

The 'Cut and Paste' of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant

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A. Introduction

A bit over a decade ago the Israeli Competition Act was amended. The amendment added a new Section to the law- Section 29A.¹ The legislator did not slave over the details of the legal rule – all he did is 'cut and paste' Article 82 of the Treaty of Rome, which prohibits abuse of dominance.² True, a word processor was not sufficient to do the job – as the European provision had to be translated into Hebrew, but beyond that the prohibition was supposed to be completely similar.³ Since then, Section 29A has been the major basis for all cases dealing with abuse of dominance in Israel.

The question I would like to address in this article is whether the copying of Article 82 of the Treaty has served as a racing horse, in that it advanced the Israeli law of abuse, or whether it has been a Trojan horse – in that its adoption brought in doctrines and legal rules which did not serve well Israeli competition law. The answer is, in my view, that the result has been a mixture of both: a hybrid horse. It definitely has strong traits of a racing horse, but one cannot deny its resemblance, in some respects, to a Trojan one. Nonetheless, a few years of exercise on the local racetrack have strengthened its racing abilities by acclimatizing it to the special conditions of the new legal environment.

In analyzing this experience the article empirically tests some of the predictions of the theories of legal transplant. Israel is an interesting case study because it shares many basic cultural, political and economic traits with the EU, while at the same time significant differences exist. Relevant differences include Israel's transition from a largely command-and-control regulatory regime to a more market oriented one at the time of transplant and the non-enforceability of its past

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¹ Competition Act 1988, Section 29A.

² Treaty of Rome 1957, Article 82.

³ Minor differences exist, which result from imprecise translation.

provisions against abuse of dominance. Differences in market size and in some goals of competition law are also of relevance. The article argues that despite these differences, the legal graft was largely successful. It analyzes the conditions that contributed to this success, as well as some of the obstacles that limited its extent. In light of this experience it is contended that in the right circumstances a foreign law can create a positive legal culture.

The article proceeds as follows. Section B surveys the basic arguments in the literature on the transplant of laws in order to place the case study in the broader, theoretical context. Section C focuses on the Israeli transplant and analyzes its benefits as well as its down sides. The article contributes to the existing literature by identifying benefits from a transplant that result not only from the substantive context of the transplanted law and the characteristics of the home jurisdiction, but also from the international relationships of the transplanting jurisdiction. It also sheds light on how the size of an economy might affect the motivations for legal transplants. This section also analyzes the conditions that enabled the generally successful transplant. It also identifies on-going long-term benefits that go beyond the time of transplant. Many of these conclusions are of relevance to other jurisdictions contemplating the adoption of foreign laws. Section D concludes the article.

B. Normative Foundations: The Theory of Transplant of Laws

I. The Viability of Legal Transplants

Legal transplants are not a new phenomenon. Rather, they have existed from very early times onwards. Studies of biblical legal rules indicate, for example, that many of these rules were also common in other societies which lived in the Mediterranean area. Indeed, even in the competition law sphere, the first operational European competition law was the German post-war competition law enforced by the occupying powers, which largely followed established US antitrust doctrines.⁴ Transplants were, and still are, a major form of legal development.

However, as the rich literature on legal transplants indicates, transplants face many obstacles to their successful implementation. Even if the law is optimal for its home jurisdiction, this does not guarantee that it will be beneficial for the transplanting one. Some concerns, at the macro level, centre on legal imperialism.⁵ The argument is that a legal transplant is a form of external imposition and, as such, contrary to the principles of democratic governance. This argument is especially strong where the legal graft is a result of external pressures. In the competition law area this argument might have been relevant, at least to some

⁴ W. Wells, *Antitrust and the Formation of the Postwar World* 147 (2001).

⁵ J. Faundez, *Legal Reform in Developing and Transition Countries – Making Haste Slowly*, 1 *Law, Social Justice and Global Development* 1, at 8 (2000).

extent, to the requirements of the World Bank in the 1990s that countries which receive financial assistance adopt some form of a competition law and policy.⁶ Yet when a country voluntarily and willingly chooses to copy the laws of another, such arguments lose much of their relevance.

On the micro level, legal transplants can be unsuccessful and even harmful if they are not designed to deal effectively with the special characteristics of the recipient jurisdiction. Such characteristics may include cultural traits, but may also relate to economic or sociological differences which affect the law. Oliver Wendell Holmes' famous dictum still resonates today: "if the law is at odds with the values of society, the law falls into disrepute and loses its force to ensure conformity with its precepts."⁷ Law is thus dependent on values and goals external to the law itself for its viability.

The effects of culture on the success of a legal transplant have generated a heated debate, with almost bi-polar views. On the one hand, the 'culturalists' argue that the success of a legal transplant depends on the culture from which the law originates and the culture into which it is transplanted. On the other hand, the 'transferists' posit that law is autonomous from culture and, as such, good law is transplantable irrespective of culture.⁸ In large measure, this debate reflects the disagreement about the relationship of law and society.

The culturalists argue that because law is a culturally determined artefact, it cannot be separated from its original purpose or the circumstances under which it was first promulgated. This line of thought dates back to Montesquieu. In his seminal work, *The Spirit of the Laws*, published in 1748, Montesquieu identifies indigenous characteristics such as climate, terrain, population and religion as key to determining the way law is shaped. He concludes that "[the political and civil laws of each nation] should be so closely tailored to the people for whom they are made, that it would be pure chance if the laws of one nation could meet the needs of another."⁹

Montesquieu's arguments were later developed and refined by others.¹⁰ Several contemporary scholars, including Kahn-Freund¹¹ and Legrand¹² continued to support and refine the theory. They all share the conviction that law is a mirror of society and thus cannot be understood without analyzing economic, sociological, philosophical and political forces.¹³ This leads, of course, to the negation of a proposition for the universality of law.

Yet most contemporary culturalists do not completely negate the idea of transplant. Kahn-Freund's theory, for example, is more nuanced. He cautions that the use of foreign law as a model for domestic law is abusive if it is "informed by

⁶ See, e.g., J. E. Stiglitz, *Globalization and its Discontents* (2003).

⁷ O. W. Holmes Jr., *The Common Law* 41 (1881).

⁸ R. G. Small, *Towards a Theory of Contextual Transplants*, 19 *Emory Int'l L. Rev.* 1431 (2005).

⁹ C. Montesquieu, *The Spirit of Laws* (1748).

¹⁰ See, e.g., F. Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* 24 (1814).

¹¹ O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Mod. L. Rev.* 1, at 27 (1974).

¹² P. Legrand, *The Impossibility of Legal Transplants*, 4 *Maastricht J. Eur. & Comp. L.* 111, at 114 (1997).

¹³ W. Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *Am. J. of Comp. L.* 489, at 510 (1995).

a legalistic spirit which ignores the context of the law” and is separated from its purpose or from the circumstances in which it is made.¹⁴ Yet he recognizes that in the “developed and industrialized world” sociological and economic differences may be of much diminished extent. Kahn-Freund suggests that each rule has a degree of transferability, depending on its connection to the socio-political structure of society and the relative socio-political environment of the origin and receiving states.¹⁵ Ewald summarized Kahn-Freund’s theory as follows:

legal institutions may be more-or-less embedded in a nation’s life, and therefore more-or-less readily transplantable from one legal system to another; but nevertheless at one end of the spectrum law is so deeply embedded that transplantation is in effect impossible.¹⁶

Modern sociology strengthens culturalistic theories by stipulating that ideas and morals are embedded in a specific temporal, physical and social setting that permits them to flourish.¹⁷ Similarly, post-modern legal theory suggests that law cannot be easily transferred since the focus shifts to the reader’s construction of the text based on the reader’s life experience and social setting.¹⁸ Pierre Legrand, for example, argues that not just the law is socially determined, but also our thinking about the law: the interpretation of legal rules is “a function of the interpreter’s epistemological assumptions, which are themselves historically and culturally conditioned.”¹⁹ As a result, even those transplants that appear to flourish in another legal culture must have fundamentally changed in character.

On the other hand stand the transferists, led by Alan Watson. Watson argued that even laws deeply embedded in one context “may be successfully transplanted to a country with very different traditions.”²⁰ Watson does not dispute that law is deeply rooted in its political context, but he argues that the culturalists seriously underestimate the successful transplantation of legal ideas. To strengthen his arguments, he points out to practical experiences in which legal borrowings have been the most fertile source of legal change. Based on such experiences he maintains that “legal rules may be very successfully borrowed [even] where the relevant social, economic, geographical and political circumstances of the recipient are very different from those of the donor system.”²¹

Watson deploys two basic arguments against the mirror theories. Firstly, “law develops by transplanting, not because some such rule was the inevitable

¹⁴ Kahn-Freund, *supra* note 11.

¹⁵ *Id.*

¹⁶ Ewald, *supra* note 13.

¹⁷ See, e.g., M. Foucault, *The Archaeology of Knowledge and the Discourse on Language* 135-140 (1993) cited in S. W. Waller, *Neo Realism and the Institutional Harmonization of Laws: Lessons From Antitrust*, 42 Kan. L. Rev. 557, at 568 (1994).

¹⁸ See, e.g., R. Weisberg, *Poethics and Other Strategies of Law and Literature* (1992); R. Weisberg, *The Failure of the Word; The Protagonist as Lawyer in Modern Fiction* (1984), cited in Waller, *supra* note 17.

¹⁹ Legrand, *supra* note 12.

²⁰ A. Watson, *Legal Transplants and Law Reform*, 92 Law Q. Rev. 79 (1980). See also A. Watson, *Legal Transplants* (1974); A. Watson, *Aspects of Reception of Law*, 44 Am. J. Comp. L. 335 (1996).

²¹ Watson (1980), *supra* note 20, at 80.

consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over law making and they observed the (apparent) benefits which could be derived from it."²² Since, in his view, the main motivation for the transplant is the idea itself rather than how it relates to society, a successful borrowing can be made from a very different legal system, even from one at a much higher level of development and of a different political orientation. Secondly, legal rules, once created, live on, even if they are ineffective, given the limited incentives and the absence of machinery for radical changes. One can also argue that the causal relationship suggested by the culturalist can sometimes be reversed, in that law can create social norms, thereby changing the culture, not merely reflecting it.

Watson stated some of his claims quite strongly, but some of his writings can be understood as adopting a milder claim that recognizes that a mixture of both internal and external elements explain the law adopted and its success. Ewald, while criticizing Watson's inability to provide an adequate foundation for a full-blown theory of law and society, nevertheless concludes that "even the weak versions of Watson's theses are adequate to scupper the traditional mirror [culturalist] theories that have so dominated modern legal thought."²³

Few have followed Montesquieu's or Watson's strong claims. Importantly, the failure of the attempts to transplant laws in developing and transitional countries in the 1960s and 1970s has created skepticism with regard to transferistic strong claims. It is now generally recognized that while law may be transferable, one must pay special attention to the existing conditions in the transplanting jurisdiction in order ensure a successful transplant.²⁴

II. Conditions for a Successful Legal Transplant

Assuming that legal transplants are possible, what conditions must exist for the transplant to be successful, once adopted? Despite the ubiquity of transplants, the answer to this question is still fairly rudimentary, and there is little agreement among scholars on the conditions for successful transplants. Nonetheless, this section attempts to set out some of the conditions which were recognized in the literature as positively affecting the adoption of foreign legal concepts.

The first question to be asked is how success is defined. Kanda and Milhaupt define success to mean "the use of the imported legal rule in the same way that it is used in the home country, subject to adaptations to local conditions."²⁵ This definition is problematic, since a law can be used in a different manner in the transplanting jurisdiction and still further social welfare. Indeed, as Teubner argues, it is false to assume that a legal transplant can be surgically grafted into another legal system and "remain identical with itself playing its old role in the

²² A. Watson, *Comparative Law and Legal Change*, 37 Cambridge L. J. 313, at 315 (1978).

²³ Ewald, *supra* note 13, at 508.

²⁴ See, e.g., B. Grossfeld, *The Strength and Weakness of Comparative Law* (1990); B. Grossfeld, *Geography and Law*, 82 Mich. L. Rev. 1510, at 1511 (1984).

²⁵ H. Kanda & C. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 Am. J. Comp. L. 887, at 890 (2003).

new organism.”²⁶ Rather, once transplanted, the law might evolve and its meaning will be reconstructed, and still benefit the transplanting jurisdiction.

I suggest defining success as the ability of the transplanted law to achieve its goals in the transplanting country. This definition enables us to focus on the transplanting country’s needs and special conditions, regardless of the law’s history of application elsewhere. It is also broad enough to relate to the basic ideas of the two main streams of thought elaborated above: it captures the essence of transplant as the borrowing of a good idea and it allows room for the impact of local conditions on its application.

Several conditions for a successful transplant have been identified in the literature. Quite surprisingly, Watson’s writings provide us with a basic framework. Although Watson generally focused on whether a transplant will occur or not, he implicitly identified several factors that contribute to a successful transplant. Most importantly, he emphasized the importance of the idea behind the law. If the idea is a good one, in that it serves to provide a suitable solution for a legal problem, then the transplant will have higher chances of success.²⁷

Yet as many commentators have emphasized, for this condition to be fulfilled the idea should be a good one in light of the special conditions of the *transplanting* jurisdiction. This can be exemplified by the effects of market size on competition laws. The laws adopted by large economies do not necessarily work well in small ones. This is because the economic paradigms on which such laws are based do not necessarily apply to small economies, which are characterized by highly concentrated markets. The main factor that creates the need to tailor competition law to economic size is that competition laws often consist of ‘fit-all’ formulations. Such formulations are designed to achieve the stated goals in each category of cases to which they apply, while recognizing that some false positives and false negatives may occur at the margin. The marginal cases of large economies often constitute, however, the mainstream cases for small economies. Accordingly, small economies should not blind-foldedly apply the competition laws of large jurisdictions.²⁸ The idea should, thus, be a good one for solving the problems of the transplanting jurisdiction.

Watson does not stop there. Rather, he identifies additional conditions that affect the transplant. The first factor is the ‘Pressure Force’ which is “the organized persons . . . who believe that a benefit would result from a practicable change in the law.” This factor might be limited by an ‘Opposition Force’, which is composed of individuals who believe the proposed legal change will harm them either as individuals or society as a whole.²⁹ The strength of these factors is determined by the social and economic status of its members, as well as their organization and political influence. While these factors are especially important for determining the possibility that a legal transplant will take place at all, they also affect its success, once adopted. The stronger the motivation and the ability

²⁶ G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 Mod. L. Rev. 11 (1998).

²⁷ Watson, *supra* note 22, at 315.

²⁸ M. Gal, *Competition Policy for Small Market Economies* (2003).

²⁹ Watson, *supra* note 22, at 324-326.

of the legal actors with the potential to make use of the new law, and the weaker the opposition, the more likely it is that the transplant will be successful, all else being equal.³⁰

Watson's 'Societal Inertia' is also of relevance. The crux of the problem is that "there is normally a desire for stability ... and ... society and, in particular, the ruling elite have a general interest in no change."³¹ Before a legal change by transplantation can take place, society's desire to maintain the *status quo* therefore must be overcome. An additional factor, closely related to the previous one, is society's 'felt-needs'. The more society perceives itself as needing the change embodied in the legal rule, the higher the chances that it will be applied in practice.³²

The final factor of relevance, identified by Watson, is a state's 'Transplant Bias', which denotes the receptivity of a state to a particular foreign law. The receiving state's knowledge, commonality with the state of origin, and the degree of prestige in which the latter is held all affect the transplant.³³ This condition, especially the requirement of 'commonality', is wide enough to encompass almost all issues which relate the relationship between law and society. The coherence of the cultural and social conditions and norms in the receiving and origin jurisdictions has time and again been recognized as an important factor in a transplant's success. Indeed, even Kahn-Freund argues that the closer the socio-political environments of the states, the greater the chance that the transplant would be viable.³⁴ It is noteworthy, however, that the weight given to such considerations differs. While Watson views coherence as one factor that affects the transplant, other scholars place almost the entire weight for determining its success on such considerations.

In this vein, many scholars emphasize that law is primarily a social institution. It should thus fit the society in which it is applied. Since the law's addressees are embedded in their specific legal systems, cultural dissonances between the origin and the recipient country may prevent a transplant from taking root. Accordingly, law reforms that are not understood or are inconsistent with deeply held moral and political beliefs may be rejected. Conversely, law reform that corresponds to common habits and beliefs seems much more promising.³⁵ Berkowitz, Pistor, and Richard argue that if the transplant is adapted to local legal conditions, or had a population that was already familiar with its basic legal principles, then it would be expected to be successful.³⁶

Some scholars emphasize the interaction of the new transplant with other legal conditions. Some emphasize the institutional compatibility of the transplant. This includes establishing whether there is a functioning regulator and institutional

³⁰ Kanda & Milhaupt, *supra* note 25, at 891.

³¹ Watson, *supra* note 22, at 324.

³² *Id.*, at 326.

³³ *Id.*, at 326-327.

³⁴ Kahn-Freund, *supra* note 11, at 12.

³⁵ I. Markovits, *Exporting Law Reform – But Will It Travel?*, 37 Cornell Int'l L.J. 95 (2004).

³⁶ D. Berkowitz, K. Pistor & J. F. Richard, *The Transplant Effect*, 51 Am. J. Comp. L. 163, at 170-171 (2003).

structures as well as procedural tools for applying the transplant effectively. Indeed, Waller argues that such conditions are as important as the “fit” of the substantive provisions of the law.³⁷ Miller identifies a strong sense of legitimacy as another condition for success. A society with a strong sense of legitimacy for any properly enacted legal norm will obviously give greater effect to any new law than a society where the legitimacy of law is weak.³⁸

Legal transplantation is thus possible, but it is a complex activity which needs to be undertaken with great care.

C. Empirical Study: Transplant of Article 82 EC

Having briefly sketched the basic theoretical literature on transplantation as a device of legal change, I now turn to analyze the Israeli experience. The goal of this research is to highlight, through the prism of a specific case study, the costs and benefits of a transplant, as well as the conditions for its relative success.

I. Racing Horse Traits of the Transplant

A major key for understanding the effects of the transplant is the stage of development of Israeli competition law at the time of the adoption. Despite the fact that Israel has had a competition law on its books for almost as long as the Europeans, it was, for the most part, a dead-letter law.³⁹ In particular, the prohibition of a refusal to deal by a monopolist was almost never applied.⁴⁰ This was due, in part, to the prevalent socio-economic ideology that often viewed monopolies as a necessary evil in a small and developing economy due to the highly concentrated nature of most markets and the need to create incentives for firms to invest and grow in order to become domestic and even world players. It was also due to the lack of knowledge of most enforcement officials of the economic theories that support a prohibition against certain kinds of conduct by a monopolist. Instead, the government opted for a highly interventionist regulatory approach that did not leave much room for free competition.⁴¹

The wind changed in the late eighties-early nineties when it was decided to give the law some teeth, in line with the more pro-market socio-economic ideology that had started to take root. Following a change in government and boosted by an economic crisis, the government embarked on a plan to create a more competitive environment by reducing barriers to trade, privatisation and

³⁷ Waller, *supra* note 17, at 589. See also Berkowitz, Pistor & Richard, *id.*

³⁸ J. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 Am. J. Comp. L. 839, at 844 (2003).

³⁹ The first Israeli Competition Law was enacted in 1959; the Treaty of Rome was enacted in 1957. It is noteworthy that EU enforcement on the abuse of dominance prohibition also started to quite late. The first major cases date to the late sixties- early seventies.

⁴⁰ For elaboration see M. S. Gal, *50 Colors of Formica: Legal Realism in the Israeli Competition Law*, forthcoming Legal Studies (2007) (Hebrew).

⁴¹ *Id.*

liberalisation. A way was sought to strengthen the competition law and to provide tools for combating anti-competitive conduct. Accordingly, a new Competition Act was enacted in 1988. While the new law made several significant changes, such as adding merger review and better defining monopoly, the prohibitions against abuse of a monopoly were left intact. This was due, in part, to a limited understanding of what constitutes an abuse. It was not surprising, therefore, that the prohibitions were still rarely applied.⁴² This changed in the mid-nineties, in large part due to the appointment of a new director of the Competition Authority, Dr. Yoram Turbowicz, who acquired his postgraduate legal education in the US and was aware of the need to limit monopolistic abuse and the availability of tools to achieve this task. He recognized that the existing provisions would not do the job: they were too vague, too general, and with practically no case law or commentary to back them up. It was then decided to adopt the EU provision. This adoption was also strongly supported by the EU, whose trade agreement with Israel required, *inter alia*, that abuses of dominance which distort or threaten to distort competition should be prohibited.⁴³ As elaborated below, such adoption created many important benefits that arose not only from the substantive content of the law, but also from the characteristics of the transplant's home jurisdiction as well as from the international interactions of the transplanting state.

Several benefits arose directly from the content of the transplanted law. First, Article 82 of the EC Treaty includes, besides a general prohibition on abuse, a list of specific types of conduct which are considered to be abusive, if engaged in by a dominant firm (discrimination, setting unfair prices and trade conditions, etc.). This enabled the Israeli legislator to move from a standard-based provision to a rules-based one, and provide some guidance as to the legality of certain types of conduct engaged in by a monopolist. Thus, the fact that the EU legislator attempted to draw the line between use and abuse of a dominant position, which is a challenging task, clearly assisted the Israeli legislator in marking that line in his own law. It also saved the costs that would have been otherwise incurred in the course of determining what content ought to be given to the law. The realization of this benefit was strengthened by the fact that Article 82 was adopted 'wholesale'. This signalled to the domestic community that not only the idea is transferred, but also it created a strong and unmistakable connection between Israeli and EU interpretation of the law. Second, EU law creates a presumption that conduct that comes under the specific prohibitions is illegal. Implementing this provision in Israeli law eased the burden of proof and enabled the creation of a new body of law on abuse of dominance. In addition, the wording of the provision enables a somewhat flexible interpretation of some of its prohibitions, as it includes several open-ended concepts such as 'fair' trade conditions and 'unfair' advantages. As elaborated below, this enabled Israeli courts to reject some interpretations that clashed with the goals of Israeli competition law.

⁴² *Id.*

⁴³ The EU-Israel Association Agreement (signed in 1995 and entered into force in 2001). A similar requirement was included in the Free Trade Agreement between EFTA and Israel in 1992. Although the requirements related only to trade-related issues, it was understood that to be effective such a requirement had to be included in the general competition law.

Yet the main benefits of the transplant did not result from its wording or legal presumptions alone. Rather, they resulted from the transplanted law's application in its home jurisdiction. Most importantly, the EU prohibition did not come empty-handed. Rather, it had a long history of implementation, interpretation and academic discourse in its saddlebag. Indeed, the EU, being a large economy with several decades of experience with applying its competition law, had quite a lot of case law and commentary on Article 82. Israeli courts, enforcement agencies and market players could thus tap such resources in order to understand what its concepts mean and how it might be applied in practice. Indeed, Israeli courts often cite EU sources when applying the law.⁴⁴

It is noteworthy that the other major competition law, the US Sherman Act, included a general prohibition of 'monopolization'.⁴⁵ To understand its scope of application one has to be familiar with its case law. It was thus considered an inferior alternative, despite the fact that its application in practice was more developed economically. It was also believed that inefficient interpretations of the EC Treaty could later be corrected by the courts and the Competition Authority, but that the best way to introduce the new concepts and prohibitions was by using the elaborate set of rules included in the Treaty.

The importance of this effect is apparent when one compares it to another alternative: the internal creation of such resources by Israeli enforcement bodies and academia. Such a process would have been lengthy and costly and would have severely limited the law's application in practice. This is especially true for a small economy. As Davies argues, typically, the smaller the jurisdiction, the longer the time that can be expected to elapse before content will have to be given to a legal rule. This is because the limited size of the population implies that less disputes will reach the courts. Lawmakers in a small jurisdiction will thus generally have a small stock of information gleaned from prior local disputes to draw upon when analysing the appropriate content of new law. Legal transplantation limits this problem by allowing lawmakers in the small jurisdiction to rely upon analysis conducted in a foreign jurisdiction. All other things being equal, legal transplantation is most beneficial when it is transplanted from a large jurisdiction, as the large one will generally have a richer body of law to draw upon.⁴⁶ The transplant indeed changed overnight the Israeli law on abuse - from a *tabula rasa* to a 'living' law with immediate and relatively clear applicability.

Such benefits are not limited to the time of the transplant. Rather, the adoption of a living law of a large and generally well-functioning jurisdiction have on-going advantages. The continued application of the law in the home jurisdiction generates positive network externalities: as more decisions that apply the law to various factual settings accumulate, legal certainty is typically further increased. This leads to a reduction in compliance costs, as market players do not necessarily need to go to court in order to clarify a legal rule, but rather can learn from the

⁴⁴ See, e.g., Decision of March 14, 2005 in *Case 2616/03, Isracard Inc. v. Howard Reis et al.*, para. 17; Decision of January 5, 2005 by the Director of the Israeli Competition Authority in *Trade agreements between providers and retail chains*, not yet published, at 25.

⁴⁵ US Sherman Act 1890, Section 2.

⁴⁶ K. Davies, *Law Making in Small Jurisdictions*, 56 *Univ. of Toronto L. J.* 151 (2006).

interpretation and application of the rule in another jurisdiction, at least to some extent. Moreover, even if a dispute reaches the courts, trial costs may be reduced as the parties and the court can refer to existing case law and commentary, rather than start the analysis from scratch. These network externalities are forward looking, as the interpretation and application of law is constantly evolving. They are especially important in the area of competition law, which is characterized by elastic and open-ended notions that are often applied on a case-by-case basis and are often informed by new economic teachings. EU competition law, being widely used and applied by generally competent institutions, is thus more valuable to other jurisdictions than its face value as judged by the clarity and comprehensibility of its provisions and current case law. Moreover, the EU can also spend more resources on analyzing the effects and efficiency of its provisions, as it recently did in its discussion paper on the application of Article 82.⁴⁷ This is because the optimal level of investment in analysis tends to increase with the volume of transactions governed by the relevant rule. This implies that lawmakers in a large jurisdiction will naturally tend to invest greater resources in analysis of the rules concerning a given activity than lawmakers in a small jurisdiction would do.⁴⁸

Another important benefit from the transplant is that it helped push through new concepts and ease their acceptance. This is due to several factors. Importantly, the adoption of a law of another jurisdiction, which was perceived as quite successful in its competition policy, has helped convince local constituencies of its importance. Indeed, the experience of another nation constitutes a legal laboratory. By objectively observing and analyzing the experience of other jurisdictions we become more sensitive to the ways our own legal system operates and what it lacks. The higher the perceived efficiency of the foreign law in solving the problems that we face, the stronger the motivation to adopt it.⁴⁹ This comports with Max Weber's theory of 'rationality' as a basis for legitimate domination, where the legitimacy of government is based "on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands."⁵⁰

In addition, adoption of such a law assisted the government in combating group-specific political pressures by providing needed legal authority in order to push forward new ideas and concepts.⁵¹ Indeed, the imposition of new prohibitions on dominant firms is bound to be met with strong opposition from such undertakings as it limits the ability of an incumbent monopolist to create artificial barriers to the entry or expansion of its rivals. As a result, it may change the legal status of deep-rooted types of business conduct. But more importantly, altering the rules of the game may change the existing economic equilibrium by impairing the economic status of some market participants that were secluded from competition by private barriers to entry. This change often involves high personal stakes of the existing dominant firms. The prospect of reform may

⁴⁷ Gal, *supra* note 28, ch. 6.

⁴⁸ Davies, *supra* note 46, at 172.

⁴⁹ U. Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 *Int'l Rev. L. & Econ.* 3, at 8 (1994).

⁵⁰ M. Weber, *Economy and Society* 215-216 (1978).

⁵¹ Watson (1996), *supra* note 20, at 346, 350-351.

thus motivate such firms to engage in rent-seeking behaviour, aimed at limiting change in the existing regime. The concern is that legislatures and government officials may have motivations to abuse their decision-making power by singling out particular individuals or groups and bestowing government largesse upon them in return to political support. This problem is known as regulatory capture. Regulatory capture requires a modicum of responsiveness by devising ways to reduce political pressures that might reduce government officials' willingness to adopt and implement a socially desirable competition law. An extremely powerful and important method for combating political influences on decision-makers is the creation of a strong and educated public opinion in favour of necessary changes. Such public opinion may refocus the political interests of politicians on long-term and general goals and lead to the channelling of their private aspirations in more constructive and overall efficient ways. The ability to point to the successful example of another jurisdiction which adopted a similar prohibition eases this political struggle, especially if potential supporters, such as consumer groups and journalists, can be easily convinced of the law's positive effect and thus create internal pressures to create a better law.⁵² Indeed, the EU experience was often cited in the debates preceding the transplant.

The benefits elaborated thus far have a common trait- they are all inward-looking and would exist even if the transplanting economy had no direct relationships with other nations. Additional benefits arise when we consider such relationships. Israel has strong ties with the EU, trade-wise and otherwise. The EU requires in its trade agreements that its trading partners prohibit anticompetitive conduct, including abuse of dominance, insofar as they may affect trade between the EU and its trade party, in order to prevent the creation of artificial barriers to entry. Such requirements accord with the attempt led by the EU and the US to create a wider liberal international order organized around liberal-democracy, open markets, intergovernmental institutions and cooperative security.⁵³ As noted, such a requirement was also included in EU-Israel trade agreements.⁵⁴ The copying of Article 82 into Israeli law ensured full compliance with this requirement: it fully aligns their abuse prohibitions (at least the law on the books). Moreover, the benefits specified above strengthened the application of the law in practice and thus made it easier for Israel to comply with its obligation to apply the law in practice.

An additional important benefit arising from the adoption of the law of a large trading party is a reduction in the learning and compliance costs of firms wishing to trade beyond their jurisdiction which, in turn, serves to create a more

⁵² See M. Gal, *Reality Bites (or Bits): The Political Economy of Competition Policy in Small Economies*, in B. Hawk, *International Antitrust Law and Policy*, at 605 (2002); M. Gal, *The Ecology of Antitrust: Preconditions for Antitrust Enforcement in Developing Countries*, in P. Brusick Alvarez, L. Cernat & P. Holmes, *Competition, Competitiveness and Development: Lessons from Developing Countries*, at 22 (2004).

⁵³ A. Magen, *Transformative Engagement Through Law: The Acquis Communautaire as an Instrument of EU External Influence*, in this Volume.

⁵⁴ See *supra* note 39. See also, A. Reich, *Globalization and Law: The Future Impact of International Law on Israel's Commercial Law*, 17 Bar Ilan Law Studies 17 (2001).

competitive environment. A patchwork of national competition laws has become a barrier to international business. Harmonisation of laws reduces such barriers in several ways. First, it aids domestic firms to export their products, as it reduces their costs of learning which competition law issues they might face in foreign markets. This consideration is especially important for small economies, as export opportunities might be the only possible way for domestic firms to realize scale and scope economies.

Second, harmonisation of laws may increase pro-competitive pressures in the domestic market by increasing the incentives of foreign firms to import into them. It might not be profitable for an importer to invest resources in learning the competition laws of small economies, if they significantly differ from those of his home jurisdiction or major trading markets, because the learning costs may be high relative to the profits to be had. Accordingly, the lower costs of trade to a small economy – including the costs of learning and complying with domestic competition laws – the stronger the incentive of foreign firm to import their products into it, all else equal.⁵⁵ Finally, unification of legal rules facilitates communication amongst firms located in different jurisdictions, and may serve to ease the creation of pro-competitive multinational joint ventures.⁵⁶ Accordingly, the benefits of harmonisation and coordination may eclipse the value of fine-tuning each system to its idiosyncratic needs, because of the prevalence of transaction costs. Such benefits are dependent, of course, on the transplanted law not being unduly burdensome and not significantly diverging from the optimum law for each jurisdiction.

The harmonisation of laws also creates a basis for understanding and collaboration in international organisations which are becoming increasingly important in the ever-growing global economy. In the last decade some significant steps have been taken at the international level in order to harmonize competition laws and reduce, at least to some degree, global market failures and the negative externalities of inefficient regulatory systems. The most significant of these endeavours has been the establishment of the International Competition Network (ICN), a voluntary body comprised of all competition authorities and of non-governmental advisors.⁵⁷ One of the goals of the ICN is to align the abuse notions of different jurisdictions in order to reduce learning costs and enhance reciprocity. Of course, the fact that many nations have simply adopted the EU's definition of abuse makes this task less formidable.

Harmonisation of competition laws also creates reciprocity among nations, where each imposes similar prohibitions against foreign importers operating in its jurisdiction. Yet while reciprocity might exist on a theoretical level, it faces significant hurdles in practice. This is because of Israel's small size and the resulting limited pressure it can exert on foreign firms to comply with its laws.⁵⁸

⁵⁵ Of course, foreign trade is not without its problems. It exposes small economies to many vulnerabilities, including strong fluctuations in international demand.

⁵⁶ Gal, *supra* note 28, ch. 7.

⁵⁷ See www.internationalcompetitionnetwork.org.

⁵⁸ Gal, *supra* note 28, ch. 7.

In retrospective, one can surely say that the transplant of Article 82 into Israeli competition law created abundant benefits of many kinds. It has filled the gap that existed in the Israeli law on abuse of dominance and has taken it several steps forward, in a timely manner.

II. Traits of a Trojan Horse

The transplant of Article 82 was not, however, all roses. The adoption had some traits of a Trojan horse, in that it brought into Israeli law some unintended results.

First and foremost, the combination of Article 82 and the definition of monopoly included in the Israeli law creates some harmful implications. Israeli law adopts a structural-technical definition of monopoly which applies to any undertaking which supplies at least 50% of the relevant market.⁵⁹ Once such market shares are proven to exist, a non-rebuttable presumption of monopoly is created. While this presumption has many advantages, its combination with the non-rebuttable presumption that certain conduct is abusive, is highly problematic. This results from two factors: the definition sometimes captures situations in which firms do not actually possess market power, and many types of conduct which are considered abusive when engaged in by a dominant firm, are not considered so when engaged in by a non-dominant firm. This may lead to prohibitions against firms with no market power of what in fact is neutral or pro-competitive conduct. Thus the current law suffers from what economists call type two errors, in that it is over-inclusive.⁶⁰ This problem is a direct result of the legal transplant. It does not exist in the EU, because there a dominant position is defined based on the firm's actual market power. Of course, it can be remedied by relaxing the definition of monopoly or by creating a rebuttable presumption of abuse, but these solutions involve other costs.⁶¹

Another unintended cost, of no less importance, is the prohibition of 'unfair prices and trade conditions'. This prohibition was interpreted in the EU as prohibiting, *inter alia*, high prices, better known as 'excessive prices'.⁶² However, the problems inherent in determining when a price stops to be a fair reward for winning the market game and starts being unfair, have led the EU to adopt a policy of non-implementation.⁶³ Such a policy is not possible under Israeli law, where private actions are a common way of enforcing the legal prohibitions.

⁵⁹ Israeli Competition Act 1988, Section 26. One might argue that the different tests for finding dominance imply that the adoption of Article 82 is not a 'real' transplant but rather a symbolic one. However, in my view this argument should be rejected, because in most cases both tests for dominance create similar results. It is only in marginal cases that the outcomes differ.

⁶⁰ For elaboration of such errors in the antitrust arena see A. Fisher & R. H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 Cal. L. Rev. 1580 (1983).

⁶¹ See, e.g. Gal, *supra* note 28, ch. 3.

⁶² See, e.g., *Case 26/75, General Motors v. Commission* [1975] ECR 1367; *Case 27/76, United Brands Co. v. Commission* [1978] ECR 207.

⁶³ For elaboration see M. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?*, 49 Antitrust Bulletin 343 (2004).

Indeed, all the Israeli cases which are based on this prohibition are private ones. Moreover, under Israeli law abuse of dominance constitutes a criminal offence. The uncertainty involved in defining what is an 'unfair' price thus also creates doctrinal problems of uncertainty in criminal enforcement. The issue of whether the Israeli law should be interpreted in the same way as Article 82 and include an offence of unfair *high* prices rather than only unfair *low* prices (i.e. predatory prices) has reached the Israeli Supreme Court.⁶⁴ The Court cited the argument that the law was copied from the Treaty and thus should be interpreted in accordance with its interpretation at the time of adoption, as this was the intention of the Israeli legislator. At the same time, it also raised the argument that Israeli law is different, since it serves as a basis for a criminal offence and thus its level of clarity should be higher than that of EU law. It did not determine which line of argument was more persuasive, since such a decision was not necessary in order to decide the case. The lower courts, however, follow the EU interpretation and allow cases to be brought on such grounds. In my view, were it not for the 'wholesale' legal transplant, the Israeli legislator would have debated the issue of monopoly pricing regulation more thoroughly and would have attempted to find solutions to the problems it creates.

Of less importance, but nonetheless with possible effects, are provisions that were interpreted in the EU in light of the goal of market integration, a goal that is not relevant to Israel. For example, some of the basic EU decisions on discriminatory prices attempt to further market integration by ensuring that different members of the EU do not receive different trade conditions.⁶⁵ Such a wide prohibition might not be justified on other grounds, including efficiency considerations. Indeed, a recent Israeli decision applied a different reading to the prohibition, which in fact allows a rule-of-reason interpretation, but it has taken Israeli courts some time to apply such a different reading.⁶⁶

Finally, in light of current economic teachings it is far from clear that the way in which Article 82 was interpreted by EU enforcement agencies and courts has been welfare-enhancing. As the recent European Commission's discussion paper on abuse of dominance suggests, much of the existing case law is based on structural rather than on economic considerations.⁶⁷ Blind-foldedly following such interpretation creates much of the same problems faced by the EU. Nonetheless, as noted above, Israeli courts and enforcement agencies have used their discretion in order to limit this problem and include additional economic components into the interpretation of the law.

⁶⁴ Judgment of 14 March 2005 in *Civil Appeal 2616/03, Isracard and others v. Howard Reis*, not yet published.

⁶⁵ Judgment of 13 July 1966, *Cases 56 & 58/64, Etablissements Consten SA and Grundig-Verkaufs GmbH v. Commission*, [1966] ECR 299.

⁶⁶ Judgment of 29 April 2003, *Competition Case (Jerusalem) 3574/00, The Federation for Israeli and Mediterranean Music v. Director of the Competition Authority*, not yet published.

⁶⁷ See, e.g., European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary abuses* (2005); J. Vickers, *Abuse of Market Power* 115 Econ. J. 244 (2005).

III. Conditions for Successful Adoption: The Making of the Road

In order to draw conclusions from the Israeli experience one must recognize some of the conditions that enabled a relatively easy and successful transplant.

Probably the most important factor that led to the successful transplant was the socio-economic ideology prevalent in Israel at the time of adoption, which was largely a pro-liberalisation one. Indeed, the transplant was not applied in a vacuum and should be considered in light of the general changes in regulatory measures that took place at the relevant period. As the country shifted from a highly interventionist command-and-control system to a more market oriented one, it became clear that new regulatory tools were required in order to limit artificial barriers to trade created by dominant firms, or otherwise the benefits of liberalisation would be frustrated.

Another important factor was the existence of a strong 'Pressure Force' for its adoption and application. The Director of the Competition Authority and the Authority's legal advisor, who were the main driving force behind the change, understood its importance and succeeded in convincing the legislature to adopt it. This was strengthened by the external pressure the EU exerted on Israel to prohibit abuse of dominance, in line with signed trade agreements.

An additional condition that contributed to the success of the transplant was the fact that copying the established but yet evolving law of a large jurisdiction was, indeed, a good idea. As elaborated above, it created many benefits to Israeli competition law. Probably the most important benefit was that the transplant came with some soil clinging to its roots that helped it grow.

Of no less importance is the fact that the Israeli enforcement institutions – both the Competition Authority and the Competition Tribunal – were largely competent institutions that had the ability to take the law one step forward and apply relatively sophisticated legal and economic concepts.

In addition, the adoption was eased by the flexibility of enforcement and interpretation. To ease the transition towards new legal rules, the Authority did not apply it widely but rather used its discretion and brought only several cases in which it believed that abuse was prevalent. In addition, Israeli courts interpreted and applied the law in a manner which is consistent with Israeli conditions and goals, thereby creating a horse of a slightly different colour than the one adopted initially. Of course, such flexibility is not costless. There exists a trade-off between applying the foreign law without change thereby strengthening the network and long-term learning externalities noted above but bearing the risk that the law will not achieve its goals efficiently in the new environment, and adapting the law to domestic conditions thereby incurring adaptation costs but increasing the law's compatibility with its goals. The strategy to be adopted thereby depends on the relative height of these costs and risks.

The importance of shaping the transplanted law to the needs of the local environment can be exemplified by another case of Israeli adoption of EU competition law: the copying of the block exemption mechanism. Similar to the pre-2003 EU system, Israeli regulation of restrictive agreements is based on

ex ante notification.⁶⁸ Every agreement in restraint of trade that fulfills certain conditions is subject to *ex ante* approval. This system is highly cumbersome, costly and ineffective because many agreements, which cause no or minimal harm to competition, are still subject to approval. In order to limit this problem, the Israeli legislator copied in 2001 the block-exemption mechanism employed by the EU, which exempts categories of cases from notifications. This legal mechanism, while not solving all the problems created by the regulatory system, has many advantages. This is another example of a good idea which can apply similarly in many different systems that suffer from similar problems. At the same time it also exemplifies the need to fit the idea to local conditions. Accordingly, the block exemptions have been changed, where appropriate, to apply to the smaller size of Israeli markets. For example, market share thresholds have generally been lowered to capture the more concentrated nature of Israeli markets.

The successful transplant was also assisted by the fact that the area of competition law is unique in that it combines notions of law and economics, and is not based on legal doctrine alone. This is significant since economics has no jurisdictional boundaries. Thus, a prohibition which is largely based on economic concepts can 'travel' better between jurisdictions than one based solely on legal concepts.

Another condition that assisted the transplant was the fact that not a whole new law was copied, but rather part of the law, which was then embedded into an existing framework. The fact that there already existed some prohibitions against monopolistic abuse – although they were almost never enforced in practice – assisted the implementation greatly. The new provision was thus not regarded as a significant conceptual change and did not require the creation of new institutions to enforce it.

Finally, success was assisted by the fact that Israeli culture is not hostile to foreign, and especially Western, concepts. As Israel is a relatively new jurisdiction, created from people who have come from different legal cultures as diverse as Germany, Iraq, and Ethiopia, it is not surprising that its legal culture is highly receptive to foreign legal concepts when they seem to further its goals.

D. Conclusion

Much of human development is based on the experience of others. Indeed, it is often said that knowledge and development are shaped like an inverted pyramid in which current additions are based on the accumulated knowledge at any specific time. This is definitely true for technology and medicine. But is it also true for legal rules, or should each jurisdiction operate as a legal autarky which has to grow its own legal innovations? This issue has generated a heated debate. Yet most modern scholars agree that legal transplants might be successful if the 'right' conditions exist. The debate in the literature has thus shifted from a bi-polar

⁶⁸ Chapter 2 of the Israeli Competition Act 1988.

view on the viability of such transplants to one centred on the conditions that may render transplants successful and the costs and benefits involved in them.

This article attempts to add to this growing literature by shedding light on the costs, benefits and conditions of a specific case study. The case chosen – the ‘cut and paste’ of Article 82 of the Treaty of Rome into the Israeli Competition Act – is especially interesting given several traits. The adopted prohibition was new in the sense that no similar prohibition was applied in Israel before. Indeed, the existing prohibitions against abuse of power were almost never applied and there existed no coherent theory of abuse. Moreover, it introduced novel prohibitions that significantly limited the conduct of dominant economic actors. Yet the transplant generally fit the socio-economic ideology of the government that was beginning to take root at the time of adoption, thus responding to the internal imperatives of the culture itself. The Israeli experience shows that law can play an important role in constituting culture, if it fits well with the existing ideology and is not largely culturally invasive. The discrete and careful use of foreign laws does not necessarily undermine legal culture. On the contrary, it can enrich local law.

The Israeli experience also indicates that even if the idea of the transplanted law is a good one, its application in practice must be attuned to local conditions. As was argued, one of the most important causes for the successful transplantation of Article 82 was the fact that as time evolved, Israeli courts applied only those interpretations of the prohibition that, in their view, fit Israeli legal culture and economic conditions and rejected those that were not in par with it. The Israeli national poet, Haim Nachman Byalik, once wrote that a poem, once published, does not belong exclusively to its writer and may be interpreted and understood in ways that the writer did not intend or conceive. Law is the same. Part of the success of the transplant is that it becomes embedded into the local soil and starts receiving its needed nutrients from it, which may sometime change the colours of its leaves.

The article identified the benefits and costs of the transplant, some of which were not previously explored. The transplant is often viewed in isolation of ongoing developments in its home jurisdiction and focus is given to the conditions in the transplanting one. This article showed that such effects should not be ignored, as they provide an important part of the benefits and motivations for legal transplantation. It also showed that the transplanting jurisdiction’s international relationships also determine some of the benefits of the transplant. As was argued, the size of a jurisdiction is an important factor in determining the benefits from a transplant.

It is thus fortunate that laws are not protected by copyrights, so that jurisdictions are free to pick and choose as they wish from the plethora of legal solutions already applied in other places where making up their own is costly. Yet one must always remember that, as a paraphrase on Tom Friedman’s metaphor, there is no “flat law.”⁶⁹ Rather, law should always fit the unique conditions of the jurisdictions in which it is applied.

⁶⁹ T. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (2006).