relations is bound to vary from nation to nation. Today our attention is focused on accident liability, and the nature of accidents at work, on the road, to some extent even in the home, is much the same everywhere. No wonder then that precisely the same problems of insurance, of risk and fault, of producers' liability, of the relation between private liability and social security are discussed wherever you go, nor that legislation passed in New Zealand, and, in a different form, in parts of Canada,[32] incorporates ideas now to be investigated by Royal Commissions in this country

[32] New Zealand: Accident Compensation Act 1972; Canada: Saskatchewan Automobile Insurance Act 1946, as amended, now Revised Statutes of Saskatchewan 1965, c. 409; Ontario Insurance Amendment Act 1971, Stats. 1971, ss. 14 and 15; British Columbia Insurance Act, Stats. 1969, ss. 325 and 326; Manitoba Insurance Act, Stats. 1970, c. 102; also Alberta Statutes 1971, c. 53. The pioneering events were the enactment of the Saskatchewan Statute of 1946 and the publication of the Woodhouse Report, the Report of the Royal Commission on Compensation for Personal Injury in New Zealand in 1967.

and in Australia and actively promoted by writers in England and in the United States, and also in the Continental countries such as France.[33]

Nevertheless, one could envisage Montesquieu most eloquently defending his theory of environmental obstacles to legal transplantation: Yes, we can hear him say, there may be something in your point if you look at Europe—Western or Eastern, capitalist or communist—at North America or Australia, at Japan or parts of Latin America. But have you forgotten India, have you forgotten China and South East Asia, or Africa or the Islamic Middle East? Your economic and social and cultural integration, he might say, covers only a minority of the inhabitants of this Globe, and not the subsistence peasants, say in India or Pakistan, and in large parts of Africa. And could anyone deny that this answer would have great force, but, on the other hand, could anyone overlook that this force is diminishing from year to year? Even in relation to the developing world, I would submit, there is a tendency, stronger here, weaker there, and of course of varying velocity, to assimilate the law to that of the developed countries. This is happening even in family law: for me—rightly or wrongly—it is one of the greatest legal events of our time that the Indian Legislature should by statute have abolished polygamy for Hindus in the Republic of India.[34] Presently I shall say a brief word about developments in East Africa and in Islamic countries which also support the argument.

There is today what Mr. Justice Holmes might have called a far reaching free trade in legal ideas.[35] Far reaching, not all embracing. Environmental obstacles persist—how strong they are depends of course on what the legal ideas are about. Obviously they are least formidable in all that relates to trade and transport, and most potent in all that is closest to people's lives: the family, succession to property, and also the criminal law and its administration. Yet we have seen and we shall further see that, even in relation to the family, legal ideas are now moving freely around the world so as to influence legislation and pending law reform.[36]

[33] The literature on the subject is prodigious and ubiquitous. See *e.g.* Keeton and O'Connell, *Basic Protection for the Traffic Victim*, 1965; Tunc, *La Sécurité Routière; Esquisse d'une Loi sur les Accidents de la Circulation*, 1966; Ison, *The Forensic Lottery; a Critique of Tort Liability as a System of Personal Injury Compensation*, 1967; Elliott and Street, *Road Accidents*, 1968; Atiyah, *Accidents, Compensation and the Law*, 1970.

[34] Hindu Marriage Act 1955, Act 25 of 1955, s. 5 (1). See also the Hindu Married Women's Right to Separate Residence and Maintenance Act 1946, Act 19 of 1946; the Hindu Marriage Disabilities Removal Act 1946, Act 27 of 1946; the Hindu Marriages Validity Act 1949, Act 21 of 1949.—Derrett, *Introduction to Hindu Law*, O.U.P. 1963—on the monogamy point esp. s. 229, p. 152.

[35] See his dissenting opinion in *Abrams* v. *United States*, 250 U.S. 616, 630 (1919).

[36] See below VII.

VI

Thus, whilst many of the forces resisting transplantation enumerated by Montesquieu have greatly lost in importance, some which he mentioned only among others have become overwhelming. There is, as we have seen, a political element in Montesquieu's catalogue of environmental determinants of the law: one concrete example is the contrast between the constitutions of the absolute monarchies of Continental Europe and the parliamentary Constitution of England. We know how closely this was linked with the relation between judiciary and administration, and how clearly it was reflected in many of the details of the law, especially of criminal procedure. No doubt this was, around the middle of the eighteenth century, a prime example to show how the political environment of legal institutions can be an obstacle to their transplantation.

But how can the magnitude and impact of this political element on the environment of the law be compared with the political factors resisting the international exchange of legal institutions today? The fact of political differentiation is as obvious as that of cultural and social integration. Let me just briefly allude to three of its essential features.

The first and foremost of these is of course the gulf between the communist and the non-communist world, and that between dictatorships and democracies in the capitalist world. The ways people earn their living may be similar, but not the role played by pressure groups such as independent trade unions and employers' associations. Problems such as those of housing, of town planning, of pollution may be no different in Russia or Spain or South Africa from what they are in this country or in the United States, but the procedure of arriving at a solution, the form of discussion, the role of the individual in that discussion, are different. In all that concerns the organisation of the law-making and the decision-making power and the relation between self-governing social groups and the official apparatus of the state a wall has been erected which is an obstacle far more effective in our time than any of the environmental criteria mentioned by Montesquieu. I referred to a wall: the wall which separates East and West Berlin is a symbol of this development. The geographical and demographic factors and even the social and economic structures would not stand in the way of a transplantation of legal ideas and institutions between the Federal Republic of Germany and the German Democratic Republic. It is still the same German nation. If the thought of such transplantation appears today to be ludicrous and even frivolous, the reasons are purely political—they are environmental factors of which Montesquieu could have no conception.

The second element of political differentiation is the evolution

of a seemingly endless series of variations on the democratic theme, or rather themes. There are, it seems to me, two principal themes or, to change the metaphor, types: the presidential type developed in the United States and the parliamentary type developed in this country and an untold number of mixtures of which the French Constitution of 1958 or the German Basic Law of 1949 are examples. The significance of this difference as an obstacle to legal transplantation is, it seems to me, constantly underestimated. It impinges on the distribution between the judicial and the administrative decision and policy-making power and therefore on the minutest details of legislation affecting economic and social policy, especially industrial relations. In all these matters it must be decisively important whether or not the executive is responsible to the legislature and how far it can therefore shift policy-making decisions onto independent judicial organs or regulatory commissions. The immense difference in the interpretation of what is meant by that separation of powers which Montesquieu did so much to promote is today one of the elements that determine the line between the use and the misuse of the comparative method. I shall say more about it in a moment.

But there is a third political element, and in many ways it is from a practical point of view the most important. It is the enormously increased role which is played by organised interests in the making and in the maintenance of legal institutions. Anyone contemplating the use of foreign legislation for law making in his country must ask himself: 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? How far would it be accepted and how far rejected by the organised groups which, in the political sense, are part of our constitution? And if I say " organised groups " I am not only thinking of groups representing economic interests: big business, agriculture, trade unions, consumer organisations, but equally of organised 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. Here perhaps is the strongest " organic " element in the law today: its close link with the infinite variations of the organisation of power in culturally, socially, economically very similar countries.

Let me sum up my principal thesis and then give a few examples: the degree to which any rule, say on accident liability or on the protection of the accused in criminal proceedings, or any institution, say a type of matrimonial property or of commercial corporation or of local government, can be transplanted, its distance from the organic and from the mechanical end of the continuum still depends to some extent on the geographical and sociological factors mentioned by Montesquieu, but especially in the developed and industrialised world to a very greatly diminished

extent. The question is in many cases no longer how deeply it is embedded, how deep are its roots in the soil of its country, but who has planted the roots and who cultivates the garden. Or in non-metaphorical language: how closely it is linked with the foreign power structure, whether that be expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic country play a decisive role in the law-making and the decision-making process and which are in fact part and parcel of its constitutional and administrative law.[37]

Permit me now to give a few examples. In the first place I shall say a few words about family law which illustrates the diminishing strength of environmental obstacles to transplantation. I shall then turn to two areas of the law which show how variations in the organisation of power between one country and another can prevent or frustrate the transfer of legal institutions, and turn the use of the comparative method into an abuse. My two examples will be the law of procedure in the widest sense of that word, and the law of industrial relations.

VII

One would have thought that no subject of legal regulation was more likely to prove the validity of Montesquieu's warning and of his catalogue of determinants than the family, and marriage in particular. What can be closer to the moral and religious convictions, the habits and the mores and also the social structure of a community than the making and unmaking of marriages, and their effect on the legal position of the spouses, including their property? And indeed, even in closely linked federations such as the United States we find great variations, for example in the conditions and also the consequences of a divorce, especially as regards alimony.[38] And nearer home we cannot ignore the persisting deep differences between England and Scotland in many matters of family law and the kindred issues of succession to property.[39] We have international conventions on the mutual recognition of divorces [40]—in our boldest dreams we cannot envisage a convention on the grounds of divorce.

Prima facie you would expect the risk of rejection and the difficulties of adjustment to be here at their maximum. Yet in

[37] See de Smith, *Constitutional and Administrative Law*, 1971, pp. 277 *et seq.*

[38] Jacobs and Goebel *Domestic Relations, Cases and Materials*, 4th ed. (1961), pp. 748 *et seq.*; Vernier, *American Family Laws*, Vol. II (1932), section 104, pp. 259 *et seq.* The contrast between two neighbouring States such as Pennsylvania and Ohio is quite astonishing.

[39] Gloag and Henderson, *Introduction to the Law of Scotland*, 7th ed. 1968, Chaps. XL, XLI, XLII.

[40] See above note 11.

hardly any legal field have we seen so intensive and so rapid an assimilation of ideas and institutions as in family law. Is it not a remarkable thing how in one country after another the idea of divorce as a redress for fault or sin is giving way to the principle that it is a relief from misfortune, the misfortune of marriage failure? [41] Not only fundamental rules but even details of divorce law have been transplanted from Australia [42] and New Zealand [43] to England [44]—radical changes in the same direction have occurred in Canada [45] and in New York [46] and similar transformations took place even earlier in Japan [47] and in the Scandinavian countries,[48] and are now impending in Western Germany.[49] Is it not also significant how new ideas on the property relation between the spouses are spreading from country to country, including countries as different in their legal traditions as the Scandinavian countries,[50] Western Germany [51] and England,[52] and, in a different form,

[41] Max Rheinstein, *Marriage Stability, Divorce and the Law*, 1972, esp. Chap. 4; W. Müller-Freienfels, *Ehe und Recht*, 1962, esp. pp. 135 *et seq.*

[42] Matrimonial Causes Act 1959; Commonwealth Statute No. 104 of 1959. See Finlay and Bissett-Johnson, *Family Law in Australia*, 1972, Chap. X.

[43] Matrimonial Proceedings Act 1963; Statute No. 71 of 1963.

[44] Divorce Reform Act 1969. The Law Commission's Report: *Reform of the Grounds of Divorce. The Field of Choice* (Cmnd. 3123), 1967, remains of permanent importance. For an excellent presentation of the development in this country see Rheinstein, *loc. cit.*, pp. 317 *et seq.*

[45] An Act respecting Divorce 1968. See Deech, " Comparative Approaches to Divorce: Canada and England " (1972) 35 M.L.R. 113.

[46] See Rheinstein, *loc. cit*, pp. 252 *et seq.* The radical change occurred in 1966, but for reasons explained by Rheinstein, *loc. cit.*, the original text was amended in 1968 and again in 1970. The present version of para. 17 of the Domestic Relations Law took effect on September 1, 1972, see Rheinstein, *loc. cit.* p. 355, note 165.

[47] Rheinstein, *loc. cit.*, Chap. 5.

[48] *Ibid.*, Chap. 6; Folke Schmidt, *The " Leniency " of the Scandinavian Divorce Laws*, Scandinavian Studies in Law, Vol. 7 (1963), pp. 107–121.

[49] The draft Statute for the Reform of Marriage and Family Law published by the Government in 1971 is discussed by Lange, *Zeitschrift für das gesamte Familienrecht* Vol. 18 (1971), p. 481 and Vol. 19 (1972), p. 225. The Minister's Report (*Diskussionsentwurf*) preceding this is discussed by Rheinstein, *loc. cit.*, pp. 391 *et seq.* For the earlier developments see Müller-Freienfels, *loc. cit.* The German bill is intended *inter alia* completely to replace the principle of the " matrimonial offence " by the principle of divorce as a response to marriage breakdown.

[50] Law Commission Working Paper No. 42, p. 268 note 15; Pedersen, " Matrimonial Property Law in Denmark " (1965) 28 M.L.R. 137; Sussman, " Spouses and their Property under Swedish Law," 12 American Journal of Comparative Law (1963), p. 553.

[51] Law on Equality of Rights of Husband and Wife in the Field of Private Law of June 18 1957. For an attempt to summarise its main principles see (1959) 22 M.L.R. 253 *et seq.*

[52] s. 4 of the Matrimonial Proceedings and Property Act 1970 is an important step in the direction of matrimonial property reform. Further changes regarding the matrimonial home, are foreshadowed by the Law Commission's Report No. 52: *First Report on Family Property: A New Approach*, 1973. For a discussion of the problems see Eekelaar, *Family Security and Family Breakdown*, 1971 (Penguin: Law and Society).

the Netherlands,[53] France,[54] and the Province of Quebec?[55] Does not this illustrate how the place of a given set of rules and institutions on the scale of our continuum may change in time, how much the validity of Montesquieu's criteria depended on the conditions of his age? I have already mentioned the impressive Working Paper of the Law Commission on family property[56] anyone can see from it how carefully foreign institutions in this field are now being studied. Clearly it is the result of the assimilation of the conditions under which married couples acquire property and of the nature of that property. More than that: even institutions which remain alien to Western mores and traditions can be accommodated in a Western system. Owing partly to what the courts[57] and partly what the Legislature[58] have done, a polygamous marriage validly concluded abroad is now fully recognised in this country. A change of importance for thousands of immigrants which would have surprised the author of *l'Esprit des Lois*.[59]

Yet, we do not have to go far to see how despite the shrinking of distances and of differences in mores, walls may be erected between neighbouring countries which bar the migration of legal ideas in this field. That it is the task of the law to relieve the parties of a marriage which has collapsed is now accepted in London, in New York, in Sydney, in Auckland, in Stockholm and in Tokyo, and will soon be accepted in Bonn, perphas also in Paris and in Edinburgh. Will it ever be accepted in Dublin? Will it be accepted in Italy?[60] But does not for example the staggering contrast between the English and Irish attitudes show the central importance of the power factor as a determinant of assimiliation and differentiation? How can the Irish rejection of divorce, enshrined in the Constitution of the Republic,[61] be

[53] Law Commission Working Paper No. 42, p. 268 note 17; Kirsch and Jessurun d'Oliveira, Revue Internationale de Droit Comparé, Vol. 17 (1965), p. 683; Eekelaar, *loc. cit.*, pp. 101 *et seq.*

[54] Mazeaud et Mazeaud, *Leçons de Droit Civil*, Tome Quatrième, Premier Volume, 3rd ed. 1969.

[55] An Act respecting Matrimonial Regimes of December 12, 1969, Statutes of Quebec 1969 Chap. 77, see esp. s. 12660.

[56] In addition to the Working Paper on Family Property Law (No. 42) to which reference has been made above see now also the *First Report on Family Property*: cited *ante*, note 52.

[57] For a summary of the case law which begins with the decision of the Court of Appeal in *Baindail* v. *Baindail* [1946] P. 122, Dicey and Morris, *Conflict of Laws*, 9th ed. (1973) Rule 39, pp. 290 *et seq.*; Bromley, *Family Law*, 4th ed. (1971) pp. 49 *et seq.*

[58] Matrimonial Proceedings (Polygamous Marriages) Act 1972, see Dicey and Morris, *loc. cit.*, Rule 40, pp. 300 *et seq.*

[59] See Book XVI, Chap. 6.

[60] See for a very interesting analysis of the development in Italy Rheinstein, *loc. cit.* Chap. 7, pp. 158 *et seq.* Divorce was introduced by the Law of December 1, 1970, Gazetta Ufficiale of December 3, 1970, No. 306, pp. 8046 *et seq.* The future of the Italian divorce law is a political question, a question of power.

[61] Constitution of Ireland Art. 41 (3) No. 2: " No law shall be enacted providing for the grant of a dissolution of a marriage." No. 3: " No person whose marriage has been dissolved under the civil law of any other State but is a

explained except in terms of the political power of the Catholic hierarchy? In Ireland as in Italy the rejection or long delay of measures of family law reform shared by so many similar countries can only be seen as the result of a different structure of political power. The history of French Divorce Law since 1792 illustrates the same point.[62]

Of course, if you look beyond what we call the "Western" orbit, we can in the sphere of family law still see the force of Montesquieu's approach. The British rulers introduced in India and in many colonies the English law of contract,[63] even the criminal law [64] and the law of civil procedure and of evidence [65]: to introduce the English law of marriage, of parent-child relation, or of succession, would have been impossible. Before the First World War Japan adopted the German law of contract, of civil delict and of property, but the principles of family law only with modifications,[66] and even as modified, we are told, they largely failed to mould the "law in actual operation" as distinct from the "law in books." [67] Turkey took over the entire Swiss Civil Code, but anthropologists who have made studies on the spot have shown how, at least in the rural areas, the Western family law

subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved." For the difficulties to which the interpretation of this provision has given rise see *Mayo-Perrott* v. *Mayo-Perrott* [1958] I.R. 336, and *Breen* v. *Breen* [1964] P. 144.

62 Rheinstein, *loc. cit.*, Chap. 8.

63 Indian Contract Act 1872; also Specific Relief Act 1877; Indian Trust Act 1882; Indian Sale of Goods Act 1930; Indian Partnership Act 1932. For these and other statutes introducing (with modifications) English private law in India see Gledhill, *The Republic of India. The Development of its Laws and Constitutions*, 2nd ed. 1964 (Stevens: British Commonwealth Series edited by G. W. Keeton), Chap. 18. See also Jain, *Outlines of Indian Legal History*. 2nd ed. 1966, Chap. 24.

64 Indian Penal Code 1860; Codes of Criminal Procedure 1882 and 1898. See Gledhill, *loc. cit.* Chap. 13.

65 Code of Civil Procedure 1877, 1882, 1908; Evidence Act 1882 (covering criminal and civil evidence). See Gledhill, *loc. cit.* Chap. 13 and 14.

66 The first three books of the German Civil Code (which deal with General Principles, Obligations, and Property Rights) were introduced in 1895, but the fourth and fifth book (Family Law and Law of Succession) were taken over "*avec plus de prudence, parce que les rédacteurs devaient se garder de retomber dans la reproche de ne pas avoir dûment tenu compte des moeurs traditionnelles*": Yosiyuki Noda, *Introduction au Droit Japonais*, Dalloz 1966, p. 58. See also Coleman, "Japanese Family Law," 9 Stanford Law Review 132, 135 (1956); Yozo Watanabe, assisted by Max Rheinstein, "The Family and the Law: the Individualistic Premise and Modern Japanese Family Law," in A. T. von Mehren (ed.) *Law in Japan. The Legal Order in a Changing Society*, 1963, pp. 364 *et seq.* The Fourth and Fifth Books of the German Code were introduced with modifications in 1898.—See also Rheinstein, *loc. cit.* Chap. 5, pp. 116 *et seq.*

67 Kenzo Takayanagi, assisted by T. L. Blakemore, "A Century of Innovation: The Development of Japanese Law, 1868–1961," in von Mehren, *loc. cit.*, p. 40. This refers to the situation before the First World War. Professor Rheinstein suggests in Chap. 5, *loc. cit.* that, as far as divorce law is concerned, it is no longer true under the new legislation enacted after the Second World War—in the vastly different conditions of modern Japan.

was clearly " rejected." [68] All this is true, and yet Montesquieu's thesis may begin to lose force in family law even in Asia and in Africa. After all, India has abolished polygamy among Hindus,[69] if not among Muslims. But many Islamic countries are also in the process of adjusting much of their family law to modern urban conditions, to economic and social change, to the changed status of women.[70] Even here difficult and—in a different sense " hazardous "—transplantations are occurring. The successful codification of family law in East Africa, especially in Kenya, has shown the difficulty and how it can be surmounted. This codification combines policies of preservation and innovation in a manner which deserves much more attention than it has received in this country.[71] It shows the possibilities of, and the need for transplantation in, family law in a country combining many different cultures and many different stages of economic and social development. It shows above all the weakening of the environmental obstacles to the transplantation of legislative methods in this field.

VIII

As soon as we turn to my second example, the power factor looms much more strongly into orbit. All rules which organise constitutional, legislative, administrative or judicial institutions and procedures, are designed to allocate power, rule making, decision making, above all, policy making power. These are the rules which are closest to the " organic " end of our continuum, they are the ones most resistant to transplantation. Nothing shows it more clearly than the futile attempts to export British parliamentary institutions into countries which do not share the very peculiar features of history, of social structure, and of political consensus characteristic of this country.[72] The point is amply proved by what happened in Germany and in France in the nineteenth and twentieth centuries and what happened in many African territories in our own day. Much the same can be said about the attempts made in the nineteenth century to export the English jury system to the Continent. This was part of the Liberal programme in France and in Germany. It was attempted and it failed: the legal profession hated it. It did not fit into the accustomed dis-

[68] Stirling, *Turkish Village*, 1965, esp. pp. 209 *et seq.*, p. 220. See also Mahmut Matal, *A Village in Anatolia*, 1954, esp. pp. 121 *et seq.*

[69] See note 34, *supra*.

[70] J. N. D. Anderson, " The Eclipse of the Patriarchal Family in Modern Islamic Law " in *Family Law in Asia and Africa* edited by J. N. D. Anderson, 1968, p. 221.

[71] See the fascinating Reports of the Kenya Commission on the Law of Marriage and Divorce and of the Commission on the Law of Succession, 1968, reviewed by various authors in the East African Law Journal, Vol. V, Nos. 1 and 2, 1969.

[72] All these points have often been made, *e.g.* by Sidney Low, *The Governance of England*, 1904 (esp. Chap. 3), and more recently by Richard Rose, *Politics in England*, 1965, Chap. 2 (" The political culture ").

tribution of power between Bar and Bench, expressed in the inquisitorial as distinct from accusatorial method of criminal procedure. When it was quietly replaced by a mixed bench system in Germany in 1924 [73] and in France in 1932 and 1941 [74] no one seems to have cared very much. No one wants to go back to it.

Not as if institutional patterns were never transplantable. The history of administrative courts plainly shows that, given favourable conditions, they may be. The model of the *Conseil d'Etat* has been one of the great French exports to many Continental countries [75] and—at a decisive turning point of history—it was in most parts of Germany deliberately preferred to the English system of the control of the legality of administrative action by the ordinary courts.[76] A similar process of naturalisation led in our time to the introduction in this country of the Continental pattern of mixed labour courts for individual disputes between employers and employees: the industrial tribunals, created in 1964 [77] have now become an important part of the British judicial system.[78] Or—the same phenomenon of naturalisation in the opposite direction—the pattern of English local government, the dichotomy of mayor and town clerk, which was introduced by the British occupation authorities still persists in most of those parts of the Federal Republic which used to be the British Zone of Occupation (and only there).[79]

[73] By an " Emergency Decree " of January 4, 1924, the famous " *Emminger Verordnung.*" The principle of the " mixed court " is now incorporated in the *Gerichtsverfassungsgestz* of September 12, 1950. See Kern, *Gerichtsverfassungsrecht*, 4th ed. (Beck), Para. 29, pp. 208 *et seq.* The court consists of three judges and six jurors and decides the question of guilt as well as that of punishment (Para. 81 of the law of 1950), but a decision unfavourable to the accused requires at least six out of nine votes (*Strafprozess-Ordnung*, Para. 263), except on a number of special matters the most important of which is probation.

[74] Levasseur et Chavanne, *Droit Pénal et de Procédure Pénale*, 2nd ed. Sirey 1971, Para. 212, p. 84. For the details of the very interesting history of the relation between judges and jury since the Revolution see Bouzat et Pinatel, *Traité de Droit Pénal et de Criminologie*, Vol. 2, Para. 1138, pp. 880 *et seq.* (Dalloz 1963). The system has been made permanent by the *Code de Procédure Pénale* of 1957. The *cour d'assises* consists of three judges and nine jurors and decides on guilt as well as punishment, but a decision unfavourable to the accused requires at least eight out of twelve votes. According to an Italian law of 1951 the court consists of two judges and six jurors.

[75] See the series of essays " Le rayonnement du Conseil d'Etat et le droit administratif à l'étranger " in Part II (pp. 481 *et seq.*) of *Le Conseil d'Etat, Livre Jubilaire*, Sirey 1949.

[76] Fleiner, *Institutionen des deutschen Verwaltungsrechts*, 1963, Para. 16, pp. 286 *et seq.*

[77] Industrial Training Act 1964, s. 12,

[78] Especially in view of their jurisdiction under the Redundancy Payments Act 1965 and under the Industrial Relations Act 1971. If and when the Lord Chancellor exercises the powers vested in him by s. 113 of the Industrial Relations Act the industrial tribunals will, as regards the individual employment relationship have a jurisdiction comparable to " labour courts " in countries such as France, Germany or Belgium.

[79] In the entire former " British Zone " (and only there), except Schleswig-Holstein. See Forsthoff, *Lehrbuch des Verwaltungsrechts*, Vol. I, 9th ed. 1966 (Beck), pp. 517 *et seq.*

However, if we consider those institutions and procedures which express the power of the legal profession and the distribution of power within the legal profession, we see the barriers. What happened to the jury system in France and in Germany is one example. The reaction in this country to the French system of administrative courts is another. Many people greatly admire the *Conseil d'Etat*, but if ever a special tribunal was created in this country to protect the citizen against illegal administrative acts or more generally against maladministration, it would be a new Division of the High Court or of the Court of Appeal, and not what a Frenchman would call a different "*ordre de juridiction.*" [80] It would (like so many institutions in this country) continue to express the unparalleled power of the legal profession and the national belief in, or national myth of, its "neutral position" between the citizen and the government. And however much the substantive norms of commercial law have in this country already been harmonised with those of other countries, however much this process may be further advanced by our membership in the European Communities, who can believe that anything like the French *tribunal de commerce* [81] which consists entirely of merchants or the German *Kammer für Handelssachen* [82] which has a legal chairman and two businessmen as assessors will ever see the light of day in this country? Going one step further, is it likely that (despite pending discussions) the French or the Germans will ever accept a single judge as the court of first instance in major civil cases, or that a collegiate court will replace the judge in this country? And—community or no community—will there ever be a time when the profound differences between the powers and duties of commercial arbitrators as between this country and its Continental neighbours will be wiped out? [83] It was only three years ago that an important decision of the House of Lords reminded us of the radical difference even between England and Scotland as regards the controlling or supervisory powers of the courts over commercial arbitrators.[84]

We cannot forget that, in the face of all the assimilation of the substantive laws in Great Britain, Scotland retains her separate judicial organisations and procedures, solemnly guaranteed by the Act of Union.[85] And we also remember that Switzerland has

[80] See, for example, the proposals in *The Rule of Law. A Study by the Inns of Court Conservative and Unionist Society* 1955, esp. pp. 53 *et seq.*

[81] *Code de Commerce*, Book IV. The *tribunaux de commerce* are now regulated by Decree No. 61–923 of August 3, 1961.

[82] *Gerichtsverfassungs-Gesetz* of September 12, 1950, para. 93–114.

[83] See Sanders, "Arbitration Law in Western Europe" in *International Trade Arbitration*, edited by M. Domke, pp. 137 *et seq.* (1958, American Arbitration Association).

[84] *James Miller and Partners Ltd.* v. *Whitworth Street Estates (Manchester) Ltd.* [1970] A.C. 583.

[85] Union with Scotland Act 1706, incorporating the Articles of Union of January 16, 1706. By Art XVIII "private right" in Scotland may not be altered "except for evident utility of the subjects within Scotland," but by Art. XIX

unified almost all its private and criminal law, but each Canton retains its separate system of civil procedure.[86]

With renewed apologies to Maitland one may say that procedural law is tough law. All that concerns the technique of legal practice is likely to resist change. In most respects the organisation of the courts and of the legal profession, the law of procedure and the law of evidence help to allocate power, and belong, in Montesquieu's sense, to the *lois politiques*. Comparative law has far greater utility in substantive law than in the law of procedure, and the attempt to use foreign models of judicial organisation and procedure may lead to frustration and may thus be a misuse of the comparative method.

IX

How great is this danger of a misuse of the comparative method in the field of labour relations which is my third and last example?

Clearly there is no field of human endeavour in which it is more important to set up international standards and to transplant institutions and principles from more to less developed countries. Not only is it important—the impressive achievement of the International Labour Organisation shows that it is possible. Here, if anywhere, we see the comparative method in action, in successful action. This is the obverse side of the coin.

Let us look at the reverse. In each country the relations between management and labour are organised under the influence of strong political traditions, traditions connected with the role played by the organisations on both sides as political pressure groups promoting legislation, and as rule making agencies through the procedures of collective bargaining. Moreover, what I said a few minutes ago about the link between the political constitution of a country and the allocation of decision making power applies here with particular force: it is hard to think of any branch of the law where decisions in individual cases involve a higher degree of political responsibility. Hence the answer to the question who—court or government—makes what decisions must depend on how far the spirit of the constitution permits the substitution of independent judicial action for governmental action subject to political criticism. The obstacles to transplantation are formidable.

the judicial organisation of Scotland shall " remain in all time coming within Scotland as it is now constituted by the laws of that Kingdom," subject only to new " regulations for the better administration of justice." See T. B. Smith, *Scotland. The Development of its Laws and Constitution*, pp. 52 *et seq.* (in *The British Commonwealth* Series edited by G. W. Keeton, Vol. II, Stevens 1962). Whether this striking difference in formulation has any practical consequences, and if so which, cannot of course here be discussed. See on this T. B. Smith, *Studies Critical and Comparative* (Green, Edinburgh) 1962, Chap. I, esp. pp. 16 *et seq.*

[86] Guldner, *Schweizerisches Zivilprozessrecht*, 2nd ed. 1958 (Zuerich, Schulthess). In Germany, on the other hand, the unification of the law of civil procedure preceded that of private law by almost a quarter of a century.

I suggest that this contradiction is more apparent than real. The law of labour relations comprises a number of separable elements: It is concerned with individual relations between employers and workers—wages and hours of work, safety and health, holidays and pensions. It is however also concerned with collective relations between unions and other groups of workers and management, with the way the labour market is organised through understandings between them, the way rules are established through their agreements, and the way conflicts between them are fought and settled. In my opinion the first element—individual labour law—lends itself to transplantation very much more easily than the second element—that is collective labour law. Standards of protection and rules on substantive terms of employment can be imitated—rules on collective bargaining, on the closed shop, on trade unions, on strikes, can not.

If one looks at the corpus of Conventions and Recommendations made by the I.L.O. in the course of more than half a century, one sees without surprise that most of it is designed to establish international standards of individual protection, and this accounts for much of the great success of this gigantic enterprise of transplantation. Yet, in accordance with the Preamble to its Constitution [87] and with the Declaration of Philadelphia,[88] the I.L.O. has also sought to promote the principles of freedom of association and the effective recognition of the right of collective bargaining, and what are probably its two best known Conventions, made in 1948 and in 1949, were made for these purposes.[89] Similarly, the European Social Charter [90] contains among many provisions for individual protection two on freedom of organisation and various aspects of collective bargaining.[91] I need not dwell on the very great importance of these international agreements nor am I here concerned with the administrative and quasi-judicial machinery set up by the I.L.O. for the implementation of the two Conventions.[92]

[87] Constitution of the International Labour Organisation as amended by the Constitution of the International Labour Organisation Instrument of Amendment 1946.

[88] Declaration concerning the Aims and Purposes of the International Labour Organisation adopted by the 26th Session of the General Conference of the I.L.O. on May 10, 1944, at Philadelphia, Art. III (e).

[89] Conventions No. 87 of 1948 and 98 of 1949, both ratified by the United Kingdom.

[90] European Social Charter of October 18, 1961, under the auspices of the Council of Europe, ratified by the United Kingdom on July 11, 1962 (see Treaty Series No. 38 (1965), Cmnd. 2643), and in force since February 26, 1965. It has been ratified by 10 of the 17 members of the Council of Europe.

[91] Arts. 5 and 6. See Kahn-Freund, *Labour Relations and International Standards. Some Reflections on the European Social Charter*, Miscellanea W. J. Ganshof van der Meersch, Brussels and Paris, 1972, p. 131.

[92] See N. Valticos, *Droit International du Travail*, Vol. VII of Camerlynck's (ed.) *Traité de Droit du Travail*, 1970 (Dalloz), Quatrième Partie, Titre II, Chap. 3, Paras. 659 *et seq.*, pp. 587 *et seq.*, and *Mise à Jour*, 1973, pp. 97–98; Jenks, *The International Protection of Trade Union Freedom*, Stevens, 1957 (Library of World Affairs No. 35); von Potobsky, " Protection of Trade Union

My point is that those who drafted the Conventions and the European Social Charter must have been well aware of the obstacles to transplantation to which I have referred. In both cases this is shown by the contrast between the formulation used to give effect to the principle of freedom of organisation which is expressed in strict legal terms [93] and that chosen to impose an obligation to promote collective bargaining which is to be implemented by " measures appropriate to national conditions " and only " where necessary." These are the words of the relevant I.L.O. Convention.[94] The Charter is quite similar,[95] and so are the relevant Recommendations adopted by the I.L.O.[96] Nothing could more clearly demonstrate the knowledge of the draftsman that collective bargaining institutions and rules are untransplantable—and in the same context it is significant that in the whole corpus of I.L.O. Conventions and Recommendations and in the Charter you will not find a single rule in favour of or against the closed shop—an element in the details of the organisation of collective bargaining and unconnected with freedom of association.[97] Nor does the I.L.O. explicitly establish or restrain the freedom to strike—here the European Social Charter differs [98]—but inevitably in practice the question arose how far anyone can be said to enjoy an effective freedom of organisation if he is denied the right to strike.[99] The distinction between the strict standard of the freedom to organise and the adaptable standard of the right to bargain collectively is all the more remarkable in view of the strong influence exercised on the I.L.O. legislation by that of the United States where these two matters are inextricably intertwined.[1] The need for transmuting the American principles when converting them into international standards shows how much Montesquieu's pessimism has remained valid in all matters—such as the organisation of collective bargaining—linked with the political organisation of a society.

Rights: 20 Years' Work by the Committee on Freedom of Association " (1972) 105 Internat. Labour Review 69.

[93] Convention No. 87, Part I; No. 98, Arts. 1 and 2. The " machinery " for its enforcement however is to depend on national necessities and conditions. Art. 3.

[94] Convention No. 98, Art. 4. Note the difference between this Article, which refers to " measures," and Art. 3, which refers only to the " machinery " for enforcing an established right.

[95] Art. 6 (2).

[96] Recommendations Nos. 91 and 92 of 1951—except however with regard to the normative effect of collective agreements which is defined in strictly legal terms (Recommendation No. 91, Art. 3).

[97] This omission is deliberate as far as the I.L.O. is concerned—see Valticos, *loc. cit.*, Para. 251, p. 260, Note 4; Para. 266, p. 268—and not only deliberate, but express, as far as the European Social Charter is concerned: Appendix, Part II; gloss to Art. 1, Para. 2.

[98] Art. 6, Para. 4.

[99] Valticos, *loc. cit.*, Para. 265, p. 267.

[1] National Labor Relations Act 1935 (Wagner Act), amended by the Labor-Management Relations Act 1947 (Taft-Hartley Act) and by the Labor-Management Reporting and Disclosure Act 1959 (Landrum-Griffin Act). Compare *e.g.* s. 7 of the U.S. statute of 1935 with Art. 2 of Convention 87 or s. 8 (*a*) of the American statute with Arts. 1 and 2 of Convention 98.

These reflections are perhaps of more than academic importance in view of the Industrial Relations Act of 1971. I do not think that one could in the whole of the Statute Book find an Act of Parliament more strongly influenced by foreign patterns than this statute, and these foreign influences came from various directions.

Some of the provisions of the Act belong to that area of individual labour relations where, as I have suggested, transplantation is comparatively easy, especially between countries which have reached similar stages of economic development. I am particularly thinking of the new provisions intended to protect workers against unfair dismissal.[2] These are a very diluted version of the German legislation [3] which has exercised its influence through an I.L.O. Recommendation [4] accepted by this country. There are also special provisions intended to protect the worker against discriminatory treatment, including dismissal, by reason of trade union membership or activity.[5] These are an even more diluted version of corresponding provisions in the law of the United States.[6] What interests me in our present context is not only the transplantation, but also and especially the dilution and its causes. What I mean by " dilution " is that—contrary to the German [7] and American [8] prototypes—a worker who succeeds in an action by reason of unfair and even of discriminatory dismissal can only claim compensation (subject to a maximum and assessed on common law principles). He cannot claim to be reinstated, not even to be re-engaged under a new contract.[9] In adopting this policy the legislature followed a recommendation of the Donovan Commission [10] which I now regard as unfortunate, and the justification of the recommendation in the Donovan Report shows a parallel to the rejection of the Geneva

[2] Industrial Relations Act 1971, ss. 22 *et seq.*

[3] *Kündigungs-Schutzgesetz* of 1951 as amended in 1969 and now by the *Betriebsverfassungsgesetz* of 1972.

[4] Recommendation No. 119 concerning Termination of Employment at the Initiative of the Employer (1963). See Donovan Report (Cmnd. 3623), Chap. IX,

[5] s. 5—provided the union concerned is a registered union. The so-called freedom not to organise is also protected by similar measures.

[6] National Labor Relations Act, ss. 7, 8 (*a*) (1) and (3), 10.

[7] *Kündigungs-Schutzgesetz* of 1951, s. 7, and, as regards members of the works council, s. 13. In the case of ordinary employees the court may, in its discretion, order compensation instead of reinstatement in the event of unfair dismissal, but this is only permissible for special reasons defined in the statute. The discharge of a member of a works council is prohibited and ineffective, except in circumstances justifying instantaneous dismissal or in the event of the closure of the plant.

[8] The order for reinstatement is expressly provided for in s. 10 (*c*) of the National Labor Relations Act.

[9] The words " other than sections 5 and 22 " in s. 101 (1) (*b*) exclude the jurisdiction of the National Industrial Relations Court as a court of first instance in all matters concerning complaints of unfair or discriminatory dismissal. Only the industrial tribunals have jurisdiction in these matters (s. 106), but they cannot grant injunctions. They can " recommend " " re-engagement " (not reinstatement), but in the event of a refusal by the employer to accept the recommendation, all the tribunal can do is to increase the compensation within the statutory maximum (s. 116).

[10] Cmnd. 3623, Para. 551.

Conventions on negotiable instruments to which I referred earlier on. In both situations we see the power of a legal shibboleth—here it is the ancient doctrine that a contract of employment cannot be specifically enforced against either side because Equity does nothing in vain and also because an order for specific performance against the worker would savour of compulsory labour, and the rule of mutuality demands that if no such order can be made against the employee, it cannot be made against the employer either.[11] This ancient doctrine did not prevent the United States Congress from conferring on the appropriate court the power through a mandatory injunction to compel an employer to reinstate a worker whose dismissal had been an " unfair labor practice." The corresponding French doctrine however (which goes even further than that of Equity and has found its way *via* Pothier into the Code Civil [12]) produced the result that until last year the Cour de Cassation refused to enforce the reinstatement of members of works councils who, contrary to law, had been dismissed without the consent of the Inspector of Labour,[13] a fact noted by the Donovan Commission. The Cour de Cassation has now overruled its previous *jurisprudence* [14] and freed itself from the legal shibboleth which in France —surest sign of a shibboleth—had been raised to the dignity of a brocard in Latin.[15] No such development is possible under our Act of 1971, which thus furnishes an illustration to show not only that in the sphere of individual labour law rules and institutions can be transplanted, but also that even here deeply engrained legal ideologies may set a limit to transplantation.

The bulk of the Act, however, is about unions and their relations with employers, about collective agreements and strikes, and these parts of the Act raise the different problem of how far one can transplant institutions closely linked with the structure and organisation of political and social power in their own environment.

Thus the provisions on union registration [16] may owe something

[11] Rideout, *Principles of Labour Law*, 1972, Chap. 6, pp. 127 *et seq.*; Hepple and O'Higgins, *Individual Employment Law*, 1971, Paras. 1–17. The decision of the Court of Appeal in *Hill* v. *C. A. Parsons Ltd.* [1972] Ch. 305 suggests that there may be exceptions to this rule. Their nature is obscure—see on the whole problem G. de N. Clark, " Unfair Dismissal and Reinstatement," (1969) 32 M.L.R. 532.

[12] Art. 1121: Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en case d'inexécution de la part du débiteur. On this see *e.g.* Starck, *Droit Civil, Obligations*, 1972, Para. 2044, pp. 605–606; Carbonnier, *Droit Civil*, 6th ed., Vol. 4, Para. 143, pp. 523 *et seq.*—see also Kahn-Freund, Lévy and Rudden, *A Source-book on French Law*, 1973, p. 458.

[13] See *e.g. Sortais* c. *Cie Industrielle des Téléphones*, Cass.Soc. 27.11.1952, D. 1953, 239—no member of a *comité d'entreprise*, no *délégué du personnel*, and no *délégué syndical* (statutory shop steward) can be discharged without certain consents, ultimately that of the *Inspecteur du Travail*. (*Ordonnance* of 22.2.1945, Art. 22; Law of 16.4.1946, Art. 16; Law of 27.12.1968, Art. 13).

[14] *Société Comptoir des Revêtements Revet-Sol* c. *Dal Poz*, Cass.Soc. 14.6.1972, D.-S. 1973 II 114.

[15] *Nemo potest praecise cogi ad factum.*

[16] ss. 67–95 and Sched. 4.

to the Australian model,[17] but in Australia union registration is a condition for full participation in the arbitration procedure, and a comparative lawyer has no right to be surprised that this part of the Act does not work in a country which rejects compulsory arbitration. Very much, indeed most, of the 1971 Act, however, shows a very strong American influence, including the provisions on the contractual effect of collective agreements,[18] those on the closed shop,[19] the determination of the bargaining unit and the sole bargaining agent,[20] on cooling-off pauses and compulsory ballots in emergencies,[21] on the entire concept of an "unfair industrial practice."[22]

Now some of these specimens of attempted transatlantic transplantation are taken out of a habitat of industrial relations quite different from that to which they are to be adjusted. Thus a collective agreement in America is generally an explicit and formal written transaction at plant level, couched in terms which lend themselves to construction in the legal sense. It is not or not to the same extent as in this country a stage in a continuous bargaining process, formulated in esoteric terms, and very frequently in the shape of a resolution of a permanent bargaining body, such as a Joint Industrial Council.[23] The prohibition of the closed shop in America was enacted against that same background of explicit plant bargaining.[24] It would have been a miracle if rules such as those on collective agreements as contracts or on the suppression of

[17] Commonwealth Conciliation and Arbitration Act 1904–1972, Part VIII, ss. 132 *et seq.*

[18] ss. 34 *et seq.* Compare s. 301 of the Taft-Hartley Act.

[19] s. 5 (1) (*b*) and (2), s. 7, s. 33 (3). Compare s. 8 (*a*) (3) and s. 8 (*b*) (2) of the National Labor Relations Act, as amended in 1947.

[20] ss. 44–55. Compare National Labor Relations Act, s. 9 and s. 8 (*b*) (4) (B)–(D), s. 8 (*b*) (7). The difficulty of transplanting into the environment of the British public sector the transatlantic distinction between the right to organise and the right to negotiate are vividly illustrated by *Crouch* v. *Post Office and U.P.W.* [1973] 3 All E.R. 225 (C.A.)

[21] ss. 138–145. Compare ss. 206–210 of the Taft-Hartley Act.

[22] This concept which permeates the whole of the Act is derived from that of an "unfair labor practice," as defined in s. 8 of the National Labor Relations Act. It has been used for purposes unknown in America, *e.g.* in connection with unfair dismissal (ss. 22 *et seq.* of the British Act), but the American influence is very visible, *e.g.* in connection with the prohibition of certain types secondary action (s. 98). The principal difference between the present Act and its American model is that in this country injunctions by reason of discriminatory practice are available only against unions, whilst in America they are also available against employers. See *supra*, note 9.

[23] On this see Kahn-Freund: *Labour and the Law*, Hamlyn Lectures 24th Series, 1972 pp. 56 *et seq.*, 132. The artificiality of the concept of the collective agreement as a "contract" in a setting of "dynamic" bargaining is demonstrated by the intellectual tergiversations reflected in s. 35 of the Act.

[24] See W. E. J. McCarthy, *The Closed Shop in Britain*, 1964, and Chap. XI of the Donovan Report (Cmnd. 3623). The point made in the text is well illustrated by the situation, much discussed in the press, and before the N.I.R.C. in *Langston* v. *A.U.E.W.* [1973] 2 All E.R. 430, in which an employee who had left the union was by the employer suspended on full salary in order to avoid the trouble which any infringement of the accepted closed shop practice would have created.

the closed shop had worked in a country where so much has to be seen in the light of informal and often not even articulated custom and practice—quite generally, and also most especially as regards the closed shop. Both sets of provisions look as if they were going to be textbook examples of " rejection " in the physiological sense, posthumous vindications of Montesquieu.

Other provisions—those on bargaining units and agents, and on emergency measures for example—can in America only be understood within the framework of a presidential democracy which permits the executive to entrust what are in fact political decisions either to a regulatory commission or to a court of law. Thus the National Labor Relations Board—a regulatory commission—makes a policy decision when it determines which union should be recognised by an employer and which workers it should represent. And when the National Industrial Relations Court makes a similar decision under the 1971 Act it is still a policy decision, however much it may be based on a Report of the Commission on Industrial Relations. A policy decision however is something for which in a parliamentary democracy the government should be responsible to Parliament and not a judicial act shielded by the principle of judicial independence. And, in a different context, the finding that an emergency situation has arisen is a political act (and was treated as such by our Emergency Powers Act of 1920) and retains that character if it is entrusted to a court as it is now in America as well as here. Here, however, this means what it does not mean in America, that is, an encroachment on the principle of parliamentary responsibility.[25]

In short, whatever its merits or its demerits, the Industrial Relations Act is designed to teach us the wisdom of Montesquieu. It would indeed be an almost unbelievable " *hazard*," an unexpected coincidence if substantive rules wrenched out of their American constitutional, political and industrial context could suc-

[25] See *Labour and the Law* (*supra*, note 23), pp. 237 *et seq.* According to s. 138 (1) (*b*), (2), and s. 139 (1), it is for the court to decide, *inter alia*, whether there are sufficient grounds for believing that industrial action is likely to be " gravely injurious to the national economy." This involves an appraisal of the same kind as that which the Government has to make under the Emergency Powers Act 1920. The nature of this judgment as an economic or political value judgment is not affected by the fact that obviously, as Sir John Donaldson P. emphasised in *Secretary of State for Employment* v. *ASLEF* [1972] 2 All E.R. 853, 857, the court is " independent of the government and is in no way concerned with politics." Its reason for deciding that the industrial action was " likely to be gravely injurious to the national economy " was that this " was fully borne out by the affidavit evidence of two senior officials of the Department of the Environment and the Department of Trade and Industry " (p. 859). See also *Secretary of State for Employment* v. *ASLEF* (*No. 2*) [1972] 2 All E.R. 949, 960, and, in the Court of Appeal, *per* Lord Denning M.R. at p. 964. It is not suggested that, as regards this point, the courts arrived at a wrong conclusion in these cases. What is suggested is that in a parliamentary democracy it is not a proper function for the courts to draw this conclusion.

cessfully be made to fit the needs of a country with institutions and traditions so different from those of the United States.

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This however is precisely the point I have attempted to submit to you in this lecture, the point that we cannot take for granted that rules or institutions are transplantable. The criteria answering the question whether or how far they are, have changed since Montesquieu's day, but any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope, deter legislators in this or any other country from using the comparative method. All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law. I am appealing to those who teach comparative law to be aware of this risk and to transmit that awareness to their students among whom there may be those called upon to promote the exchange of legal ideas in the processes of legislation.

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