Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences

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Legal transplant: a misleading metaphor

Good faith is irritating British law. Recently, the (in)famous European Consumer Protection Directive 1994[1] transplanted the continental principle of *bona fides* directly into the body of British contract law where it has caused a great deal of irritation. A contractual term is unfair if 'contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. The infecting virus had already earlier found inroads into the common law of contracts, especially in the United States where the Uniform Commercial Code and the Restatement (2d) of Contracts provide for a requirement of good faith in the performance and enforcement of contracts.[2] British courts have energetically rejected this doctrine on several occasions treating it like a contagious disease of alien origin, as 'inherently repugnant to the adversarial position of the parties' and as 'unworkable in practice'.[3] But they are now at a loss how to deal with the EU Directive. And there is more to come, extending good faith well beyond consumer protection. Art. 1.106 of the Principles of European Contract Law states:

(1) In exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing.
(2) The parties may not exclude or limit this duty.

Finally, in international commercial law, good faith is playing an increasingly important role.[4]

Some academic commentators have expressed deep worries: 'Good faith could well work practical mischief if ruthlessly implanted in our system of law.'[5] Others have welcomed good faith as a healthy infusion of communitarian values, hoping

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1 Regulation 4 of the Unfair Terms in Consumer Contracts, SI 1994 No 3159, implementing the EU Directive on Unfair Terms in Consumer Contracts, Council Directive 93/13/EEC of 5 April 1993 (OJ L95, 21 April 1993, 29).
2 Uniform Commercial Code, U.C.C. s 1-203; Restatement (2d) of Contracts, s 205.
3 *Walford* v *Miles* [1992] 1 All ER 453, 460–461.
4 On Art. 1.7 UNIDROIT Principles of International Commercial Contracts and Art. 7 (1) CISG, see E. Allan Farnsworth, 'Good Faith in Contract Performance' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1995) 153; Peter Schlechtriem, ' "Good Faith" in German Law and International Uniform Laws' (1997) Centro di studi e ricerche di diritto comparato e straniero, Roma no. 24.
5 M.G. Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9 *Canadian Business Law Journal* 385, 426; similarly R. Goode, 'The Concept of "Good Faith" in English Law', (1992) Centro di studi e ricerche di diritto comparato e straniero, Roma, 3. Sceptical from a comparative law viewpoint, A. de Moor, 'Common and Civil Law Conceptions of Contract and European Law of Contract: The Case of the Directive on Unfair Terms in Consumer Contracts' (1995) 3 *European Review of Private Law* 257.

that it will cure the ills of contractual formalism and interact productively with other substantive elements in British contract law.[6] The whole debate is shaped by the powerful metaphor of the 'legal transplant'. Will good faith, once transplanted, be rejected by an immune reaction of the *corpus iuris britannicum*? Or will it function as a successful transplant interacting productively with other elements in the legal organism?

Repulsion or interaction? In my view, this is a false dichotomy because the underlying metaphor of legal transplants, suggestive as it is, is in itself misleading. I think 'legal irritant' expresses things better than 'legal transplant'. To be sure, transplant makes sense insofar as it describes legal import/export in organismic, not in machinistic, terms. Legal institutions cannot be easily moved from one context to the other, like the 'transfer' of a part from one machine into the other.[7] They need careful implantation and cultivation in the environment. But 'transplant' creates the wrong impression that after a difficult surgical operation the transferred material will remain identical with itself playing its old role in the new organism. Accordingly, it comes down to the narrow alternative: repulsion or integration. However, when a foreign rule is imposed on a domestic culture, I submit, something else is happening. It is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events. It irritates, of course, the minds and emotions of tradition-bound lawyers; but in a deeper sense, — and this is the core of my thesis — it irritates law's 'binding arrangements'. It is an outside noise which creates wild perturbations in the interplay of discourses within these arrangements and forces them to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself. 'Legal irritants' cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change.

Thus, the question is not so much if British contract doctrine will reject or integrate good faith. Rather, it is what kind of transformations of meaning will the term undergo, how will its role differ, once it is reconstructed anew under British law? My guess is that this is not only a matter of reconstructing it from a common law as opposed to a civil law perspective. There is also the crucial difference of 'production regimes'. The imperatives of a specific Anglo-American economic culture as against a specific Continental one will bring about an even more fundamental reconstruction of good faith under the new conditions. This is why I think that in spite of all benign intentions towards an 'Ever Closer Union', attempts at unifying European contract law will result in new cleavages.

With this argument I take issue with two fundamental assumptions that are popular today in comparative law. One is the 'convergence thesis'.[8] In the current

6 Roger Brownsword, 'Two Concepts of Good Faith' (1994) 7 *Journal of Contract Law* 197; Roger Brownsword, '"Good Faith in Contract" Revisited' (1996) 49 *Current Legal Problems* 111.

7 Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' in Kahn-Freund, *Selected Writings* (London: Stevens, 1978).

8 *Locus classicus* is Clark Kerr, *Industrialism and Industrial Man* (Cambridge, Mass: Harvard University Press, 1960): Global cultural convergence is the result of industrialisation processes. Its juridical resonances can be heard in Basil Markesinis, 'Learning from Europe and Learning in Europe' in B. Markesinis (ed) *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (Oxford: Clarendon, 1994) 30; Gerard-René Groot, 'European Education in the 21st Century' in B. de Witte and C. Forder (eds) *The Common Law of Europe and the Future of Legal Education* (Deventer: Kluwer, 1992) 7. They see a convergence of

movements toward internationalisation, Europeanisation and globalisation, industrial nations are supposed to converge toward similar socio-economic structures. Consequently, socio-economic convergence makes uniformisation of law as a primary objective to appear simultaneously possible and desirable. The other is 'functional equivalence'. While national legal orders are still founded on diverse doctrinal traditions, they face the same structural problems which they have to resolve. Accordingly, they will find different doctrinal solutions as functional equivalents to the same problems which again results in convergence.[9] I question these assumptions because they are not aware of ongoing debates in the social sciences on globalisation which make it plausible that the exact opposite of both assumptions is true. From these debates it seems that contemporary trends toward globalisation do not necessarily result in a convergence of social orders and in a uniformisation of law. Rather, new differences are produced by globalisation itself.[10] These trends lead to a double-fragmentation of world-society into functionally differentiated global sectors and a multiplicity of global cultures. Worse still, they result in a new exclusion of whole segments of the population from the modernising effects.[11] Accordingly, different sectors of the globalised society do not face the same problems for their laws to deal with, but highly different ones. The result is not more uniform laws but more fragmented laws as a direct consequence of globalising processes.

While there is evidence of such fragmentation at the level of the global society, it is less apparent on the regional level. In Europe, especially, there is a movement towards unification through law. This appears to lend support to the view that there is increasing convergence and functional equivalence of different national solutions. Of course, differences in fragmentation on the global level and the European level are enormous. Nevertheless, I want to take good faith, an important element of the ongoing harmonisation of European contract law, as my test case and put forward the argument that not only globalising tendencies but also the efforts of Europeanisation of national legal orders produce new divergences as their unintended consequences.

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sources of law, procedures, drafting techniques and judicial views; cf also Richard Helmholz, 'Continental Law and Common Law: Historical Strangers or Companions' (1990) *Duke Law Journal* 1207.

9 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1992) 31, n 16; Marc Ancel, *Utilité et méthodes du droit comparé* (Neuchatel: Ides et Calendes, 1971) 101–103; M. Ann Glendon, *Comparative Legal Traditions* (St. Paul: West, 1994) 12f; Michael Bogdan, *Comparative Law* (Deventer: Kluwer, 1994) 60. Critical: Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal of Legal Studies* 101, 106f.; Pierre Legrand, 'European Systems Are Not Converging' (1996) 45 *International and Comparative Law Quarterly* 52, 55; William Ewald, 'Comparative Jurisprudence I: What Was It Like to Try a Rat' (1995) 143 *University of Pennsylvania Law Review* 1889, 1986.

10 Samuel P. Huntington, 'The Clash of Civilizations' (1993) 72 *Foreign Affairs* 22, paints a rather dramatic scenario of global cleavages. More realistic appears a simultaneous increase of both convergence and divergence tendencies as a result of globalisation: Jonathan Friedman, 'Being in the World: Globalisation and Localisation' in Mike Featherstone (ed.), *Global Culture: Nationalism, Globalisation and Modernity* (London: Sage, 1990); Mike Featherstone, 'Globalisation, Modernity and the Spatialisation of Social Theory' in Mike Featherstone, Scott Lash and Robert Robertson (eds), *Global Modernities* (London: Sage, 1995); Robertson, 'Glocalisation: Time-Space and Homogeneity-Heterogeneity' in *ibid.* The crucial question is then how to identify conditions of convergence/divergence. The text identifies major conditions of convergence within the legal system and major conditions of divergence in its binding arrangements with other social systems.

11 Surya P. Sinha, 'Legal Polycentricity' in H. Petersen and H. Zahle (eds), *Legal Polycentricity* (Aldershot: Dartmouth, 1995); Niklas Luhmann, 'The Paradoxy of Observing Systems' (1995) 31 *Cultural Critique* 37; Niklas Luhmann, 'Inklusion und Exklusion' in H. Berding (ed), *Nationales Bewußtsein und kollektive Identität* (Frankfurt: Suhrkamp, 1994) vol 2.

Context versus autonomy

In stark contrast to main-stream comparative law, some outsiders have recently developed ambitious theoretical perspectives dealing with legal irritants and at the same time irritating the main-stream. I single out three authors: Pierre Legrand, Alan Watson, and William Ewald.

From an anthropologically informed 'culturalist' perspective Pierre Legrand stresses the idiosyncracies of diverse legal cultures and irritates the European-minded consensus of comparativists with his provocative thesis that 'European legal systems are not converging'.[12] Of course, he argues, convergences are observable on the level of legal rules and institutions but the deep structures of law, legal cultures, legal mentalities, legal epistemologies and the unconscious of law as expressed in legal mythologies, remain historically unique and cannot be bridged:

> cultures are spiritual creations of their relevant communities, and products of their unique historical experience as distilled and interpreted over centuries by their unique imagination.[13]

These fundamental differences do not only exist between very distant world cultures, but between the laws of modern industrialised societies as well, and they are particularly strong between the common law and the civil law culture. Accordingly, legal transplants are exposed to the insurmountable differences of cultural organisms; they cannot survive, unchanged, the surgical operation:

> Rather, the rule, as it finds itself technically integrated into another legal order, is invested with a culture-specific meaning at variance with the earlier one. Accordingly, a crucial element of the ruleness of the rule — its meaning — does not survive the journey from one legal culture to another.[14]

This is an exciting perspective which promises new insights from an adventurous journey through deeper and darker areas of comparative law. It is a contemporary reformulation of Montesquieu's culturalist scepticism against the easy transfer of legal institutions, but with the important modification that the 'esprit des lois' is less a reflection of a national culture, but rather, of a specific legal culture. And it radically reconstructs legal transplants anew. This is done not from the author-perspective of the super-imposing legal order, but from the view point of the receiving legal culture, which is reading anew, reconstructing, recreating the text of the transplant. 'Accordingly, legal transplants are impossible'.[15]

Promising as it is, this approach is, however, vulnerable to some important objections. How will it avoid the fatal calamities of any approach to '*gesellschaftliche Totalität*', to 'totality of society' in which each legal element reflects the whole societal culture and vice versa? How will such an appeal to the

12 Pierre Legrand, 'Comparatists-at-Law and the Contrarian Challenge' (1995a) *Inaugural Lecture, Tilburg*; Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995b) 58 *Modern Law Review* 262; Pierre Legrand, 'Against a European Civil Code' (1997a) 60 *Modern Law Review*; Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997b) 4 *Maastricht Journal of European and Comparative Law* 111.

13 Bhikou Parekh, 1994 cited by Pierre Legrand, 1995a, n 12 above, 10.

14 Pierre Legrand, 1995a, n 12 above, n 33; 1997b, n 12 above, 119.

15 Legrand, 1997b, n 12 above, 114. The inspirational source is of course Stanley Fish and his reader-response theory, see Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford: Oxford University Press, 1989); Stanley Fish, *There's No such Thing as Free Speech* (Oxford: Oxford University Press, 1994).

totality of cultural meaning, to the ensemble of deep structures of law and to society's culture *tout court* be translated into detailed analyses of interaction between law and culture? Legrand's still rather modest efforts stand in a somewhat strange contrast to the sweeping claims of his general programme.[16] Secondly, how will he account for the manifold successful institutional transfers among Western societies that have taken place rapidly and smoothly? And thirdly, does his own transfer into legal discourse of anthropological culturalist knowledge, which presumes that legal phenomena are deeply culturally embedded, take into account fragmentation, differentiation, separation, closure of discourses that is so typical for the modern and post-modern experience?[17] Does Legrand adequately reflect the double fragmentation of global society which consists not only in polyculturalism which he speaks about but also in deep cleavages between discourses which he tends to neglect?[18]

In direct contrast to Legrand, the legal historian Alan Watson has an easy way to deal with these three objections. He provides rich historical evidence showing that transferring legal institutions between societies has been an enormous historical success despite the fact that these societies display a bewildering diversity of socio-economic structures. He explains the success of legal transplants by a highly developed autonomy of the modern legal profession.[19] He confronts functionalist comparativists with the theoretical argument that convergence of socio-economic structures as well as functional equivalence of legal institutions in fact do not matter at all. Neither does — this is his message to the culturalists — the totality of a society's culture.

These claims are based on three main arguments which deserve closer scrutiny. First, Watson asserts, comparative law should no longer simply study foreign laws but study the interrelations between different legal systems.[20] In my view, this argument reflects rightly a major historical shift in the relation between nations and their laws and is apt to reduce inflated culturalist claims. Montesquieu, in his '*esprit des lois*', could still maintain that laws are the expression of the spirit of nations, that they are deeply embedded in and unseparable from their geographical peculiarities, their customs and politics. Therefore the transfer of culturally deeply embedded laws from one nation to the other was a '*grand hasard*'. Today, due to long-term historical processes of differentiation and globalisation, the situation is indeed different. The primary unit is no longer the nation which expresses its unique spirit in a law of its own as a cultural experience which cannot be shared by

16 See Pierre Legrand, 1995a, n 12 above, and Pierre Legrand, 1996, n 9 above, for a somewhat 'schematic' attempt to sort out the differences between the civil law and the common law culture. The empirical basis for his thesis is not very strong, see Legrand, 1997b, n 12 above, 118f.

17 Jean-François Lyotard, *The Différend: Phrases in Dispute* (Manchester: Manchester University Press, 1987) speaks of hermetic closure of discourses; Niklas Luhmann, 1995, n 11 above, sees in the global society a double fragmentation: cultural polycentricity and functional differentiation; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass: MIT, 1996) identifies within the lifeworld a multiplicity of discourses.

18 Pierre Legrand needs to explain why he sees almost unsuperable cleavages between different legal cultures while he negates similar cleavages between legal cultures on the one hand, political, economic, academic, aesthetic cultures on the other (Pierre Legrand, 1995a, n 12 above). Particularly under post-modernist claims which accentuate the fragmentation of diverse discourses (Jean-Francois Lyotard) this position is difficult to defend.

19 Alan Watson, *The Evolution of Law* (Baltimore: Johns Hopkins University Press, 1985); Alan Watson, 'Evolution of Law: Continued' (1987) 5 *Law and History Review* 537–570; Alan Watson, *Legal Transplants* (2nd ed, Georgia: University of Georgia, 1993); Alan Watson, 'Aspects of Reception of Law', (1996) 44 *American Journal of Comparative Law* 335.

20 Alan Watson (1993) *ibid* 1–21.

other nations with different cultural traditions. Rather, national laws — similar to national economies — have become separated from their original comprehensive embeddedness in the culture of a nation. And globalising processes have created one world-wide network of legal communications which downgrades the laws of the nation states to mere regional parts of this network which are in close communication with each other.[21] Therefore the transfer of legal institutions is no longer a matter of an inter-relation of national societies where the transferred institution carries the whole burden of the original national culture. Rather it is a direct contact between legal orders within one global legal discourse. This explains the frequent and relatively easy transfer of legal institutions from one legal order to the other. However, at the same time their ties to the 'life of nations' have not vanished. Although having become rather loose they still exist, but in a different form. And it must be said against Watson in his engaged polemics against mirror-theories of law and society that in spite of all differentiation and all autonomy of law we should not lose sight of the cultural ties of the laws and closely observe what happens to them when laws are de-coupled from their national roots.

Second, Watson identifies transplants as the main source of legal change.[22] The legal profession prefers to imitate and take over rules and principles from foreign legal orders rather than reacting directly to external stimuli from society. Watson traces this to the peculiarities of the legal profession who need to argue from precedent and authority. They prefer to derive their solutions from legal traditions and abhor a *creatio ex nihilo*. Again, he has a point here. However, the idiosyncrasies of the profession seem to me a secondary phenomenon. It is the inner logics of the legal discourse itself that builds on normative self-reference and recursivity and thus creates a preference for internal transfer within the global legal system as opposed to the difficult new invention of legal rules out of social issues. But once again, this preference of the legal discourse for its own products should not blind the analysis against the fact that usually in case of transplants the law reacts to external pressures that are then expressed in a recourse to foreign legal rules. And if one wants to understand the dynamics of legal transplants one must analyse those external pressures from culture and society carefully.

Third, Watson generalises from his historical materials that legal evolution takes place rather insulated from social changes, that it tends to use the technique of 'legal borrowing' and can be explained without reference to social, political, or economic factors.[23] Again, with the richness of his studies on the history of private law he scores a point against contextualists and culturalists who see law as mirroring culture and society. And his findings resonate with sociological theories about cultural evolution which reject a historical trajectory for the whole of society and identify, instead, separate evolutionary paths for different sectors of society, among them law. Indeed, legal transplants seem to be one main source for a specific legal evolution because they create variety of meaning in law. However, here again, Watson has not finished his task. In his polemics against contextualism he overgeneralises and is not willing to

21 For the debate on globalisation and law, see William Twining, 'Globalisation and Legal Theory' (1996) 49 *Current Legal Problems* 1; G. Teubner (ed), *Global Law Without A State* (Aldershot: Dartmouth Gower, 1997); Klaus Röhl and Stefan Magen, 'Die Rolle des Rechts im Prozeß der Globalisierung' (1996) 17 *Zeitschrift für Rechtssoziologie* 1; Lawrence M. Friedman, 'Borders: On the Emerging Sociology of Transnational Law' (1996) 32 *Stanford Journal of International Law* 65.

22 Alan Watson, 1993, n 19 above, 95.

23 Alan Watson, *The Making of the Civil Law* (Cambridge, Mass: Harvard University Press, 1981) 38.

scrutinise more indirect, more subtle ways of law and society interrelations.[24] He makes only one attempt when he describes the legal professional elite as the translator of general culture to legal culture. But here he identifies a surface phenomenon instead of scrutinising the links between the deep structure of different discourses.[25] How will he integrate obvious counterexamples of politically induced changes of the law, like the political transformation of American public law in the Revolution, as analysed by Ewald?[26] He seems to be obsessed with the somewhat sterile alternative of cultural dependency versus legal insulation, of social context versus legal autonomy, an obsession which he shares, of course, with his opponents.[27] The whole debate, it seems to me, needs some conceptual refinement that allows us to analyse institutional transfer in terms different from the simple alternative context versus autonomy. Hopefully, the refinement will not end up in the compromising formula that legal transfers take place in 'relative autonomy' ...

Binding arrangements in a fragmented society

The impasse of context versus autonomy may be overcome by distinguishing two types of institutional transfer which Otto Kahn-Freund suggested twenty years ago.[28] He proposed to distinguish between legal institutions that are culturally deeply embedded and others that are effectively insulated from culture and society. Legal institutions are ordered alongside a spectrum which ranges from the 'mechanical' where transfer is relatively easy to the 'organic' where transfer is very difficult, if not outright excluded. At the same time Kahn-Freund reformulated drastically the meaning of the 'organic', shifting it from the traditional comprehensive social embeddedness of law to a new selective connectivity. Legal institutions are no longer totally intertwined in the whole fabric of society and culture, their primary interdependency is concentrated on politics. Thus, institutional transfers of the organic type depend mainly on their interlocking with specific power structure of the societies involved.[29]

I would like to build on these distinctions — mechanic/organic and comprehensive/selective — modifying them, however, to a certain degree. They provide indeed the missing link in Watson's account of autonomous transplants and allow for a more sociologically informed formulation of Legrand's culturalism. They attempt to grasp what happened to the social ties of law in the great historical transformation from embeddedness to autonomy — something that I would call law's 'binding arrangements'.[30] True, Montesquieu's vision of a total

24 This argument is made forcefully by William Ewald, 'The American Revolution and the Evolution of Law' (1994) 42 *American Journal of Comparative Law* 1; William Ewald, 'Comparative Jurisprudence II: The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489, in his detailed critique of Alan Watson's work.

25 Alan Watson, 1985, n 19 above, ch 5; Alan Watson, 1987, n 19 above, 568ff.

26 William Ewald, 1994, n 24 above, uses historical studies of legal changes in the American Revolution which corroborate roughly Alan Watson's findings in the field of private law but contradict them directly in the field of public law. See also J.W.F. Allison, *A Continental Distinction in the Common Law* (Oxford: Oxford University Press, 1996) 14, questioning Watson's empirical evidence.

27 Richard Abel, 'Law as Lag: Inertia as a Social Theory of Law' (1982) 80 *Michigan Law Review* 785–809.

28 Otto Kahn-Freund, n 7 above, 298f.

29 *ibid* 303ff.

30 For this concept see Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443.

union of law and national culture is no longer adequate for the formalised, technicised, professionalised law of our times which has achieved operational closure in the process of positivisation. But, where something is excluded, it often returns through a back door. Law's old connections reappear in new disguises in which they are barely discernible.

I would like to put forward four theses as to how the new ties of law look and elaborate on these in the remainder of the article:

(1) Law's contemporary ties to society are no longer comprehensive, but are highly selective and vary from loose coupling to tight interwovenness.
(2) They are no longer connected to the totality of the social, but to diverse fragments of society.
(3) Where, formerly, law was tied to society by its identity with it, ties are now established via difference.
(4) They no longer evolve in a joint historical development but in the conflictual interrelation of two or more independent evolutionary trajectories.

These four properties of law's binding arrangements share with a culturalist perspective the assumption that law is intricately interwoven with culture, but they differ when it comes to the high degree of selectivity of the bonds which excludes any talk about the 'totality of society'. They share with an autonomist perspective the assumption that it is naive to speak of law mirroring society, but they differ in their assessment of legal autonomy. Greater autonomy does not mean greater independence of law, rather a greater degree of interdependence with specific discourses in society.

What do these four properties of the new ties of law and society imply for the transfer of legal institutions? In particular, how will the transfer of continental good faith to British law be influenced by these selective bonds?

Tight and loose coupling

The new ties are highly selective. Since contemporary legal rule production is institutionally separate from cultural norm production, large areas of law are only in loose, non-systematic contact with social processes. It is only on the ad-hoc basis of legal 'cases' that they are confronted with social conflicts. They reconstruct them internally as 'cases' deciding them via the reformulation of pre-existing rules. However, as opposed to these spaces of loose coupling there are areas where legal and social processes are tightly coupled. Here, legal rules are formulated in ultracyclical processes between law and other social discourses which bind them closely together while maintaining at the same time their separation and mutual closure.[31]

Various formal organisations and processes of standardisation as well as references of law to social norms work as extra-legal rule-making machines. They are driven by the inner logics of one specialised social domain and compete with

31 For an analysis of ultracyclical processes in law and society see Gunther Teubner, 'Autopoiesis and Steering: How Politics Profits from the Normative Surplus of Capital' in R. in t'Veld *et al* (eds), *Autopoiesis and Configuration Theory* (Dordrecht: Kluwer, 1991).

the legislative machinery and the contracting mechanism.[32] This difference between loose and tight coupling has implications for the institutional transfer from one legal order to the other. Kahn-Freund's suggestion that institutional transfer may be of a 'mechanic' type or of a more 'organic' type makes sense in the light of this difference. While in the loosely coupled areas of law a transfer is comparably easy to accomplish, the resistance to change is high when law is tightly coupled in binding arrangements to other social processes.

We should be aware, however, that even in areas of loose coupling, where an institutional transfer is easier to accomplish, this is not as 'mechanical' as Kahn-Freund suggested, such as the analogy of changing a carburretor in an engine. William Ewald in his subtle critique of both legal contextualism and legal autonomism makes a forceful argument against a purely mechanical transfer. Even in those situations when the law is rather 'technical', insulated from its social context, legal transfer is not smooth and simple but has to be assimilated to the deep structure of the new law, to the social world constructions that are unique to the different legal culture.[33] Here, in the difference of legal *épistémes*, in the different styles of legal reasoning, modes of interpretation, views of the social world, Legrand's culturalist ideas find their legitimate field of application, particularly under contemporary conditions. After the formal transfer, the rule may look the same but actually it has changed with its assimilation into the new network of legal distinctions. In such situations, the transfer is exposed to the differences of episode linkages that are at the root of different legal world constructions.[34] Legal cultures differ particularly in the way in which they interconnect their episodes of conflict solution. Here, the great historical divide between common law and civil law culture still has an important role to play.

Returning to our example, the famous *bona fides* principle is clearly one of the unique expressions of continental legal culture. The specific way in which continental lawyers deal with such a 'general clause' is abstract, open-ended, principle-oriented, but at the same time strongly systematised and dogmatised. This is clearly at odds with the more rule-oriented, technical, concrete, but loosely systematised British style of legal reasoning, especially when it comes to the interpretation of statutes. Does then the inclusion of such a broad principle in a British statute also imply that British lawyers are now supposed to 'concretise' this general clause in the continental way? Will British judges now 'derive' their decisions from this abstract and vague principle moving from the abstract to the concrete via different and carefully distinguished steps of concretisation? Will they reconstruct good faith in a series of abstract well-defined doctrinal constructs, translate it into a system of conditional programmes, apply to it the obscurities of teleological reasoning, and indulge in pseudo-historical interpretation of the motives why good faith had been incorporated into the Euro-Directive? From my impressions of British contract law I would guess that good faith will never be

32 Inger-Johanne Sand, 'From the Distinction Between Public Law and Private Law to Legal Categories of Social and Institutional Differentiation in a Pluralistic Legal Context' in Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995) 85; Gunther Teubner, *ibid*, 134ff.

33 William Ewald, n 9 above, 1943ff. For a recent comparative analysis of the deep structure of common law and civil law, Tim Murphy, *The Oldest Social Science?* (Oxford: Clarendon, 1997) 81–126.

34 See Gunther Teubner, 'Episodenverknüpfung' in D. Baecker *et al* (eds), *Theorie als Passion* (Frankfurt: Suhrkamp, 1987); and Gunther Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (1989) 23 *Law and Society Review* 727 for the relation of episode linkages to social world constructions of law.

'transplanted' this way. But it will 'irritate' British legal culture considerably. Under the permanent influence of continental noise this culture is indeed undergoing considerable change and is developing a new order of principle-oriented statutory interpretation which is, however, remarkably different from its continental counterpart. New dissonances from harmonisation!

Under present conditions it is inconceivable that British good faith will be the same as *Treu und Glauben* German style which has been developed in a rather special historical and cultural constellation. *Treu und Glauben* has been the revolutionising instrument by which the formalistic civil code of 1900 has been 'materialised' and adapted to the convulsions of Germany's history in the 20th century.[35] During this time German legal culture developed an intimate 'symbiotic relationship' between the new powers that the national constitution and the civil code had given to the judiciary and the old powers invested in the authorities of pandectic legal scholarship.[36] The result of this unique type of episode linkage was that the highly ambivalent and open-ended good faith principle which was originally supposed to flexibly counteract on an ad hoc basis the rigidities of formal law, was actually propelled into an incredible degree of conceptual systematisation and abstract dogmatisation.[37] The law of good faith as it has been developed through extensive case law is divided into three functions: (1) expansion and establishment of contractual duties (*officium iudicis*); (2) limitation of contractual rights (*praeter legem*); (3) transformation of contract (*contra legem*).

The first function which establishes an expansive doctrine of relational contracting is divided into a series of doctrinal constructs: secondary duties of performance, duties of information, of protection, of cooperation. The second function deals with the doctrine of individual and institutional abuse of rights: disloyal acquisition of rights, violations of own duties, lack of legitimate interest, proportionality, contradictory behaviour. The third one expands the judicial power to rewrite contracts in the light of supervening events: imbalance of equivalence, frustration of contractual purpose, fundamental social changes.[38] This thorough dogmatic systematisation of good faith, a *contradictio in adiectu*, was possible only via a mutual reinforcement of judicial and professorial activism. Bold judicial decisions were sanctified under the condition that they obeyed the rigorous requirements of 'dogmatisation' and vice versa. The trend continues; in the most recent round, academics criticise the judge-made law on good faith for its free-style argument, they lament that good faith is still lacking sufficient dogmatisation and push for a closer reintegration into the doctrinal system of German private law.[39]

In Britain, it may well be that 'good faith' (together with 'legitimate expectation', 'proportionality' and other continental general clauses) will trigger

35 For a brilliant account of the materialisation of private law and the role of good faith in this process, see Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Oxford: Clarendon Press, 1996) ch 27–30.

36 William Ewald, n 9 above, 2087.

37 For an English language account of good faith in German Law, see Werner Ebke and Bettina Steinhauer, 'The Doctrine of Good Faith in German Contract Law' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1995); cf also Peter Schlechtriem, n 4 above, 9ff.

38 Palandt, *Bürgerliches Gesetzbuch* (München: 56th ed, 1997) § 242; Saergel, *Bürgerliches Gesetzbuch* (Stuttgart: Kohlhammer, 12th ed, 1991) § 242; Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (13th ed, Berlin: Schweitzer, 1993) § 242, 56.

39 See the attempt of a systematic reintegration of good faith into the civil code by J. Schmidt in: Staudinger, *ibid* 283–1433.

deep, long-term changes from highly formal rule-focused decision-making in contract law toward a more discretionary principle-based judicial reasoning.[40] But it will probably move into a direction quite different from German-style dogmatisation. Given the distinctive British mode of episode linkages, good faith will be developed rather in forms of judicial activism similar to those other common law countries have adopted, combining close fact-oriented case analysis with loosely arranged arguments from broad principles and policies. British lawyers will avoid the recourse to elaborate intermediate structures, dogmatic constructs, juridical theories and conceptual systematisation which is so close to the heart of German law. The predictable result will be a judicial doctrine of good faith that is much more 'situational' in character.[41] 'English courts will inevitably prefer to imply more precise terms governing particular aspects of the business relation.'[42] As opposed to abstract and general 'conditional programmes' and to a series of finely circumscribed doctrinal figures based upon good faith, they will distinguish and elaborate different factual situations of contracting. They will not rely primarily on abstract distinctions developed by legal and economic theory (complete/incomplete, discrete/relational, consumer/commercial), but rather begin to typify different 'relationships which are of common occurrence'[43] (landlord and tenant, doctor and patient, carrier and shipper etc) and will see the pressures of the factual situations:

> Some of this is trade usage in the narrow sense, some of it regards practices common in the situation; some of it concerns the usual players in the situation beyond the particular pair of contracting parties; and some of it connects the particular transaction-type with other institutions, or with other already-applicable rules.[44]

On the basis of this type of information English law will develop on an analogical basis new rules coming out of a close analysis of the factual situations involved. And principles will enter the scene which will not be translated into strictly conceptualised and systematised doctrines, but rather appear as loosely organised ad hoc arguments that do not deny their political-ethical origin.

Tying law to social fragments

Such an exposure to the deep structures of legal culture will take place in any type of institutional transfer, whether they are 'mechanic' or 'organic' in Kahn-Freund's sense, or whether they occur in situations of loose coupling or of tight coupling. Tight coupling will, however, pose additional difficulties. Transfers will not only be confronted with the idiosyncrasies of the new legal culture, they will have to face resistance which is external to the law. To identify the sources of resistance one must understand that today law meets its society as a fragmented multiplicity of discourses.

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40 See Jonathan Levitsky, 'The Europeanization of the British Legal Style' (1994) 42 *American Journal of Comparative Law* 347, 368–378.

41 For such a situational approach to good faith, see Todd Rakoff, 'The Implied Terms of Contracts: Of "Default Rules" and "Situation Sense"' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1995) 191–228 201ff.

42 Hugh Collins, *The Law of Contract* (London: Butterworths, 3rd ed, 1997) 271.

43 *Liverpool City Council* v *Irwin* [1997] AC 239; *Shell UK Ltd* v *Lostock Garage Ltd* [1976] 1 WLR 1187, 1196f.

44 Todd Rakoff, n 41 above, 221.

Contemporary legal discourse is no longer an expression of society and culture *tout court*; rather it ties up closely only with some of its areas, only on specific occasions and only to different fragments of society.[45] Today's society does not present itself to law as the mystical unity of nation, language, culture and society, as *Volksgeist* in the sense of Savigny and Herder, but rather as a fractured multitude of social systems which allows accordingly only for discrete linkages with these fragments. Kahn-Freund expressed a similar idea, maintaining that among the many social factors that Montesquieu had made responsible for the *esprit des lois*, today only certain ones matter. He singled out the political power discourse as law's primary link to society.[46]

This is an important insight which must however be modified. Kahn-Freund formulated his account in the early seventies, and the emphasis on the law's political connections reflects the all-important political differences of the Cold War, the ever-present heritage of Europe's political totalitarian regimes, the obsession with political institutions as the almost exclusive expression of society's relevant conflicts, and the high aspirations for political planning and steering which was prevalent in those days. From the somewhat sobering perspective of the nineties, this seems to overestimate the importance of the political system at the expense of other social systems. These other sub-systems have by no means lost their importance through a process of socio-economic convergence which would leave us only with differences in institutionalised politics, as Kahn-Freund argued. On the contrary, while political liberal constitutionalism has now become the dominant global norm, differences in respect of other discourses have gained in prominence. This is true especially for the different types of economic regimes under victorious global capitalism.

This has implications for institutional transfer. True, some legal institutions are so closely coupled to the political culture of a society that their transfer to another society would require simultaneously profound changes of its political system in order to work properly in the new environment. This is the reason why Kahn-Freund was highly critical about the import of collective labour law rules from the United States to Britain. He denounced this as a (politically motivated) 'misuse' of comparative law.[47] But there are other legal institutions — especially in private law — whose ties to politics are rather loose while they are at the same time closely intertwined with economic processes. Others are tightly coupled to technology, to health, science, or culture. It is in their close links to different social worlds that we can see why legal institutions resist transfer in various ways. The social discourse to which they are tightly connected will not respond to the signals of legal change. It obeys a different internal logic and responds only to signals of change of a political, economic, technological or cultural nature. Transfer will be effectively excluded without a simultaneous and complementary change in the other social field.

Good faith is a splendid example of this fundamental transformation from law's comprehensive social embeddedness to a more selective and fractured connectivity. While contract law in general can be adequately described as consisting of 'principles of voluntarism superimposed on underlying social

45 For an elaboration of this point, see Gunther Teubner, n 30 above,

46 Otto Kahn-Freund, n 7 above, 303ff.

47 *ibid* 316ff; it is another question, of course, whether they were ever supposed to work 'properly'.

patterns and statuses',[48] good faith has always been the element in contract law that directly connects with these patterns. But over time this recourse has taken on different forms co-varying with different forms of social organisation. Historically, *bona fides* had been contract law's recourse to social morality.[49] Whenever the application of strict formal contract rules led to morally unacceptable results, *bona fides* was invoked to counteract the formalism of contract law doctrine with a substantive social morality. Contracts were performed in good faith when the participants behaved in accordance with accepted standards of moral behaviour.

Under contemporary conditions of moral pluralisation and social fragmentation, good faith cannot play this role any more. There have been attempts to take into account these historical changes and to replace recourse to morality by recourse to the 'purpose' of the legal institutions involved. Contracts are performed in good faith when the participants are responsive to the policy of the rules, the *telos* of their rights, the *idées directrices* of the institutions, the elements of 'ordre public', the values of the political constitution law within private arrangements.[50] This new policy-oriented interpretation of good faith which gained high prominence in this century, especially in the debate about institutional *abus des droits*, reflected indeed the more selective nature of law's social ties. It concentrated them on the policies of institutionalised politics. But in a sense it privileged the political ties of law, neglecting ties to other discourses.

Formal contractual obligations are not only linked to substantive policy requirements and the *ordre public* of institutionalised politics, they are equally exposed to substantive demands of other social institutions. Markets and organisations, the professions, the health sector, social security, family, culture, religion — they all impose certain requirements on the 'private' contractual relation. Invoking good faith in such situations means making visible how contractual expectations depend upon a variety of non-contractual social expectations, among them (but not exclusively) policy expectations, and their reconstruction within the contract. Unbounded priority of the individual consensus between parties to the contract cannot be insisted upon, whether one is dealing with matters of individual conscience, strict religious prohibitions, political freedoms, regulatory policies or economic institutions. Good faith complements contractual duties with social expectations stemming from those various fields. Due to its high degree of indeterminacy, the general clause of good faith is particularly suited to link contracts selectively to their unstable social environments with constantly shifting and conflicting requirements.[51]

It is this selective and fractured linkage of good faith to highly diverse social environments that will be responsible for newly emerging cleavages. If, under European law, good faith is transferred from the Continent to British law and if it is supposed to play also in the new context its role of linking contracts to a variety of

48 Todd Rakoff, n 41 above, 221.

49 Franz Wieacker, n 35 above, ch 25 III 3; Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen: Mohr, 1956 4th ed, 1990) 151–152.

50 For a thorough rethinking of German contract law and good faith in such a policy-oriented perspective, see Eike Schmidt and Josef Esser, *Schuldrecht* I (Heidelberg: Mueller, 7th ed, 1991) § 1 II, § 2 II, § 4 IV.

51 For a reformulation of good faith in contemporary society, see Gunther Teubner, *Law as an Autopoietic System* (London: Blackwell, 1993) ch. 6 IV, V; Gunther Teubner, 'Die Generalklausel von "Treu und Glauben"' in R. Wassermann (ed) *Alternativkommentar zum Bürgerlichen Gesetzbuch. Band 2* (Neuwied: Luchterhand, 1980) 32–91.

different discourses, then it is bound to produce results at great variance with continental legal orders. Good faith will reproduce in legal form larger differences of the national cultures involved, and it will do so, paradoxically, because it was meant to make their laws more uniform.

In the considerations to follow we cannot deal with the many links that good faith establishes toward different discourses. We will concentrate on only one of the links good faith is creating, that is the link of contracts to the production regimes in their economic environment. What happens to the institutional transfer of good faith clauses when they are indeed tightly coupled to the production regimes of the countries involved?

Divergent production regimes

Here we are confronted with rather surprising results in comparative political economy which undermine the assumptions of mainstream comparative law about 'convergence' and 'functional equivalence' mentioned above.[52] Against all expectations that globalisation of the markets and computerisation of the economy will lead to a convergence of economic regimes and to a functional equivalence of legal norms in responding to their identical problems, the opposite has turned out to be the case. Against all talk of 'regulatory competition' which is supposed to wipe out institutional differences, economic regimes under advanced capitalism have not converged. Instead, new differences have been created, even under the unifying attempts of the European Common Market. Despite liberalisation of the world markets and the legal establishment of the Common Market, the somewhat surprising result of the last thirty years is the establishment of more than one form of advanced capitalism. And the differences in production regimes seem to have increased.[53]

Production regimes are the institutional environment of economic action. They organise production through markets and market-related institutions, and determine the framework of incentives and constraints or the 'rules of the game' by a range of market-related institutions within which economic action is embedded.[54] They form a stable configuration of institutions — an interlocking system of financial arrangements, corporate governance, industrial relations, education and training, and inter-company relations, including contracting, networks, technology, standard-setting and dispute resolution. Within these stable configurations, institutions interact in such a way to produce specific outcomes thus creating comparative institutional advantages.[55] 'Varieties of capitalism' are the result of interlocking systems of economic institutions.[56] These configurations

52 Michael Porter, *The Competitive Advantage of Nations* (London: Macmillan, 1990); Michel Albert, *Capitalism Against Capitalism* (London: Whurr, 1993); David Soskice, 'Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980s and 1990s' in H. Kitschelt *et al* (eds), *Continuity and Change in Contemporary Capitalism* (Cambridge: Cambridge University Press, forthcoming) 271; Colin Crouch and Wolfgang Streeck, *Modern Capitalism or Modern Capitalisms* (London: Pinter, 1995).

53 David Soskice, *ibid.*

54 J. Rogers Hollingsworth, *Comparing Capitalist Economies* (Oxford: Oxford University Press, 1993); Aoki, 'The Japanese Firm as a System of Attributes: A Survey and Research Agenda' in M. Aoki and R. Dore (eds), *The Japanese Firm: Sources of Competitive Strength* (Oxford: Oxford University Press, 1994); David Soskice, n 52 above.

55 Michael Porter, n 52 above.

56 Peter Hall, 'The Political Economy of Europe in an Era of Interdependence' in H. Kitschelt *et al* (eds), n 52 above.

differ widely from country to country, even in the European context. As can be expected the strongest divide is between European production regimes (mainly Germany, Sweden, Norway, Switzerland, Austria) and their Anglo-Saxon counterparts (Britain, The United States, Ireland, Canada, Australia, New Zealand). Obviously, this configuration of economic institutions is the place where private law comes into play. Here the principles of good faith play the role of the major binding arrangement between the rules of private law and economic production regimes.

If we look at the German context where good faith has been a driving force in contract law, we find that the developments of this legal principle are closely linked to a specific production regime — Rhineland capitalism.[57] Here, the judicial requirements of performing a contract in good faith have been deeply influenced by an economic culture which is best described as a 'business-coordinated market economy'.[58] Economic action is closely coordinated by business associations and by informal business networks. As several studies in comparative political economy have shown in great detail, they are characterised by long-term cooperative relations between companies in the market, between companies and their employees, between companies and their owners and the suppliers of financial capital.[59] These regimes give considerable autonomy to employees within the hierarchy of the organisation and to suppliers and deliverers within long-term cooperative networks. This opens opportunities for production prone to long-term cooperation, but creates simultaneously considerable risks that are typical for high autonomy and high trust relations. It is open both to collective hold-up and to the moral hazard which is implied by high monitoring costs.[60] In general, it can be said that this production regime has been facilitated and supported by a system of private law in which the courts used particularly the good faith principle to respond through law to the risks and opportunities which the mixture of autonomy and trust produced in the specific production regime.

More specifically, the following characteristics of the German production regime find their structural correlates in an extensive series of good faith obligations which have been developed by the courts.[61]

(1) German corporate governance and corporate finance tend to favour long-term financing of firms. Private law supports this by good faith obligations which the participant owners, companies and banks, owe to each other. Under the umbrella of good faith, not only partners of a business association are under a general duty of mutual loyalty; German law acknowledges a far-reaching obligation upon the owners of capital and other constituencies of the firm to further actively the long-term 'company interest' as opposed to their partial self-interest.[62] An extensive system of duties of disclosure and provision of information has been developed in the relation between bank and company.

57 See Wolfgang Streeck, 'German Capitalism: Does It Exist? Can It Survive?' in C. Crouch and W. Streeck (eds) *Modern Capitalism or Modern Capitalisms*, (London: Pinter, 1995).

58 David Soskice, 'German Technology Policy, Innovation and National Institutional Frameworks' (1997) *Industry and Innovation* 75.

59 See particularly the empirical studies on different economic institutions in P. Hall and D. Soskice (eds), *Varieties of Capitalism: The Challenges Facing Contemporary Political Economies* (forthcoming).

60 David Soskice, n 58 above.

61 The text builds on David Soskice, n 52 and n 58 above, and expands his analyses in the direction of private law requirements.

62 See Gunther Teubner, 'Company Interest: The Public Interest of the Enterprise "in Itself"' in Ralf Rogowski and Ton Wilthagen (eds), *Reflexive Labour Law* (Deventer: Kluwer, 1994).

(2) Industrial relations within the firm and in the industry are highly cooperative relations in which labour unions play an important part. As a corollary of employees' high autonomy, the courts have developed extensive good faith duties of loyalty toward the organisation which mitigate the risk of moral hazard inherent in their autonomous position. In turn the law gives them a protected status within the firm. There are equally extensive legal duties of responsibility and care of managers toward the employees.[63]

(3) Inter-company relations tend to be cooperative networks with relational long-term contracting, horizontally within markets as well as vertically between different suppliers, producers and distributors. Under the good faith clause, courts have imposed duties of cooperation which are geared toward the common purpose of the contract. In relational contracts they have developed the general duty *ex lege* to renegotiate contractual terms if a new situation arises. And one of the most important judicial innovations has been to re-introduce the old *clausula rebus sic stantibus* which the Civil Code had excluded. Judges take the freedom to rewrite contractual terms in case of supervening events.[64]

(4) Business associations and large firms coordinate markets via technical standard setting, business standard contracting and dispute resolution. In support of this self-coordination of industries, courts have recognised and reconstructed multilateral firm relations well beyond the wording of bilateral contracts.[65] However, their most important contribution to associational market coordination was to acknowledge standard terms as binding and to regulate them by taking certain interests, particularly that of the consumer, into account.[66]

(5) Business associations negotiate technical and business standards with government. Other non-economic interest groups, such as consumer associations and ecological movements, favour a 'neo-corporatist' culture of mediating economic transactions with their outside world, with political, social and ecological concerns. The courts can build on such a body of negotiated *ordre public* and reconstruct good faith standards on its basis to counteract excessive economic transactions.[67]

An implantation of this 'living law' into the British soil simply would not find its roots in a corresponding economic culture. The British economic culture, together with United States, Ireland, Canada, New Zealand, make up a group of relatively unregulated Liberal Market Economies (LME). In contrast to continental Business-Coordinated Economies (CME), organised business is weak and plays rather a limited role in coordinating the institutional framework.[68] Instead, a rather unmediated interplay of market forces on the one side and external governmental regulation on the other takes place. Government, regulatory agencies, quasi-public bodies and the legal system play the major role in rule-setting with the rules typically taking a low-discretionary form. How would good faith duties of

63 See eg Wolfgang Zöllner and Karl-Georg Loritz, *Arbeitsrecht* (München, 4th ed, 1992) 12–17,

64 For an overview, see Peter Schlechtriem, n 4 above, 9ff.

65 For an extensive treatment see Joachim Gernhuber, *Das Schuldverhältnis* (Tübingen: Mohr & Siebeck, 1989).

66 Ursula Stein in: Soergel, *Bürgerliches Gesetzbuch* (Stuttgart: Kohlhammer, 12th ed, 1991), Schuldrecht II, AGB-Gesetz, Einl 3–8.

67 See Gunther Teubner, 1980, n 51 above.

68 David Soskice, n 52 above; Peter Hall, n 56 above.

cooperation, information, renegotiation, contractual adaptation 'fit' into a production regime that is characterised by the following traits?[69]

(1) financial systems which impose relatively short-term time horizons on companies, but at the same time allow high risk-taking.
(2) industrial relations systems in deregulated labour markets which discourage effective employee representation within companies — hence weak unions, but which facilitate unilateral control by top management;
(3) inter-company systems which impose strong competition requirements and hence limits on possible cooperation between companies.[70]
(4) a coordination between the economic sector and other sectors of society which is either left to market forces or is exclusively assigned to governmental regulation, in contrast to neo-corporatist style of intermediation which is typical of continental production regimes.

The difference between the production regimes is striking. The British economic culture does not appear to be a fertile ground on which continental *bona fide* would blossom. Thus, the 'legal transplant' approach would lead us to expect repulsion, not interaction. The good faith clause will remain an exotic exception in the British landscape. Alternatively, what is the narrative that emerges from the irritant metaphor?

Co-evolving trajectories

Here we have to take a further complication into account: the Janus-like character of law's binding arrangements. Economic 'rules of the game' are not identical with legal rules; economic institutions are different from legal institutions. An economic transaction needs to be distinguished from a legally valid contract, even if they occur at the same instant. The difference in a nutshell is that economic institutions are constraint and incentive structures that influence cost benefit calculations of economic actors, while legal institutions are ensembles of legally valid rules that structure the resolution of conflicts. While being in a relation of tight structural coupling economic institutions and legal ones are not only analytically but empirically distinct from each other.[71]

Structural coupling does not create a new identity, rather it binds via a difference — via the difference that distinguishes law from the discourse to which it is bound. Binding arrangements do not create a new unity of law and society, unified socio-legal operations, or common socio-legal structures. While their events happen simultaneously, they remain distinct parts of their specific discourse with a different past and a different future. The only condition for their synchronisation is this: they need to be compatible with each other. Binding arrangements are Janus-headed, they have a legal face and a social face. And unfortunately, the two faces of Janus tend to change their minds in different directions.

69 For the following see David Soskice, 'The Institutional Infrastructure for International Competitiveness: A Comparative Analysis of the UK and Germany' in A.B. Atkinson and R. Brunetta (eds), *Economics for the New Europe* (London: Macmillan, 1991) 45; David Soskice, 1997, n 52 above.
70 David Soskice, n 52 above.
71 For details see Gunther Teubner, n 30 above.

Now, when in case of a legal transfer the legal side of the relation is changed, this compatibility of diverse units can no longer be presupposed; it would have to be recreated in the new context which is a difficult and time-consuming process. It would involve a double transformation, a change on both sides of the distinction of the transferred institution, not only the recontextualisation of its legal side within the new network of legal distinctions but also the recontextualisation of its social side in the other discourse. There is no unilateral determination of the direction in which the change of the other side will take place. Their interrelation cannot be described as institutional identity. It is equally wrong to describe it as causal dependency between an independent and a dependent variable, not to speak of a 'last instance' relation between economic base and legal superstructure. Rather, it is a symbolic space of compatibility of different meanings which allows for several possible actualisations.

A binding arrangement, tying law to a social discourse, does not develop in one single historical trajectory but in two separate and qualitatively different evolutionary paths of the two sides which are re-connected via co-evolution. Their legal side takes part in the evolutionary logics of law while the social side obeys a different logic of development. Their changes however interact insofar as due to their close structural coupling they permanently perturb each other and provoke change on the other side.

Now it becomes clear why the transferred rule can only serve as an irritation, and never as a transplantation, if a transfer of legal rules is supposed to change a binding arrangement between law and another social discourse. It irritates a co-evolutionary process of separate trajectories. On the legal side of the binding institution, the rule will be recontextualised in the new network of legal distinctions and it may still be recognisable as the original legal rule even if its legal interpretation changes. But on the social side, something very different will take place. The legal impulse, if it is recognised at all, will create perturbations in the other social system and will trigger there some changes governed by the internal logics of this world of meaning. It will be reconstructed in the different language of the social system involved, reformulated in its codes and programmes, which in turn leads to a new series of events. This social change in its turn will work back as an irritation to the legal side of the institution thus creating a circular co-evolutionary dynamic that comes to a preliminary equilibrium only once both the legal and the social discourse will have evolved relatively stable eigenvalues in their respective sphere. This shows how improbable it is that a legal rule will be successfully transplanted in a binding arrangement of a different legal context. If it is not rejected outright, either it destroys the binding arrangement or it will result in a dynamics of mutual irritations that alter its identity fundamentally.

And good faith? — It will not even be an irritant to the British production regime if it presents itself as a bundle of legal duties of mandatory cooperation, German style, imposed on the parties to a contract. The British regime would react with cool indifference. However, — and this is my concluding thesis — good faith will become a strong irritation to the market-driven production regime in Britain if the new context transforms good faith from a facilitative rule into a prohibitive rule. Instead of facilitating autonomy, trust and cooperation, its effect would be to outlaw certain excesses of economic action. Good faith would become a quasi-constitutional constraint on two central elements of the production regime: a constraint on strong hierarchies of private government and a constraint on certain expansionist tendencies of competitive processes.

The continental production regime to which *Treu und Glauben* responded, as we said, was characterised by high autonomy and high trust relations within the market and within the organisations. They carry specific risks and dangers which were mitigated by an elaborate system of legal cooperation duties. The risks and dangers that the British production regime carry are not problems of high autonomy and high trust, but rather the opposite. This production regime is governed by the risks of 'financial Fordism' where low-cost standardised production requires detailed work regulation and frequent personnel change, by the dangers of project organisations that manage complex tasks by a strong managerial prerogative, by the steep hierarchy within economic organisation, and asymmetric relations between powerful companies and their dependent satellites.[72] The role of the good faith principle cannot conceivably be to transform these tightly coordinated organisations into cooperative arrangements.[73] Rather, the task for contract law would be to define quasi-constitutional rights and to protect them against encroachments of private government, to set low-discretionary rules that draw clearly-defined legal limits to quasi-administrative discretion.[74] The good faith principle would have to develop into judicial constraints on arbitrary decisions of private government. As opposed to activating the communitarian traditions of 'duties' of trustful cooperation, the judiciary would have to activate the tradition of constitutional 'rights' which have historically been invoked against governmental authority, and reinforce them in the private law context.

There is a second re-interpretation of good faith which seems equally relevant in the new production regime. It takes into account the fundamental difference between associational coordination and market-driven coordination in standard-setting — in the broad sense of technical, intra-organisational, and contractual standards. While on the continent the judiciary frequently refers to neo-corporatist processes of standardisation where negotiations between associations result in a certain mediation of social and political interests with market results,[75] standard setting in Britain is basically driven by market processes. Thus, according to its production regime, British law tends to invalidate standard terms when business associations have been involved unilaterally in imposing uniform standard terms over the whole market. In *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* the court saw it as an invalidating factor that 'a similar limitation of liability was universally embodied in the terms of trade between seedsmen and farmers and had been so for many years.'[76] Under the British production regime, business associations are not supposed to play a decisive role in the formulation of standard

72 See David Soskice, n 52 above.

73 Production regimes are not easy to change by political action. And there is an in-built asymmetry. While it is comparably easy to switch from association-driven regime to a market-driven regime, just by politically dismantling existing intermediary structures, it is infinitely more difficult, time and energy consuming to move from market coordination to business coordination by political will. See David Soskice, n 52 above.

74 So-called horizontal effect of constitutional rights. For a sociological discussion, Philip Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage, 1969) ch 7; for an application of basic rights as legal constraints on private government, Hugh Collins, *Justice in Dismissal* (Oxford: Clarendon, 1992). A recent comparative analysis of horizontal effects of fundamental rights is Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1996); cf also Christoph Graber and Gunther Teubner, 'Art and Money: Constitutional Rights in the Private Sphere' (1998) OJLS.

75 BGHZ 102, 41, 51; Ursula Stein in: Soergel, *Bürgerliches Gesetzbuch* (Stuttgart: Kohlhammer, 12th ed, 1991) § 9, 22.

76 Lord Bridge, [1983] 2 AC 803, [1983] 2 All ER 737 (HL).

contracts. The courts see it as a market failure when business associations produce uniform standard contracts which exlude competition between diverse contractual regimes.[77] This is in striking contrast to the German situation where business associations play a crucial role in the unilateral standardisation of business conditions.[78] As a consequence, under German good faith rules it does not make a difference whether the standard contracts had been formulated by one enterprise or by business associations for the whole market.[79]

Under the British production regime, it is exceptional for standard terms to be bilaterally negotiated by the relevant interest associations to which the courts could then refer as a fair compromise. Standardisation is more or less exclusively left to market mechanisms. In such a situation, it would be disastrous if the judiciary understood good faith as an incorporation of spontaneously developed standards into private law. The law would simply sanction the standard-eroding effects of market-competition and would effectively rule out non-economic political and cultural aspects of standardisation. In such a situation, the role of the judiciary becomes much closer to that of an external political regulatory agency which sets firm boundaries to market dynamics when they work against the fundamental requirements of other social spheres.[80] In conjunction with government, regulatory agencies and quasi-public organisations, the judiciary of the British production regime needs to set its own external standards to economic action without having recourse to social norms that have been preformulated in inter-associational negotiations.

Thus, the procedural dimension of good faith is profoundly influenced by the difference of production regimes. If good faith means among other things that one party has to take the other party's legitimate interest into account, and in the case of consumer contracts that standardised contracts must reflect the consumer interest,[81] then the central question is what kind of procedures are effectively working to satisfy this requirement. This is, to be sure, a more demanding procedural requirement of good faith than the usual question of absence of pressure and deception. Under an association-driven production regime the courts have to monitor whether the negotiations between different associations and regulatory agencies fulfill the procedural requirement of an adequate and effective representation of consumer interests in the process of standardisation. Their corrective action would primarily consist in changing the rules of the game and re-defining the property rights of the collective actors involved. Under a market-driven production regime, the courts will have to take a more active approach in order to make sure that standardised contracts fulfill the procedural requirements of good faith. In the absence of associational negotiations they have to rely on a division of labour with regulatory agencies, particularly the Office of Fair Trading and the Trading Standards Departments of local government authorities.[82] However, as has been

77 Hugh Collins, n 42 above, 242.

78 Steven Casper, 'German Industrial Associations and the Diffusion of Innovative Economic Organisation' (1996) *Discussion Paper FS I 96-306 Wissenschaftszentrum Berlin.*

79 Ursula Stein in: Soergel, *Bürgerliches Gesetzbuch* (Stuttgart: Kohlhammer, 12th ed, 1991), Schuldrecht II, AGB-Gesetz §1, 11, §9, 22.

80 Roger Brownsword, 'Contract Law, Co-operation and Good Faith: The Movement from Static to Dynamic Market-Individualism' in Simon Deakin and Jonathan Michie (eds), *Contracts, Co-operation and Competition* (Oxford: Oxford University Press, 1997) 255 at 278: 'the law of consumer contracts must be seen nowadays as a regulatory regime in its own right.'

81 Preamble, s 16 to the Council Directive, n 1 above.

82 See the annual report, Office of Fair Trading, *Unfair Contract Terms*, Bulletin Issue No 1 May 1996.

well documented, those procedures seem to have 'serious defects'.[83] This implies that for the time being the courts themselves would have to carry the main burden of making sure that the procedural requirements of good faith are satisfied. Instead of monitoring a negotiation process, the courts will have to answer themselves the substantive questions involved and decide about how to account for the legitimate interest of the other party to the contract.

Such an interpretation of good faith which is oriented to the peculiarities, opportunities, risks and dangers of a specific production regime would indeed result in widely divergent rules in different countries, even in contradictory decisions in apparently equal cases. These cleavages cannot and should not be papered over by the European zeal for harmonisation of laws. If there is a role for the European legal authorities to play, it would be to strengthen the capacity for irritation of the good faith clause instead of neutralising it when they try to enforce its unitarian interpretation.

European efforts at harmonisation have not yet seriously taken into account the 'varieties of capitalism', the difference of production regimes. If there is a lesson to learn then it would be a new interpretation of the subsidiarity principle, understood no longer only in terms of political decentralisation, but rather of respect for the autonomy of social, economic and cultural sectors, devolution of rulemaking powers to social groups, and a reinterpretation of conflict of laws no longer in terms of national laws but of different production regimes.[84]

Perhaps the young emerging network of European Nations may learn a lesson from the experiences of another, a bit older, federation of nations, the Commonwealth. Recently the Privy Council allowed for the possibility that a House of Lords decision about the general clause of negligence need not to be adapted throughout the Commonwealth if this were not warranted by the 'general pattern of socio-economic behaviour'.[85] This sounds a bit like the diversity of production regimes: a general legal principle allows for a diversity of concrete decisions once it is respecified in different social and economic cultural contexts. This is not a question of Euro-philia or Euro-phobia, rather a question of Euro-paradoxia, the paradox of the unitas multiplex which requests the integrating law against all the rhetorics of an 'ever closer union' to pay utmost respect to the autonomy and diversity of European cultures:

> Le devoir de répondre à l'appel de la mémoire européenne ... dicte de respecter la différence, l'idiome, la minorité, la singularité ... commande de tolérer tout ce qui ne se place pas sous l'autorité de la raison.[86]

To summarise our more abstract reflections, attempts at institutional transfer seem to produce a double irritation in the new context. They irritate law's binding arrangements to society. Foreign rules are irritants not only in relation to the

83 Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in J. Beatson and D. Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon, 1995); Office of Fair Trading, *Trading Malpractices*, 1990.

84 For a new perspective in European integration in terms of pluralisation, fragmentation utilising the idea of network, see Karl-Heinz Ladeur, 'Towards a Legal Theory of Supranationality: The Viability of the Network Concept' (1997) 3 *European Law Journal* 33; Christian Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration' (1996) 2 *European Law Journal* 125.

85 *Invercargill City Council* v *Hamlin* (1994) 3 NZLR 513; [1996] AC 264.

86 Jacques Derrida, *L'autre cap* (Paris: Minuit, 1991). For such a perspective in contract law, see Hugh Collins, 'European Private Law and the Cultural Identities of States' (1995) 3 *European Review of Private Law* 353.

domestic legal discourse itself, but also in relation to the social discourse to which law is, under certain circumstances, closely coupled. As legal irritants, they force the specific *epistéme* of domestic law to a reconstruction in the network of its distinctions. As social irritants they provoke the social discourse to which law is closely tied to a reconstruction of its own. Thus, they trigger two different series of events whose interaction leads to an evolutionary dynamics which may find a new equilibrium in the eigenvalues of the discourse involved. The result of such a complex and turbulent process is rarely a convergence of the participating legal orders, but rather the creation of new cleavages in the interrelation of operationally closed social discourses.