TEL AVIV UNIVERSITY אוניברסיטת תל-אביב

THE BUCHMANN FACULTY OF LAW
THE CEGLA CENTER FOR INTERDISCIPLINARY
RESEARCH OF THE LAW

MAX-PLANCK-GESELLSCHAFT

Max Planck Institute for Comparative and International Private Law

CONVERGENCE AND DIVERGENCE OF LAW: GERMAN AND ISRAELI PERSPECTIVES

International Conference

March 24-25, 2008

Organizers:

Jurgen Basedow and Roy Kreitner

The conference will take place at Tel Aviv University; The Buchmann Faculty of Law, Trubowicz Building, Sonia Kossoy Conference Room (Room 307)

The conference will be held in English

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Conference Program

MONDAY, MARCH 24, 2008

09:00 GREETINGS

Hanoch Dagan, *Tel-Aviv University*
Jurgen Basedow, *Max Planck Institute, Hamburg*
Kurt Siehr, *Max Planck Institute, Hamburg*

09:15 - 11:15 CONVERGENCE AND TRANSPLANTATION IN THE CORPORATE CONTEXT

Ron Harris, *Tel-Aviv University*

The Institutional Dynamics of Early Modern Eurasian Trade: The Corporation and the Commenda

This paper will present an example that demonstrates how our understanding of the evolvement of legal-economic institutions is enriched by the study of the migration and transplantation of such institutions. The example is the distinct use of the business corporation and the commenda partnership in early modern Eurasian trade. This paper calls attention to the fact that the commenda migrated from Arabia all the way to northwestern Europe and to China. In sharp contrast, only the western Europeans used the corporation in maritime trade. The distinct migration patterns of the two institutions direct us to some factors that are likely to affect institutional migration. A comparative study of interactions between the different environments and the institutions developed endogenously in each is not sufficient for understanding the observed institutional pattern. Only a history that takes into account the migration and transplantation of institutions, and explains why the commenda migrated and the corporation did not, can provide an understanding of the institutional pattern. Such an explanation evaluates political, religious, social and geographical factors.

Klaus Hopt, *Max Planck Institute, Hamburg*

Obstacles to Corporate Restructuring— Observations from a European and German Perspective

Resumé
In Europe there are still many obstacles to corporate restructuring, even beyond the takeover context. The experience with the implementation of the 13th Directive on Takeovers is sobering indeed. The number of member states implementing the directive in a seemingly protectionist way is unexpectedly large. This is in line with a growing popular fear of globalization and definite trends toward political protectionism regarding foreign investments in various member states. Germany is not an exception, as the draft Risk Limitation Act of

September 2007 and the ongoing discussion on further restrictions illustrate. The declaration by Commissioner McCreevy of 3 October 2007 that there will be no European action on the issue of one-share/one-vote should not mean the end of the discussion. The report of the European Corporate Governance Forum Working Group on Proportionality of June 2007 is right in pleading for an enhanced disclosure regime concerning control-enhancing mechanisms. In any case, there is a definite need for more data and further analysis.

Survey

I. Introductory Remarks

II. The Sobering Experience with the Implementation of the 13th Directive

III. Popular Fear of Globalization and Trends toward Political Protectionism Regarding Foreign Investments: The German Example

1. The discussion in the member states on unwelcome and potentially dangerous foreign investments

2. The German draft Risk Limitation Act of September 2007

IV. The One-Share/One-Vote Discussion and the Recommendations of the European Corporate Governance Forum Working Group on Proportionality of June 2007

1. The one-share/one-vote discussion and the reply of Commissioner McCreevy

2. The variety of control-enhancing mechanisms, the repudiation of a general one-share/one-vote rule, and the need for better understanding

3. Toward an enhanced disclosure regime concerning control-enhancing mechanisms

4. Particularly pressing problem areas and the need for more data and further analysis

V. Conclusions

Jan von Hein, *University of Trier*

The Role of Judges in Legal Transplantation: Recent Examples from German Corporate and Securities Litigation

Although civil law systems are traditionally regarded as having quite comprehensive codifications, fast-evolving areas such as corporate and securities law often create the need for German judges to look for foreign solutions in cases where their own legal system does not provide ready answers. In recent years, German judges have increasingly taken U.S.-American law into account. This practice leads to various questions: First, the causes for and the legitimacy of such comparative exercises. Especially general clauses and gaps in the codified law are commonly conceived as points of entry for foreign legal solutions. In securities litigation, for example, German courts have struggled with claims against issuers who have provided the market with misleading information. Yet, although the only available German legal rule (§ 826 of the civil code) is a blanket clause offering wide latitude for judicial discretion and transplantation of legal concepts, the Federal Court of Justice has explicitly and repeatedly rejected a reception of the American fraud-on-the-market doctrine. Secondly, the interaction between the German legislator and the German courts in processes of legal transplantation deserves a closer look. Comparative solutions developed by the courts may anticipate legislative changes. On the other hand, a successful reception of U.S. American legal concepts by the legislator depends upon a subsequent congenial, internationally-minded application of the imported law by

the courts. This general idea is explored in more detail by scrutinizing recent case law concerning the reception of the business judgment rule in German corporate law. This institution was imported by the Federal Court of Justice and later codified in the stock corporation act. Yet the recent decision of the Federal Court of Justice in the Mannesmann case highlights considerable differences that still separate the "German" business judgment rule from its American blueprint. Against this background, the paper tries to define and evaluate the proper role for judges in processes of legal transplantation.

Comment: Sharon Hannes, ***Tel-Aviv University***

11:15 - 11:30 COFFEE BREAK

11:30 - 13:00 CONVERGING ON INFORMALITY

Eyal Benvenisti, *Tel-Aviv University Informal International Law*

Informal International Law

In 2000 all federal German ministries were ordered to avoid international obligations as much as they could. The directive stipulated that negotiators should explore alternatives to formal undertakings based on international law. Bureaucrats in other administrations report similar expectations if not explicit directives. This new attitude toward international obligations reflects both the availability of novel ways for governments to interact across political borders, as well as new concerns about international legal tools, especially the formal international institutions. This preference for informal lawmaking suggests that international cooperation can be achieved without recourse to international legal tools and that the informality offers significant benefits to some governments. The aims of this paper are to explore some of the new modalities for international cooperation that avoid the formal tools of international law, and then to reflect on the motivations for their use as well as on the consequences of their proliferation

Michael Birnhack, *Tel-Aviv University*

Soft Legal Globalization: The Case of the EU Data Protection Directive

Globalization has many faces and is carried out by various means: military actions, political power, commercial and trade-related instruments, cultural influence or a mixture of these factors. The law is yet another important vehicle of globalization. The law offers a rich arsenal to the governments of the world, both in the North and the South to globalize their laws. Described as points on a spectrum of convergence-divergence, legal globalization might seek the

unification of the law in different jurisdictions, their harmonization, setting rules of cooperation and coordination among countries or at the other end of the spectrum, allowing each country to choose its law independently. Multilateral treaties and bilateral agreements are framed in legal terms and once ratified, have a binding legal affect. Countries join the treaties or bilateral agreements either because they believe it will benefit them in some way, or because they are politically forced to do so. The latter case is one of hard legal globalization. Unilateral measures add another layer to this matrix of international politics.

This paper explores yet another form of legal globalization, in which no explicit demand is addressed to any one country by another to comply with some international treaty or to engage in a bilateral agreement, nor is there a unilateral pressure to adapt one country's legal system to the requirements of a more powerful country. Rather, the mechanism to reach similar laws is subtle and not as aggressive as some unilateral measures (e.g., the USTR's annual review of U.S. IP interests in U.S.' trade partners). It is a mechanism which can be characterized as a positive incentive to changes in a country's law, or metaphorically, as a cookie: one can get along without it, but nevertheless, its nice to have, especially if it seems to be free and dietetic. I shall call this form of legal globalization soft legal globalization.

The prime example to be discussed in the paper is the 1995 EU Directive on data protection. The Directive sets out a detailed legal regime for protecting personal data and regulating databases. The Directive is aimed, naturally, at the EU, but it also includes articles regarding data processing which takes place outside the EU. Article 25 stipulates that member states should allow transfer of data to a third country only if the third country ensures an adequate level of protection. Thus, countries who wish to engage in data transactions with EU member states are indirectly required to provide an "adequate level of protection," or seek one of the alternative avenues which the Directive offers. Several non-EU countries (other than EU candidates) have already changed their national data protection laws so as to meet the EU's standards. Its important to note that, the European data protection regime is starkly different to the U.S. data protection regime, which is almost non-existent. This "Atlantic Divide" reflects two distinct views as to informational privacy (and perhaps the European legal response also reflects Robert Kagan's theory. Just imagine how the U.S. would have acted if they would flip sides with the EU regarding the data protection regime).

The paper will evaluate this form of legal globalization, which is still in its infancy, and place it both within the framework of the debate on informational privacy and on globalization at large, and more specifically, globalization by law.

Comment: Guy Mundlak, Tel-Aviv University

13:00 - 15:00 LUNCH

15:00 - 16:30 CONVERGING COMPETITION POLICY

Jurgen Basedow, *Max Planck Institute, Hamburg*

The Private Attorney General on Both Sides of the Atlantic: Towards the Private Enforcement of EC-Competition Law

In December 2005 the European Commission published a Green Paper on "damages actions for breach of the EC antitrust rules" and a more detailed Commission Staff Working Paper as an annex to it. These documents are meant to open a public consultation on various issues relating to the so-called private enforcement of European competition law. It may be by coincidence that the European Court of Justice has stressed in recent decisions, the right of victims of anti-competitive agreements to claim damages from undertakings which have breached Article 81 EC.

It is obvious from these events that the European Community is contemplating a rapprochement of European antitrust tort law with that of the United States of America. The paper will highlight some aspects of this development and will try to make an assessment by focusing on the incentives given to market actors in this field.

Reinhard Ellger, *Max Planck Institute, Hamburg*

Some Recent Developments in EC Competition Law

The last decade has seen quite far-reaching changes in competition law and policy of the European Community. These changes – just to name a few – concern firstly the methodological foundations of the competition rules by injecting a stronger dose of economic analysis into their application through the Commission („a more economic approach"), and secondly, the enforcement of the competition rules by substituting the old regulation 17/62 for regulation 1/2003 which – from the date of its commencement on May 1st, 2004 and as one of numerous modifications – abolished the prerogative of the Commission to exempt agreements between undertakings from the prohibition of Art. 81 (1) by way of a formal decision (or by informal comfort letters) through creating a system of legal exemtion in which the legal effects of Art. 81 (3) EC automatically take place whenever the requirements of this article are accomplished with regard to a specific agreement. The third and most recent trend to mention here is the change in the relative weight of competition as an objective of the Community/Union by excluding competition from the list of fundamental goals of the European Union as provided for in the new Reform Treaty to be concluded between the member states as a substitute fort the failed Constitution Treaty. All these changes left the wording of the competition rules untouched, but might, nevertheless, have wide-ranging influence on the practical effectiveness of such rules with regard to their function to establish „ a system ensuring that competition in the internal market is not distorted" (Art. 3 (g) EC). The paper will try to explore the implications of these changes for the protection of effective competition in the common market and their contribution to the

formulation of a sound competition policy oriented at the objectives of the Treaty and the requirements of the common market.

Comment: David Gilo, Tel-Aviv University

TUESDAY, MARCH 25, 2008

09:00 - 11:00 INSTITUTIONAL COMPARISONS OF DECENTRALIZED LAW MAKING

Daphne Barak-Erez, *Tel-Aviv University*

The Institutional Aspects of Comparative Law

Learning from other legal systems has always been a significant technique for developing law, known also as "legal transplantation". Most of the literature dealing with the technique of legal transplants deals with the desirability of this practice. The proposed article pursues a different course. Rather than asking whether importing concepts from foreign law is a desirable practice, it scrutinizes the legal institutions and procedures involved in its implementation.
Transplants can be introduced by all branches of government - legislatures, courts, or administrators. The implications of the choice between these various routes will be the center of this article. Legislation proposes the broadest potential for transplants, due to the relative unlimited power of the legislature. Transplants introduced by judges are considered more problematic, as they raise issues of legitimacy regarding the scope of judicial innovation**.**

Hermann Pünder, *Bucerius Law School, Hamburg*

Democratic Legitimating of Delegated Legislation —A Comparative Lawyers' Perspective

All countries that adhere generally to the principle of separation of powers find themselves in a dilemma. To an increasing extent, law in these countries is made not by the proper legislature, the elected parliament, but by the executive branch. The exigencies of modern state have led legislators to transfer much of their lawmaking powers to administrators. These developments have placed administrators in a very powerful position. Thus, it has become one of the major tasks of constitutional and administrative law to channel this power. The study focuses mainly on the U.S. and German Law. Other countries (including Israel) will be referred to en passant. All jurisdictions acknowledge the departure from the traditional doctrine of separation of powers, but equally have to ensure that

delegated legislation carries sufficient democratic legitimation. Realising democratic legitimation is the tertium comparationis. The primary source of democratic legitimation is the people. The source can be used either indirectly by relying on elected representatives or directly by an effectively regulated public participation in rulemaking. It can broadly be said that Germany uses mainly the first way to democratic legitimation while the United States follows the second path.

The German legal system relies primarily on substantive predetermination of the outcome of the rulemaking process by the legislature. Art. 80 clause 2 of the Basic Law ("Grundgesetz") states: "The content, purpose, and scope of the authorization so conferred (i.e. the authorization to make sub-legislative law) must be set forth in such statute". Originally American law was equivalent to German law. According to the so-called "non delegation doctrine" the role of Congress was to make the "important choices of social policy". The Supreme Court once forced Congress to set "standards" by means of delegating statutes for the executive regarding the extent legislative powers conferred upon it. The parallel is striking but not surprising, since American law was to a certain extent godfather at the birth of the actual German constitutional law after the Second World War. The wording "content, purpose and scope" in Art. 80 Basic Law can be traced back to the post-war "Office of the Military Governor of the U.S." (OMGUS). In the meantime, however, American law has diverged significantly from the German approach. The Supreme Court has given up enforcing the non-delegation doctrine. American law allows more or less unfettered legislative delegation. The non-delegation doctrine, once developed to restrict the delegation of lawmaking power, is "moribund" (so said two dissenters in the U.S. Supreme Court decision National Cable Television Ass'n, Inc. v. United States, 1974). American legislatures fail to include meaningful standards in statutes delegation power, and courts generally are willing to accept meaningless formulas such as "public interest" to avoid the need to strike down delegations.

Besides the substantive parliamentary pre-determination of the administrative legislation German law acknowledges another way of ensuring parliamentary supremacy in administrative legislation by letting the parliament participate in the decision-making process. Parliament as a whole or committees have the chance to review the outcome of the administrative legislation. The American Congress had also been seeking to monitor agency rulemaking after the administrative legislation is completed. In 1983, however, the Supreme Court in the notorious Chadha-case (1983) pronounced the "legislative veto" to be unconstitutional on the grounds that it infringed the principle of the separation of powers. To the disappointment of many commentators, delegated legislation was considered to be the task solely of the executive. The legislature could only regain the power to create norms through a formal legislative procedure in which both chambers ("bicameralism") and the President ("veto or approval") participate.

In view of the uncompromising jurisprudence of the Supreme Court on the legislative veto and the flexible approach to substantive requirements made upon the empowering legislation, American law is left with only the possibility of securing democratic legitimation of delegated legislation by means of the involvement of the public in executive legislative procedures. The American system has organized the development of administrative legislation by imposing

strict procedural requirements, allowing public participation. Compared to the American rulemaking procedure, German executive rulemaking institutions are relatively free from external requirements. As a general rule German law does not require public participation in the procedure of making sub-legislative law. It is normally at the discretion of the authority to what extent the public are involved in the creation of delegated norms. The German process of making sub-legislative law is truly informal, not requiring any societal input.

The comparison of the law governing the subordinate legislation reveals that fundamentally divergent paths to democratic legitimation are followed. The description of the various solutions to the sub-legislative lawmaking dilemma will add to a deeper understanding of the respective political systems, as legal differences can be rooted in cultural differences. Furthermore, understanding the complex system of administrative lawmaking in other countries will help analyse one's own system, reveal its weaknesses and appreciate its strength. The comparison may also suggest valuable solutions for each country's problems. Thus, the study may add further insights to the never-ending controversy about the appropriate law on administrative lawmaking.

Yishai Blank, *Tel-Aviv University*

Convergence, Divergence and the Conundrum of Contemporary Decentralization

Over the past few decades, many national jurisdictions across the world have been experimenting with decentralization schemes, at the heart of which lies transfer of duties and authorities to subnational territorial units. This process, complicated in itself as it requires an ongoing dialogue and dialectics between the various levels of government, has been further complicated by accompanying and parallel processes of regionalization, internationalization and globalization. The latter processes, such as the creation of the European Union, are aimed at creating greater harmony, cooperation and integration among the different components of the new supranational territorial units. Such unifying – or convergence-oriented – processes have thus been pushing in opposing directions to the divergence-oriented decentralization schemes. Yet it is precisely this contradiction that many legal systems try to hold. Slogans such as "unity through plurality" and "harmony of oppositions" seem to guide such paradoxical efforts and to lie at the heart of both legal principles and institutional arrangements that try to harmonize growing centralization (and integration) with growing decentralization, convergence with divergence, and globalization with localization.

In this article I will track some of the general trends that have occurred in this context and describe them in a more nuanced way in the context of the European Union's approach to the role of localities and regions. Further, I will analyze the theoretical foundations of both centralization and decentralization schemes and argue that often, the contradiction between them is only shallow. Depending on the more substantive purposes that such schemes are trying to promote, greater conformity between them can be achieved. On the other hand, I show that decentralization and centralization might have quite different outcome as far as divergence and convergence go with respect to various policies. Thus, decentralization might sometimes lead to growing convergence between

subnational units, while centralization might actually inculcate and cause divergence, depending on the meaning given to these various concepts. Focusing on the various justifications for projects of centralization and decentralization I argue that current economic thinking with its emphasis on subsidiarity and economic efficiency tries to eliminate some inherent tensions between various levels of government, ignoring the importance of institutional arrangements and thinking.

Comment: Hanoch Dagan, Tel-Aviv University

11:15 - 11:30 COFFEE BREAK

11:15 - 12:45 NON-STATE PROVISION OF LAW AND JUSTICE

Rainer Kulms, *Max Planck Institute, Hamburg*
Privatizing Civil Justice — Is There a US Lesson to be Learned by German Courts?

Courts step in when private ordering breaks down. Moreover, the judiciary is expected to demonstrate managerial qualities when it faces mass tort litigation. It less clear, though, whether traditional court functions may be outsourced to assure speedy administration of justice. In the US, overcrowded dockets and complex multi-party cases have unleashed court-connected dispute settlement programmes and innovative compensation schemes, incentivising private parties to settle before trial. In this, judges have been praised for their deference to private ordering, but they have also been criticised for what has been characterised as a thoughtless use of power.
As Germany ponders about privatising some aspects of her legal system it is apposite to analyse whether US experiences with alternative dispute resolution (ADR) establish a case for convergence. Justice will be understood as a public good that has been traditionally supplied by public authorities. But there is a strong case for the private provision of justice through ADR. The incentives for opting into ADR will be studied, applying a law and economics approach to civil procedure. An efficient out-of-court settlement is instructed by the microeconomics between the parties. It also assumes that minimum standards of due process can be upheld as parties negotiate on how to settle their dispute. Nonetheless, public policy considerations and macroeconomics may call for court intervention in private dispute settlement processes. It will have to be assessed to what extent private ordering dominates the development of law through public jurisprudence. A section on US-German policy differences on privatising civil justice concludes.

Talia Fisher, *Tel-Aviv University*

Law as a Network Industry

Network industries refer to goods and services, which generate greater value to their consumers, as the number of users who consume them proliferates. For example, as fax machines become more popular, the fax machine one owns becomes increasingly valuable, since it enables interaction with a growing number of individuals. Law is a network industry, characterized by such demand-side returns to scale: the more people join a legal network to which one belongs, i.e., abide by the rules one has accepted /recognized, the larger the group of people with whom one's transaction costs are lower. Each consumer of legislation and adjudication services confers network benefits upon other members of her legal network, by virtue of her mere affiliation with the network.

Due to technological innovation, especially in the field of telecommunications, network industries have become more prevalent in our daily lives. In conjunction with these developments, as well as the difficulties posed by network effects for classic economic analysis, economic theorists have recently begun to express particular interest in network industries. Little attention has been paid, to date, to the network effects in the production and supply of law.

My aim in the proposed paper is to demonstrate how the conceptualization of law as a network industry can substantially contribute to the analysis of questions relating to convergence and divergence in law; I will attempt to show how the literature on network industries, gaining recent popularity in the economic field of research, sheds light on the interconnections between different legal systems and normative platforms.

Essentially, there are two ways to address problems of incompatibility between diverging legal standards in society: The ubiquitous model is that of central state law. In accordance with the state law model harmonization in law is achieved through the coercive imposition of uniform state laws, and the crowning of a monolithic legal regime in a single geo-political unit. However, there are many disadvantages to central planning and hierarchical production of law. Implementation of the state law model leads to loss of the benefits of divergence and inter-jurisdictional competition, as well as to public choice problems associated with biases in favor of dominant and powerful groups in society.

The alternative model is a polycentric legal regime. Under this model numerous parallel competing legal systems dwell in geographic and political conjunction, negating the a priori concept of uniform law. The underlying assumption of the polycentric model in law is that a certain level of compatibility and interconnectedness between such different legal regimes and standards can be achieved without central planning, due to the network effects characterizing the market for law. The polycentric model enables to reap the benefits of diversity and decentralized innovation in the production of law. However, it too has drawbacks associated with the negative network effects: Examples include under-standardization in the market for law, the result of which would be "too many legal networks" operating within a single geopolitical unit. Another potential failure can be conceived of as over-standardization, namely, the problem of legal lock-ins.

My aim in this project is to delineate the description of law as a network industry, and elaborate on the distinctive characteristics of the competition between legal regimes, which distinguish it from "standard" competition between products/

services. I will show how models deriving from the economic analysis of network industries can aid in evaluating the optimal equilibrium point between convergence and divergence in law – a point which would enable compatibility in law and the benefits associated with structured convergence, on the one hand, without greatly compromising the benefits of interjurisdictional diversity and competition in law on the other.

Comment: Issi Rosen-Zvi, Tel-Aviv University

13:00 - 15:00 LUNCH

15:00 - 16:30 NATIONAL LAW IN GLOBAL CONTEXT

Yoram Margalioth, *Tel-Aviv University*

China's Tax Law

In 1978, under the leadership of Deng Xiaoping, the Communist Party introduced a new economic policy in China. Its goals were opening China to the outside world and reforming the domestic economic system. A critical part of this reform was establishing a modern tax system. To facilitate the transition, a two-track tax system was introduced so that a Western style tax system would apply to foreign firms and individuals and another system would apply to Chinese firms and individuals. The dual-track enterprise income tax system seemed to have contributed positively to the success of economic reforms at earlier stages. However, in recent years, China has begun consolidating its tax system because foreign direct investments have been abundant and competition with domestic firms grew fierce. The paper describes the ways in which tax policy contributed to China's phenomenal economic growth in the past 25 years; China's struggle with international organizations such as the IMF, the World Bank, the WTO and the OECD to maintain its tax incentives; and analyzes the optimality of its current evolving tax system.

Assaf Likhovski, *Tel-Aviv University*

Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling

This paper tells the story of the "Harvard – Israel Cooperative Research for Israel's Legal Development" Program, created by a group of German-Jewish lawyers the 1950s. The story of this program can be told in many ways. It is relevant to our understanding of the history of the global network of German-Jewish émigré legal lawyers who briefly influenced the Anglo-American legal world in the 1950s and 1960s. It relates to the general ebbs and flows in the

fortunes of comparative law scholarship in 20th century, and it is also connected to the history of American Law and Development projects, of which the Harvard – Israel program was one of the earliest examples.

The focus of this paper, however, will be on the way in which the history of the Harvard – Israel program can suggest novel ways of viewing the legal transplants phenomenon. In the last two decades, most of the work written about legal transplants appeared in the context of a more general debate about the relative autonomy of law and the question whether law is related to the social context in which it operates. This debate is certainly interesting, but it obscures the fact that there are many additional insights to be gained from studying the process of legal transplantation. In my article, I would like to shift the focus of the debate from discussions about transplantation and the autonomy of law to a look at the social act of transplanting legal norms. In doing so, I use Bronislaw Malinowski's 1922 book, Argonauts of the Western Pacific, to explore analogies between western legal scholars and their very distant, yet not quite dissimilar, Melanesian counterparts.

In his book Malinowski described the working of a particular form of gift-based trade, the Kula, which existed in the first decades of the 20th century in parts of Melanesia. The Kula was a form of circular, inter-tribal, exchange of arm-shells and necklaces passing between various tribes living on islands of the coast the Papua-New Guinea. Kula objects were traded by the islanders not for their usefulness but purely for the purpose of enhancing the social status and prestige of their temporary owners. In my article, I analyze the parallels that exist between the Kula exchange and the process of moving legal ideas around (in my case between the United States, Israel and Africa), suggesting that the social process of legal transplantation is, just like the Kula trade discussed by Malinowski, a process in which the status and prestige obtained by the trade, rather than the utility of the objects traded, are the main factors motivating the exchange.

Comment: Tsilly Dagan, Bar Ilan University