LEGAL TRANSPLANT AND UNDUE INFLUENCE: LOST IN TRANSLATION OR A WORKING MISUNDERSTANDING?

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Abstract Is legal transplant possible? The stark bipolarity of a 'yes' or 'no' answer attracted by such a question is much less interesting and revealing than the question: what shapes the life of legal transplants? The answer to the latter question is contingent on a wide range of variables triggered by the particular transplant; the result can occupy any point along the spectrum from faithful replication to outright rejection. This case study of the transplant of the English doctrine of undue influence into Singaporean law asks why the Singaporean courts have applied the doctrine in family guarantee cases to such divergent effect, when they profess to apply the same law. The answer owes less to grand theories than to a careful examination of the nature of the transplanted law and the relationship between the formal and informal legal orders of the originating and the recipient society raised by the particular transplant.

Key words: comparative, contract, guarantee, legal transplant, Singapore, undue influence.

I. INTRODUCTION

Does borrowing law from another legal system, so-called 'legal transplant',[1] work? The importance of this question is borne out by: the enormous scale of legal transplant in colonial history; post-World War II development programmes involving legal transplants into South America and Africa; the development of new legal orders, primarily via legal transplant, on the collapse of communism in the former Soviet Union and Eastern Europe; and the moves

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[1] See generally, A Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993); N Foster, 'Transmigration and Transferability of Commercial Law in a Globalized World' in AJ Harding and E Örücü (eds), *Comparative Law in the 21st Century* (Kluwer Law International 2002) 55; M Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in M Reimann and R. Zimmerman, *The Oxford Handbook of Comparative Law* (OUP 2007).

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towards regional codes, especially in commercial law, in an increasingly globalized world.[2] Does law change society or is law changed by society? Is harmonization and convergence possible across jurisdictions demonstrating a high degree of pluralism? The theoretical debate has been vigorous and polarized. One extreme, most recently championed by Legrand, argues that legal transplant is logically impossible[3] because any legal transplant is only skin-deep, it is only words, the law on the books. Law has no autonomous existence; once a law is severed from its roots it ceases to exist as such, but becomes something other. Law responds to, and so 'mirrors', the society in which it has evolved. At the other extreme is Watson (at least the extreme version of Watson)[4] who, in a long series of books and articles,[5] points to the prevalence and great importance of legal borrowing by reference to the scale of the reception of Roman law and the spread of English common law. Watson emphasizes the apparent ease with which law can be transplanted and its capacity for long life,[6] even where the transplanted law is at odds with the 'best' rules that would reflect the receiving society's needs, its conception of justice or the desires of its ruling elite. The thesis, in short, is that very little is original in law and 'borrowing is, in fact, the main way law changes'.[7]

In a sense, asking whether legal transplant is 'possible' is the wrong question, or, at least, not precisely enough the right question. Both sides of the debate are simultaneously right and wrong as general accounts of legal development. The 'mirror theory' is contradicted by the plethora of successful transfers among Western societies and by the relative closure of legal discourses from the totality of social meaning that, consequently, makes it possible for aspects of law and society to develop along separate evolutionary paths.[8] Watson's 'free transplant theory', at least in its more extreme form, loses sight of the law's unavoidable susceptibility to some external pressures from culture and society. On the other hand, both sides are right. As Watson states, a tomato plant moved from X to Y is still a tomato plant. Nevertheless, as Watson concedes in his less extreme moments, its subsequent development depends on Y's soil, temperature, wildlife and so on: 'A law in one country

[2] eg the Principles of European Contract Law (PECL); the Draft Common Frame of Reference (DCFR); the Common European Sales Law (CESL); the Principles of International Commercial Contracts (PICC); and the United Nations Convention on Contracts for the International Sale of Goods (CISG).

[3] P Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht Journal of European Comparative Law 111; see also L Friedman, *A History of American Law* (2nd edn, Simon and Schuster 1985) 595; and numerous quotes in A Watson, *Society and Legal Change* (Scottish Academic Press 1977) 3–4.

[4] See the distinction between 'strong Watson' and 'weak Watson' in W Ewald, 'Comparative Jurisprudence (II): the Logic of Legal Transplants' (1995) 43 AJCL 489.

[5] Some 20 books and 100 articles detailed in Ewald, ibid.

[6] See eg A Watson, 'Comparative Law and Legal Change' (1978) 37 CLJ 313.

[7] ibid 321.

[8] G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 MLR 15.

expressed in exactly the same wording in another is not the same rule. Context is everything. The once transplanted is different in its new home.'[9]

We need to go beyond the bipolar 'yes-no' debate and recognize that the relationship between law and society (in the sense of its culture, religion, politics and economics) is neither non-existent nor an exact mirror of each other; law is neither completely *insulated* from, nor completely *determined* by society. As with so many other areas of law and life, we have to fight our reductionist urge and accept that the relationships in question are likely to be reciprocal, multilayered, and interactive; the result may be far too complex and subtle to admit of simple, neat and tidy answers. Where law evolved in one society is parachuted into another society, the result may range along the entire spectrum or continuum between rejection and smooth reception. To understand a *particular* result we need to identify the factors that are relevant to the *particular* legal transplant; the factors that, within certain limits, determine whether transplant happens, and if so, control the relationship between transplanted rules and the society in which they subsequently operate, the relative value of the individual factors and how and why they can vary. Consistently, Foster contends that transplants vary so much that broad generalizations stated as a Grand Transplant Theory is impossible. Harding and Örücü conclude that perhaps 'not only is there no one thing called a "legal transplant", but neither is there only one meaning attached to the word "work" in the question, "do legal transplants work?"'[10] There is no choice but to engage with the messiness of real life and to proceed on the basis that the relationship between law and society must be studied case-by-case.

This article presents one such case study.[11] It grew out of my experience of a stint of lecturing in Singapore. Since English contract and commercial law has been transplanted into the Singaporean legal system largely wholesale, I rashly expected to likewise, within limits, be able to largely transplant the substance of my contract law lectures from England. However, the treatment of undue influence in family guarantees threw up an unexpected divergence. Unexpected because Singaporean courts professed to be applying the very same law; yet they interpreted and applied this law in such a way as to reach apparently opposite conclusions from the English decisions. How should this divergence in evolutionary paths be explained?

Beyond the question of the possibility of transplanting judicial precedents, we encounter the more interesting question of the life of the law *after* transplant. Here, Teubner refers to the legal transplant as a 'legal irritant' that triggers reactions in the receiving legal system's 'binding arrangements' which, in turn, leads to the reconstruction of the transplanted law.[12]

[9] A Watson, 'Ius Communis Lecture on European Private Law 2' (The Contribution of Mixed Legal Systems to European Private Law, Maastricht University, 18 May 2000).

[10] A Harding and E Örücü, *Comparative Law in the 21st Century* (Kluwer Law International 2002) ch 4, 55.

[11] An example of an excellent case study is Teubner (n 8).

[12] ibid 12.

Örücü[13] deploys the language of 'transposition' and 'tuning' of the transplanted law to suit the socio-legal culture and the needs of the recipient, and notes other apposite metaphors: 'grafting', 'implantation', 're-potting', 'cross-fertilization', 'contamination', 'infiltration', 'infusion', 'digestion', 'melting pot', and so on. This case study offers one account of the impetus and mechanism for this process.

II. SINGAPOREAN CONTRACT LAW

Singapore's geography may suggest a closer affinity with the legal system of the United States than of England. But the fact that the reverse is true is a major legacy of colonialism. Singapore's legal development had been intricately linked with the English legal system from its founding by Sir Thomas Stamford Raffles of the British East India Company in 1819 to its independence in 1965 (excepting the period of Japanese Occupation in 1942–45).[14] English legal traditions, practices, case law and legislation were often adopted without consideration as to their fit with the local circumstances. Even after Independence, the Civil Law Act 1878 continued to apply. Section 5 provided that if a question or issue arose locally with respect to certain named categories of law or to mercantile law generally, the law should be the same as that administered in England at the time, unless other provision had been made by law having force locally. This section was only repealed in the Application of English Law Act 1993,[15] the same year that appeals to the Privy Council were abolished. The 1994 Practice on Judicial Precedent declared that the Privy Council, Singapore's predecessor courts, as well as the Court of Appeal's prior decisions no longer bound the permanent Court of Appeal. Nevertheless, the Application of English Law Act 1993 also states that the common law of England (including equitable rules and principles), which was part of Singapore law immediately before the commencement of the Act, continues to be part of Singapore law subject to such modifications as the circumstances in Singapore may require. In practice, after 1993, English contract and commercial decisions are invariably cited by counsel in court, overwhelmingly accepted as persuasive and routinely applied to like effect by the courts.[16]

[13] E Örücü, 'Law as Transposition' (2002) 52 ICLQ 206–7. See also M Langer, 'From Legal Transplants to Legal Translations' (2004) 45 HJIL 1, discussing post-transplant evolution in the context of plea bargaining in criminal trials.

[14] See generally, ABL Phang, *The Development of Singapore Law* (Butterworths 1990).

[15] (Cap 7A, 1994 Rev Ed).

[16] One rare exception in the law of contract is the Singapore Court of Appeal decision in *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2005] SGCA 2; [2005] 1 SLR 502 which rejected the position in the English Court of Appeal decision on equity's jurisdiction in the case of unilateral mistake in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689. Another is the recent rejection of Lord Hoffmann's approach to remoteness of loss in *The Achilleas* [2008] UKHL 48; the Singapore Court of Appeal in *MFM Restaurants Pte Ltd v. Fish & Co Restaurants Pte Ltd* [2010] SGCA 36; [2011]

So much so that Phang, now a Supreme Court judge, lamented extra-judicially and at length the impoverished character of Singapore common law as a 'poor carbon copy' of the received English law, its 'slavish adherence to English law', and the consequent dearth of local 'crop' produced by imported English law.[17] The Singaporean cases examined in the next section can be conceived as contradicting Phang's diagnosis. Alternatively, they can be made consistent with it on the basis that they relate to the *application*, rather than the statement of, the applicable law, or that they evince the development of a local approach post-1993.

A. Case Study: Undue Influence and Family Guarantees

The question is whether a lender can enforce a guarantee given by a family member (typically the wife or child) of the primary debtor (or of his company) where that guarantee is tainted by the primary debtor's undue influence? In this important area, located on the border of the private and commercial spheres, the House of Lords in *Royal Bank of Scotland v Etridge*[18] sought to lay down, for England and Wales, 'clear, simple and practically operable' minimum requirements, which, if followed in the ordinary case without abnormal features, would ensure the enforceability of the guarantee.[19] Accordingly, a guarantee is *un*enforceable if: (1) some vitiating factor affects the dealing between the guarantor and primary debtor, most commonly undue influence; (2) the lender knows that the guarantor is not acting commercially (ie for consideration) and knows that the transaction is for the benefit of the primary debtor or his company; and (3) the lender has not taken reasonable steps to ensure that the guarantor was properly advised. In usual situations without any special features (such as evidence that the lender knows of (1) or the heightened risk of (1)), the lender is protected if it ensures that a legal advisor certifies that the non-commercial guarantor understands what he or she is doing.

Our particular interest lies in the finding of undue influence in this context. The undue influence doctrine responds to the exploitation of a relationship of influence to obtain an undue advantage.[20] The recent refinements by *Etridge* substantially preserve the two categories as set out in *Allcard v Skinner*,[21] although they are now regarded as alternative ways of proving the single

1 SLR 150, preferring the traditional approach set out in *Hadley v Baxendale* [1854] EWHC Exch J70.

[17] Phang (n 14) 6, 63, 84, 151.

[18] *Royal Bank of Scotland v Etridge* [2001] UKHL 44, [2002] AC 773.

[19] ibid [2].

[20] ibid [6]–[7]; see also R v Attorney-General for England and Wales [2003] UKPC 22 [21].

[21] *Allcard v Skinner* (1887) LR 36 Ch D 145, 171; See also *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 953 (BCCI *v Aboody*); *Barclays Bank v O'Brien* [1994] 1 AC 180 HL, 189–90.

category of undue influence.[22] First, it can be established by evidence of the primary debtor's exercise of overt pressure, which (in the context of the parties' relationship of influence – ie of trust and dependence) induces the guarantor's consent to the contract (this is the old 'Class 1 actual undue influence')[23]. Second, undue influence can be 'inferred' from the parties' relationship of influence where the resulting transaction 'calls for an explanation' (this is the old 'Class 2 presumed undue influence');[24] the inference stands if the primary debtor *fails* to rebut the evidential presumption, normally by proof that the guarantor was emancipated from the undue influence through receiving independent advice. All of this has been accepted as the law of Singapore; the majority of recent decisions[25] cite either *Etridge* itself or its precursor, *Barclays Bank v O'Brien*.[26] Only one case expresses any doubt, and that doubt relates to the burden imposed on the lender at (3), rather than the definition or scope of undue influence.[27] Yet, despite the formal concurrence, a comparison of the reasoning and outcomes of English and Singaporean cases reveals a stark practical divergence.

We start with the English cases. The venerable old case of *Allcard v Skinner*[28] is often taken as the classic example of inferred undue influence. There, the claimant, a young woman, took a vow of poverty, chastity and obedience and eventually joined a convent as a full member. The rules of the convent forbade the nuns from seeking outside advice without the permission of the Mother Superior, and imposed the most absolute submission by the nuns to the Mother Superior who was to be regarded as the 'voice of God'. The claimant gave her very substantial inheritance to the Mother Superior. Years later, she decided to leave the order and sought the return of what was left of her transfer. The court found presumed undue influence from the relationship

[22] *Etridge* (n 18) [13], [16], [17].

[23] *Allcard v Skinner*, (n 21), (at 171) sets out two categories of undue influence, which, despite the refinements by *Etridge*, remain substantially intact. These categories are affirmed in *BCCI v Aboody*, (n 21), at 953 and *Barclays Bank v O'Brien*, (n 21) at 189–90. In class 1 cases the claimant can prove that the defendant's positive application of pressure induced his consent to the contract.

[24] In class 2 cases undue influence is presumed from the claimant's proof that: (a) she was in a 'relationship of trust and confidence' with the defendant (Class 2A covers specified relationships where the influence is automatically presumed, class 2B describes relationships outside Class 2A where the existence of influence must be *proved*), and (b) the resulting transaction is manifestly disadvantageous to the claimant. It is then up to the defendant to rebut the presumption by proof that the claimant nevertheless entered the transaction freely (usually by evidence of the presence of independent advice).

[25] eg *Rajabali Jumabhoy & Ors v Ameerali R Jumabhoy & Ors* [1997] 3 SLR 802; *Overseas-Chinese Banking Corp Ltd v Chng Sock Lee & Anor* [2001] 4 SLR 370; *Bank of India v Sujanani Thakur Rochiram & Ors* [1999] SGHC 185; *Standard Chartered Bank v Uniden Systems (S) Pte Ltd* [2003] 2 SLR 385; *Malayan Banking Bhd v Hwang Rose and others* [1997] SGCA 10; *ING Bank NV v Inselatu Co Pte Ltd & Ors* [2000] SGHC 81; *Susilawati v American Express Bank Ltd* [2008] 1 SLR 237, [2007] SGHC 179; *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong and Another (Committee of the Estate of Pang Jong Wan, Mentally Disordered) and Others* [2005] 2 SLR 694; [2005] SGHC 61; *Bank of East Asia v Mody Sonal M* [2004] 4 SLR 113.

[26] *Barclays Bank v O'Brien* (n 21).

[27] *ING Bank NV v Inselatu Co Pte Ltd* (n 25), [21].

[28] *Allcard* (n 21).

of influence and the 'transaction calling for an explanation', which the Mother Superior could not rebut because the nun had not received independent advice before the transfer. In the guarantee case of *Royal Bank of Scotland v Coleman*,[29] the court inferred undue influence in the Hasidic Jewish cultural context[30] where the wife's 'upbringing and education . . . prepared her principally for marriage within her own religious community and for a life of subservience to the wishes of her husband . . . her husband's wishes and judgment in matters of finance and business were to be followed without question.'[31] She was 'not merely disinclined to second-guess her husband on matters of business, but appears to have regarded herself as obliged not to do so.'[32] In *Bank of Scotland v Bennett*[33] the husband used wounding and insulting language to accuse his wife of disloyalty in contrast to the loyalty of his relatives. He said she would be a 'waste of rations' if she did not guarantee his business debt and would be splitting up the family. The judge found actual undue influence in the 'moral blackmail amounting to coercion and victimisation'.[34] Likewise, actual undue influence was found in *BCCI v Aboody*.[35] The parties were Iraqi Jews and observed its customs, according to which business was the husband's exclusive province; the wife was confined to the domestic sphere and expected to obey her husband without question.[36]

The contrast with the consistent reasoning and outcomes in Singaporean family guarantee cases is stark. In *Overseas-Chinese Banking Corp v Chng Sock Lee & Anor*,[37] the father/husband, a property developer, obtained the guarantee of his wife and 23-year-old son for the liabilities of the company he ran, amounting to some S$5.5 million. The court found the father to be a man of 'ungovernable temper' who was occasionally violent to his wife. He also abused the son verbally in 'a cruel and unusual manner', causing the son to burn himself with cigarettes to forget the mental pain his father inflicted on him. The judge said that it was heart-rending to hear evidence of the father's exceptional harshness and accepted that mother and son were fearful of him: 'the father had firmly told them to sign the guarantee without asking too many

[29] Reported in *Etridge* (n 18), [4], [90], [123], [130], [282]–[293].
[30] ibid [130], [284], [291]. [31] ibid [284]. [32] ibid [291].
[33] Reported in *Etridge* (n 18) [4], [90], [97], [123], [131], [310]–[351].
[34] *Etridge* [312].
[35] *BCCI v Aboody* (n 21); the court declined relief because it found that the wife would have agreed even if the husband had insured that she fully understood the risks. The flaw in this reasoning is that it obstructs the finding of undue influence in the cases where it is most needed. See (n 57–8) below.
[36] The bank insisted on offering the wife independent advice in the absence of her husband. While this was happening, the husband burst into the room in a high state of excitement and said, 'Why the hell don't you get on with what you are paid to do and witness her signature?' There followed a scene which reduced the wife to tears. The advisor certified that the wife understood the transaction, but added: 'Husband is a bully. Under pressure and she wants peace.' A further attendance note read: 'Both our proposals were rejected out of hand by your husband . . . Your husband very rude and overbearing but you seemed to be quite content to submit and expressed your confidence in the business.'
[37] *Oversea-Chinese Banking Corp v Chng Sock Lee & Anor* (n 25).

questions'.[38] Nevertheless, the court found *no* undue influence because: (a) the father meant the best for family ('There was no rhyme or reason why the father should have wanted to exploit them or victimise them. On the contrary, the father was exerting himself to promote the interest of the family and of the son');[39] (b) the wife and son were the formal owners of the company; (c) they knew what they were doing; (d) the lender, through its solicitor who dealt with the wife and son, need not advise them to obtain independent advice because she 'did not know of any undue influence or of any circumstance which ought to have alerted her';[40] she 'did not witness any pressure'[41] and 'the transaction had no unusual features'; there was no 'manifest disadvantage'.[42] In *Bank of East Asia v Mody Sonal M*,[43] the daughter signed the guarantee after her father became very angry and told her that, if she did not, 'she would be responsible for the loss of everything he had worked for, and it would be *her* fault.'[44] The court found *no* undue influence because: (a) 'the father did not appear to be the imperious head of household that he was made out to be. Indeed, . . . he appeared to be more a lamb than a lion';[45] in any case, it would 'be an exaggeration to castigate the father's conduct as undue influence' because 'There must be . . . some unfair or improper conduct, some coercion or some form of misleading';[46] (b) the daughter was a shareholder and so stood to benefit; (c) the daughter knew what she was doing, she has an MBA from the US and 'is no babe in the woods';[47] (d) the bank was not 'put on inquiry' and need not take steps to satisfy itself that the guarantee was properly obtained since the daughter was a shareholder.[48] In *Standard Chartered Bank v Uniden Systems (S) Pte Ltd*,[49] the guarantee was enforced against the wife because: (a) she was a director of the company and the husband's business was the source of the family income – it was in her interest to give the guarantee;[50] (b) the wife had a university degree and knew she was signing a guarantee;[51] even if she had known that it exposed her to unlimited liability (she did not), she would still have agreed because 'she willingly accepted [her husband] Tan's dominance of her, trusted Tan and had complete faith in him, and did not think that Tan would put her in a risky position';[52] and (c) there was nothing out of the ordinary in the couple's relationship to warrant the Bank conducting further investigations before the signing of the guarantee,[53] 'the Bank's representatives did not perceive any intimidation or overbearing or bullying conduct'.[54]

[38] ibid [14]. [39] ibid. [40] ibid [16]. [41] ibid [15]. [42] ibid [15], [17].
[43] *Bank of East Asia v Mody Sonal M* (n 25); see also *Gan Cheng Chan v Gan Meng Hui*.
[44] *Bank of East Asia v Mody Sonal M* [18]. [45] ibid [12]. [46] ibid [19].
[47] ibid [17]; see also *Orix Capital Ltd v Personal Representative(s) of the Estate of Lim Chor Pee (deceased)* [2009] SGHC 201, [2009] 4 SLR 1062, [81]–[85]. [48] ibid [12].
[49] *Standard Chartered Bank v Uniden Systems (S) Pte Ltd* (n 25).
[50] ibid [72]. [51] ibid [68]. [52] ibid [70]–[71], [73].
[53] ibid [74]. [54] ibid [69].

It is evident that Singaporean courts are averse to finding undue influence against the husband/father in the family business guarantee situation and this has twisted the interpretation of the doctrine from the way it is applied in English cases. First, the Singaporean cases insist on a rather literal 'reprehensible conduct' view of undue influence, requiring bad conduct *and* bad faith; its effect is to do away with the category of inferred or presumed undue influence. In contrast, there is no requirement of bad conduct or bad faith to infer undue influence in English law.[55] Second, undue influence is ousted in the Singaporean cases if the guarantor understands what she is signing (or does not understand but would have signed even if she did because she has unquestioning trust in the primary debtor and accepts his dominance). In contrast, these factors do not oust undue influence in English law since the gist of undue influence is not lack of understanding but lack of independent consent.[56] Indeed, a claimant who refuses to obtain, or follow contrary, advice in systematic deference to the primary debtor is just the sort of person who is most in need of the protection of the undue influence doctrine.[57] For example, in *Bank of Montreal v Stuart*,[58] it was said that the wife was 'absolutely cleaned out' by acting as surety for her husband; 'She says she acted of her own free will . . . and that she would have scorned to consult anyone. . . . Her declarations . . . shew how deeprooted and how lasting the influence of her husband was'. Third, the fact that the guarantor is a shareholder or director of the company, or is likely to derive a benefit from the primary debtor's business is sufficient to oust undue influence in Singaporean law; it means that there would be no 'transaction calling for an explanation' and so nothing to put the lender on notice of the need to take extra steps to ensure that the guarantor is properly advised. In contrast, the fact that the guarantor may potentially benefit from the transaction is insufficient in itself to save it from being set aside in English law.[59] *Etridge* makes clear that the transaction may 'call for an explanation' even if the guarantor is the director or shareholder of the company, because these formal roles are not reliable indicators of the guarantor's real involvement in the conduct of the business.[60]

[55] Despite frequent use of words like 'impropriety', 'abuse', 'betrayal', 'wrong-doing', 'reprehensible', 'fault' Arden LJ has confirmed in *Jennings v Cairns, In the Estate of Davidge* [2003] EWCA Civ 1935 (at [40]) that 'the fact that the conduct of the person exercising influence is unimpeachable is not by itself an answer to a claim in undue influence'.

[56] *Etridge* (n 18) [20]; however, the court also said, *obiter*, at [159], that a wife's support is the 'natural and admirable consequence of the relationship of a mutually loyal married couple', it is readily explicable in terms of her normal trust and confidence in her husband. In *Allcard v Skinner*, (n 21), the nun knew what was expected of her before she joined the sisterhood (her mother and barrister brother had opposed her action). The judges recognized that everything she did came out of her own willing submission and enthusiastic devotion to the life and work of the sisterhood. Nevertheless, the doctrine protects her.

[57] *Credit Lyonnais Bank Nederland v Burch* [1997] 1 All ER 144 CA.

[58] *Bank of Montreal v Stuart* [1911] AC 120, 137.

[59] *O'Brien* (n 21).

[60] *Etridge* (n 18) [48]–[49].

The natural question is whether this difference in the interpretation of the same law can be explained. To answer this question, we need to identify the factors that are relevant to the reception and development of this transplanted law. These will be examined under the headings of: B. Receptivity to the transplant; C. The formal legal order of the recipient legal system; D. The informal legal orders of the recipient systems; and E. The nature of the transplanted law.

B. Receptivity to the Transplant

The divergence in the application of the undue influence doctrine is something of an aberration in Singaporean contract and commercial law, which, as noted above, is largely based on the English common law system as a legacy of colonialism. This successful transplant of English law strongly supports the Watson thesis.[61] It is partly the result of global economics.[62] In the field of international commerce and investment, there is clear incentive to borrow law and legal institutions from systems with high political reputation, high legal prestige, ease of access, and shared language. Borrowing and harmonizing with English contract and commercial law serve Singapore's aspiration of being an international commercial hub, inspires confidence in those doing business in Singapore, and creates a positive economic climate for foreign investors primarily by securing their property and contractual rights.[63]

C. Similarity of the Formal Legal Orders

The familiarity of the receiving system with the formal legal order of the originating system increases the success of the legal borrowing. This, in turn, depends on the similarity of the local legal institutions with that of the donor, and on the training and experience of local lawyers.[64] Observance of the received law rests on the latter's knowledge and understanding of not only the rules, but also of the concepts, value judgements and norms underlying them that influence their interpretation. On this point, of course, there can be variation in the interpretation of a rule even within one legal system.

[61] A Harding, 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart 2001) 199.

[62] A Harding, 'Global Doctrine and Local Knowledge Law in South East Asia' (2002) 51 ICLQ 51–2; Watson, 'Comparative Law and Legal Change' (n 6) 327.

[63] D Berkowitz, K Pistor and JF Richard, 'The Transplant Effect' (2003) 51 AJCL 164; see also Örücü (n 13) 214. According to The Singapore Academy of Law overview of the Singapore legal system (at section 1.3.1): 'Singapore has inherited the English common law tradition and thus enjoys the attendant benefits of stability, certainty and internationalisation inherent in the British system (particularly in the commercial sphere).' See Singapore Academy of Law, 'Overview' in *The Laws of Singapore* (2012) <http://www.singaporelaw.sg/content/LegalSyst1.html#Section3> accessed 23 March 2012.

[64] Watson, *Society and Legal Change* (n 3) 98ff.

Otherwise, jurisdictions would not need several levels of courts and a Supreme Court to ensure the uniform interpretation and application of the law.

Singapore scores highly on similarity and familiarity with the originating formal legal order. It has adopted not only English legal institutions based on the common law, but also the English language as the official language for business, legal and government purposes.[65] Most judges and lawyers in Singapore are either trained in England or in Singapore. The local law schools teach in English, use predominantly English textbooks and are steeped in the English common law tradition. The law that emerges, in form and in substance (the rules and their application), will be strongly influenced by the knowledge of this legal elite, by its training and by its experience of the world and of legal ideas.[66]

This supports Watson's 'insulation thesis' in explaining the apparent ease of legal transplant. Namely, the idea that a legal system is shaped by its elite priesthood of legal professionals who share certain peculiarities: they look principally to the legal tradition itself, which is conservative and backward-looking in its demand for authority, precedent, and legal justifications.[67] In this sense, the legal elite and the law they construct, develop, preserve and interpret, are 'insulated' from external factors such as culture, economics and politics. This explains the separate evolutionary paths of different sectors of society, including law. The 'inner logic of legal discourse . . . builds on normative self-reference and recursitivity and thus creates a preference for internal transfer within the global legal system as opposed to the difficult new invention of legal rules out of social issues'.[68] Thus, the law tends to reflect the legal tradition rather than anything extrinsic to it, and the legal community leans towards transplantation rather than new creation. Watson notes that: 'Legal rules, once created, live on. They are frequently remote from the experience and understanding of non-lawyers, and are kept in existence by factors such as the absence of effective machinery for radical change, indifference, the jurisdiction's preoccupation with technicalities, and lawyers' self-interest.'[69] Nevertheless, external factors cannot be excluded altogether. Beyond the sterile obsession with the debate over cultural dependency *versus* legal insulation, or social context *versus* legal autonomy, the more important question is whether, and if so how, particular transplanted law *develops* in reaction to external pressures from culture and society.

[65] S Glanert 'Speaking Language to Law: The Case of Europe' (2008) 28 Legal Studies 161 emphasizes the importance of common language, but also of local character and legal experience, for any uniformization (harmonization) of laws.

[66] Phang (n 14) 66–71, 118–60.

[67] See P Glenn, 'A Concept of Legal Tradition' (2008) 34 Queen's Law Journal 427.

[68] Teubner (n 8) 16.

[69] Watson, *Society and Legal Change* (n 3) 8; see also Watson, 'Comparative Law and Legal Change' (n 6) 315; Ewald (n 4) 499–500.

D. Similarity in the Informal Legal Orders

The third factor affecting the success of legal borrowing, then, relates to how closely the transplanted rule interlocks with (or grates against) the recipient society's informal legal order. Just as the law is not entirely insulated from society, neither is it always tightly interlocked with society; some areas of law are more intimately embedded in society than others; it is a matter of degree.[70] In Teubner's words, law's contemporary ties to society are 'highly selective and vary from loose coupling to tight interwovenness'; '[t]hey are no longer connected to the totality of the social, but to diverse fragments of society.'[71] The governance structure of most societies includes both its formal and informal legal orders. The latter comprises the internalized norms or conventions or customs or collective value systems that define what is good and bad, acceptable and unacceptable, desirable and undesirable, important and unimportant in a cohesive social group.[72] These norms are enforced informally, through social sanctions, including reputation effects, mutual monitoring and self-sanction.[73] This collectively shared value system shapes attitudes and behavioural norms. The more compatible the transplanted law is with the pre-existing social and economic conditions, the more likely it is to be well received and applied to like effect. As Sunstein observes: 'the meaning of legal statements is a function of social norms and not of the speaker's intention'.[74] Where there is a substantial mismatch between the transplanted law and the pre-existing social conditions of the recipient culture, the local legal actors have to work out how to apply a rule developed in a foreign and fundamentally different socio-economic order to its own local circumstances.[75]

Singaporean constitutional law, criminal law and labour law diverge significantly from their English counterparts,[76] while its family law was consciously adapted to local conditions.[77] In contrast, we have noted the general success of transplanting English contract and commercial law into the Singaporean context. However, the law on undue influence and non-commercial guarantees bears down on a special point of connectivity with Singaporean culture, namely at the interface between business and the family.

[70] See O Khan-Freund, 'On Uses and Misuses of Comparative Law' in Khan-Freund, (ed), *Selected Writings* (Stevens 1978) 298ff. He distinguishes between legal institutions that are effectively insulated from culture and society ('mechanical') and those that are culturally deeply embedded ('organic').

[71] Teubner (n 8) 18.

[72] JS Coleman, *Foundations of Social Theory* (Harvard University Press 1990) 243; C Sunstein, 'Social Norms and Social Roles' (1996) 96 ColumbLRev 903.

[73] Berkowitz, Pistor and Richard, 'The Transplant Effect' (n 63) 176.

[74] C Sunstein, 'On the Expressive Function of Law' (1996) 144 UPaLRev 2050.

[75] Berkowitz, Pistor and Richard, 'The Transplant Effect' (n 63) 177; A and RB Seidman, 'Drafting Legislation for Development: Lessons from a Chinese Project' (1996) 44 AJCL 1.

[76] Harding (n 61) 213; Phang (n 14) 93.

[77] See Singapore's Women's Charter 1961, Ordinance No. 18 of 1961; now Cap. 353, 2009 Rev. Ed.

The resulting moment of deviation from the English interpretation of the relevant law should engage the curiosity of comparative lawyers. What differences between the soil from which undue influence has been grafted and the soil into which it has been planted may help to account for the difference in application and development? To answer this question we need local knowledge[78] of the nature of Singaporean culture and value systems.

The task of describing the culture and value system of Singapore is fraught with risks, not least that of oversimplification.[79] All cultures contain multiple overlapping, and contradictory strands that, moreover, change over time. This is particularly so in Singapore's complex and pluralistic society. There is wide ethnic,[80] religious[81] and linguistic diversity[82] that, moreover, are not delineated according to skin colour or ancestry. There is an entire spectrum of views to be found in a society that is undergoing rapid transition and care must be taken to avoid making excessively stark claims. Nevertheless, while different strains are detectable in every society, certain ones may still be dominant and represent noteworthy centres of gravity.

The starting point is that 75 per cent of Singaporeans are ethnically Chinese and Confucianism is recognized as the basis of Chinese culture and social organization.[83] Confucianism is a perfectionist virtue ethic,[84] a world-view, a social ethic, a political ideology, a scholarly tradition, and a guide to proper behaviour.[85] It is all-embracing, being built into the heritage of language, ritual and tradition. Its aim is the realization of the conception of the good society: a harmonious and hierarchical social order in which everyone knows and observes their proper stations. Confucianism is not only synonymous with traditional Chinese civilization, but also with what it means to be Chinese; the Chinese in Singapore are no exception.[86] Formal adherence to some Confucian

[78] Harding (n 62) 49.

[79] N Englehart, 'Rights and Culture in the Asian Values Argument: the Rise and Fall of Confucian Ethics in Singapore' (2000) 22 HRQ 548.

[80] In 2009, the government census reports that 74.2 per cent of residents were of Chinese, 13.4 per cent of Malay, and 9.2 per cent of Indian descent, 'Population Trends 2009'; see Singapore Department of Statistics, 'Census of population 2010: Statistical Release 1 on Demographic Characteristics, Education, Language and Religion' (Press Release, 12 January 2011).

[81] Buddhists comprise 33 per cent, 17 per cent have no religion, 13 per cent Christians, 15 per cent are Muslims, 11 per cent are Taoists, 5.1 per cent are Hindus and 0.9 per cent are other beliefs; ibid.

[82] First language speakers are 50 per cent Chinese, 32.3 per cent English, 12.2 per cent Malay and 3.3 per cent Tamil. English is the first language of the nation and is the language of business, government and medium of instruction in schools. The Singapore constitution and all laws are written in English. Of Singaporeans 80 per cent are literate in English as either their first or second language; ibid.

[83] Wei-Ming Tu, 'Confucius and Confucianism' in WH Slote and GA DeVos (eds), *Confucianism and the Family* (State University of New York Press 1998)

[84] Its focus includes virtuous character traits necessary for living a good life and particular modes of ethical reasoning.

[85] Wei-Ming Tu (n 83) 3.

[86] WH Slote, 'Psychocultural Dynamics within the Confucian Family' in Slote and DeVos (n 83) 38.

practices, particularly those that are incompatible with industrialization and urbanization, have declined (for example, aspects of ancestor worship and the strong preference for sons). However, other aspects of Confucianism, particularly on interpersonal relationships and ethical values, are still alive and flourishing. The core values of filial piety and kinship ties remain strong among the Chinese Singaporeans, albeit given new interpretations and expressions in the new social conditions. Thus, cultural evolution reinforces cultural continuities.[87]

The argument here is *neither* that Confucianism is the only factor in play, *nor* even that it is a self-conscious factor in play. Rather, it is that Confucianism helps to explain the *roots* of overlapping and mutually reinforcing tendencies that can contribute to our understanding of the way that undue influence, a doctrine developed in a very different cultural context, manifests in Singapore. For the purposes of exposition, these tendencies are presented in contrasts to broadly 'Western' values; namely: hierarchy versus equality; the positional versus the personal; and collectivism versus individualism. We will then see how these Confucian values are played out in Chinese family businesses and consciously embraced in Singaporean public policy.

1. Hierarchy versus equality

In very general terms, social harmony is sought in the West via a system of individual rights protected by law. The emphasis is on that which can be ratified by agreement among equals.[88] In contrast, Confucianism seeks social harmony by a system of obedience to reciprocal duties; a comprehensive code of conduct based on a hierarchy of generational sequence, age, and gender.[89] People of the older generation are superior to those of the younger; within each generation, the elder are superior to the younger; men are superior to women;[90] and the oldest male is superior to everyone because he is superior in generation, age and gender. This hierarchy defines an individual's status, role, privileges, duties and liabilities within the family order. The family is then viewed as the prototype of all social organizations, a metaphor for community, country and universe.[91]

[87] EC Kuo, 'Confucianism and the Chinese Family in Singapore: Continuities and Changes' in Slote and DeVos (n 83) 244–6.

[88] Hence the widely accepted idea of the social contract as the basis of political authority, famously found in Hobbes' *Leviathan* (1651), Locke's *Second Treatise on Government* (1689) and Rousseau's *Du Contrat Social* (1762); and more recently, Rawls' idea of what can be agreed from the original position behind the veil of ignorance in *Theory of Justice* (Belknap Press 1971).

[89] Where you are in the hierarchy is expressed in an elaborate terminology of titles and honorifics that ensures everyone knows exactly where they stand in relation to everyone else.

[90] Traditionally Chinese women are expected to obey their fathers before marriage, their husbands after marriage, and their sons after their husbands die.

[91] Kuo, 'Confucianism and the Chinese Family in Singapore: Continuities and Changes' (n 87) 231.

Filial piety is considered the foundation of all virtue, an immutable part of nature's way and a fact of life to which all must submit totally.[92] The father-son relationship is the point of reference to which all other relationships are extensions or supplements. It is, of course, true that many cultures emphasize the importance of honouring one's parents, and it is not difficult to find analogies within Western society.[93] However, the Confucian tradition is unusual in the stringency of the duties spelt out towards parents. Its most salient feature is the subordination of the world and welfare of each individual to the world and welfare of his or her parents. Children, especially sons, must please, support, and submit to the parents, particularly fathers.[94] In its most stringent form, the son can persuade but not oppose,[95] and should hide the wrongdoing father even from the state.[96] Jordan observes that: 'The nearly universal Chinese view . . . is that concern with filial piety is a most, or more likely *the* most, conspicuous feature of the Chinese moral system and hints at the centre of Chinese behaviour and ideals'.[97] While Western culture contains similar elements of gratitude towards those from whom one has received great benefits, they do not necessitate agreement on the centrality and stringency of the duties evident in the Confucian tradition. Important kinds of moral difference, then, may consist in those differing emphases given to values that are shared across different cultural traditions.

The duty of all to conform to the order of relationships for the sake of maintaining harmony engenders patriarchy and behaviour characterized by authoritarianism and obedience.[98] Historically, Western patriarchy is also characterized by the authoritarian control of household members and of property, the symbolic connection with family ancestors, and the state's support of patriarchal powers. However, China was more patriarchal and remained that way long after the West left patriarchalism behind.[99] Indeed, Hamilton notes that Confucianism spelt out the duties of obedience much more

[92] GG Hamilton, 'Patriarchy, Patrimonialism, and Filial Piety: A Comparison of China and Western Europe' (1990) 41 British Journal of Sociology 77.

[93] It is the fifth of the Ten Commandments in Christianity, Exodus 20:1–21, and Deuteronomy 5:1–23.

[94] The *Analects* 2.6 says to give parents no cause for anxiety; 2.7, emphasizes the need for the material support of parents to be carried out in a respectful manner; 2.8 emphasizes that it is the expression on one's face that is filial and not just taking on the burden of work or letting elders partake of the wine and food before others.

[95] If the child believes that parents are wrong and their wishes run contrary to what is right or good, *Analects* 4.18 says that one should remonstrate with them gently. Most translations have Confucius concluding that if parents are not persuaded, one should not oppose them (eg Dim Cheuk Lau (Penguin 1979); Edward Slingerland (Hackett 2003); Arthur Waley (MacMillan 1938)).

[96] *Analects* 13.18, in which Confucius says that uprightness is found in sons and fathers covering up for each other. In this case, at least, loyalty to parents or to children takes precedence over loyalty to ruler or to public justice.

[97] DK Jordan, 'Filial Piety in Taiwanese Popular Thought' in Slote and DeVos (n 83) 268.

[98] Slote (n 86) 37.

[99] Hamilton (n 92) 85.

rigidly and stringently for the *later* periods, during which violations were viewed as highly unacceptable, unethical and morally evil.[100]

2. The positional versus the personal

The second feature of Confucianism highlighted here reinforces the first feature. The West places primary importance on the *person* and his or her uniqueness;[101] the person is the subject of its most significant ideas such as salvation, freedom, reason, contract, and love. In contrast, Confucianism places primary importance on conformity to positional *roles* and demotes the importance and the legitimate sphere of individual discretion or differences. The concept of an individual right is alien in Chinese tradition. This is a difference of kind and not simply in degree. While Western patriarchy emphasizes the superordinate's authoritative *power*, Chinese patriarchy emphasizes the subordinate's *duty* of obedience, elaborates role obligations that signify this submission, and restricts legitimate acts of power. This conception of roles permeates every sphere of Chinese society, in the same way that individuality and law permeates Western society. Consistently, Confucian ethics puts great emphasis on the importance of ritual in the ethical cultivation of character and endows it with an aesthetic dimension.[102] It is partly constitutive of a fully human life, which should be lived as a graceful co-ordinated interaction with others according to conventionally established forms, a 'dance' that one performs with others.[103]

Bellah[104] helpfully contrasts the nature of father-son relationships in Christian and Confucian cultures. Historically, the father's legitimate earthly domination in Western societies was derivative in nature; in the last analysis, God alone exercises power. Hence, power was personal even though a person occupied a role. Power was seen as the intentional acts of individuals acting within the boundaries of their jurisdictions. Disobedience to earthly fathers could be justified in terms of the will of God, as children and subjects have done for millennia. In theory, roles were always social facades that people

[100] Children could be prosecuted for being unfilial and, in the last dynasties, fathers would go unpunished if they killed their sons for being unfilial, even if they did so inhumanely. The same trend in legal severity is true for the husband's power over his wife, ibid 86–7.

[101] ibid 92.

[102] *Analects* 1.15 likens the project of cultivating one's character to crafting something fine from raw material: cutting bone, polishing or grinding a piece of jade. In this project, ritual plays a central part. This includes the ceremonies of ancestor worship, the burial of parents, and the rules governing respectful and appropriate behaviour between parents and children. All to be done with the right attitude, in the right manner and without internal conflict until it becomes second nature.

[103] CK Ihara, 'Are Individual Rights Necessary? A Confucian Perspective' in Kwong-loi Shun and DB Wong (eds), *Confucian Ethics: A Comparative Study of Self, Autonomy, and Community* (Cambridge University Press 2004) 11, 30.

[104] R Bellah, 'Father and Son of Christianity and Confucianism' in R Bellah (ed), *Beyond Belief* (Harper and Row 1970) 76.

could reject with self-righteous disobedience. This led to the systematization of conflicting powers or jurisdictions and to a modern legal framework regulating the 'free' will of individuals.[105]

In contrast, the Confucian conception of the father-son relationship recognizes no transcendental source legitimizing the father's earthly authority. Instead, it is justified in terms of the inherent correctness of harmony among hierarchically arranged players extended to an increasing range of social situations. This leaves no point of leverage from which disobedience to parents can be justified.[106] It led to no institutionalized concept of conflicting wills, nor of personal rights as such. On this view, power and the corresponding obedience are, in theory at least, not personal but positional in nature. Accordingly, unlike the West where love is the prescribed emotion between family members, in Chinese societies it is respect, which requires no personal involvement, while not precluding it.[107] Submission was not in the last analysis to persons, but to a pattern of personal relationships that is held to have ultimate validity[108] as part of the 'eternal principle of the cosmos from which there is no escape'.[109] Non-observance threatens disaster, corruption and disorder.

All societies must try to reconcile the tensions between persons and the part each society would have them play, between individual will and social responsibility. Of course, it would be crude to suggest that the Chinese stressed only roles whereas the West stressed only persons. However, the different ways that Chinese and Western thinkers resolved these tensions are clearly significant.

3. Collectivism versus individualism

The West emphasises the moral worth and rights of the individual; autonomy is its key concept. In contrast, Confucianism emphasises the importance of kinship relationships, mutual dependence and the maintenance of the security and well-being of the collective over individual interests. The family is the first arena in which care, respect, and deference to legitimate authorities is learned.[110] The proper way to enhance personal dignity and identity is to cultivate meaningful relationships with one's family[111] by observing the largely codified duties attached to each relationship. The individual is insignificant without the family and wider community. The family, not the

[105] Hamilton (n 92) 96.
[106] Bellah (n 104) 84.
[107] Hamilton (n 92) 77, 94–6.
[108] Bellah (n 104) 94.
[109] From Cheng Hao (AD1032–1085) quoted in Dau-lin Hsu, 'The Myth of the "Five Human Relations" of Confucius' (1970–71) 29 Monumenta Serica 27, 33.
[110] *Analects* 1.2.
[111] The Chinese have very elaborate kinship terminology system for properly addressing the person with whom they interact. All relatives have a specific title: Father's eldest brother, second maternal aunt, third younger paternal uncle's wife and so on.

individual, is the basic unit of society and the prototype of all social organizations, a metaphor for the community, the country, and the universe.[112] It is no accident that the Chinese write their surnames name first followed by the given name.

Slote observes that those growing up in a Confucian culture show an ego-structure and self-image that is based upon the concept of the integrated family:[113]

> It is a matter of soup versus a slice of pie. In the West we tend to regard ourselves as one part of the whole, that is, a slice that is related to the other but maintains his/her individuality. In the East, on a deeply buried unconscious level, one is part of a vast barley or lentil soup in which the ingredients swirl around each other and in which one's identity and sense of self is inextricably established only within the context of the whole. Autonomy as defined in the West and as a personal, culturally supported call, is essentially inconceivable for most East Asian societies . . .. The individual is not an 'I', rather he/she is an inextricable part of an encompassing 'we'.

The priority of the collective interest (whether family, group, organization or the whole society) means that personal preferences and activities should not disrupt harmonious social relationships or damage the underlying hierarchical social structure without which the family cannot stand, the community disintegrate, and society collapse. The individual is encouraged to make sacrifices for the good of others and the community, to show self-restraint in pursuing personal interests, and to be self-effacing in interactions with others. Unity is essential when confronted with hardships; individual competitiveness is selfish; transgressions of social mores dishonours the family.[114] The imperative to conform to group norms makes shame a more effective control technique than guilt, a more personal and Western concept.

It should be emphasized that while the Confucian framework brought great power to superordinates, it also rewarded the passive acceptance of the status quo by subordinates in the form of protection and belonging. Kinship networks provide the most important sources of finance and ensure that obligations are honoured. The conception of mutual dependence means that the individual must take the group's interests as part of his or her own interests. However, the group depends on the individual and must make that individual's interests as part of the group's interests. It highlights the distinctively human life of relationships and responsibilities to others.[115] The interaction is one of

[112] Wei-Ming Tu (n 83) 3, 13.

[113] Slote (n 86) 43–4. Hamilton makes the same point by comparing the straw in the haystack with a stone thrown in a lake causing ripples; see Hamilton (n 92) 98–9 citing Fei Xiaotong in a little-known and untranslated book on rural China: *Xiangtu Zhongguo* (Joint Publishing Company 1986).

[114] Slote (n 86) 44.

[115] David Wong, 'Chinese Ethics', *The Stanford Encyclopedia of Philosophy* (Fall edn, 2008) <http://plato.stanford.edu/archives/fall2008/entries/ethics-chinese/> accessed 11 February 2012.

reciprocity: from the inferior, submission, respect, duty, devotion and passivity; from the superior, kindness, care and benign authoritarianism. Confucian ethics is thus a relational ethic; it places relationships at the centre of a well-lived life in contrast to ethics that emphasize individual autonomy and freedom. Given its assumption that the ethical life of responsibility to others and individual flourishing are inextricably intertwined, it cannot recognize rights that defend the interests of the individual *against* group interests. This triggers the frequent criticism that Confucianism fails to provide adequate protection for the individual's legitimate interests that may conflict with community interests. Conversely, the Western focus on autonomy can be criticized for being excessively 'atomistic' or 'individualist',[116] and for ignoring the social nature of human beings. Indeed, there is significant resonance between Confucianism and communitarian philosophies such as those defended by Alasdair MacIntyre[117] and Michael Walzer[118] in giving a much larger role to social practices and customs in the make-up of morality than is typically defended in modern Western philosophy.

4. The Chinese family business

The law on undue influence and non-commercial guarantees lies at the interface between family relationships and business. Families control more than half of the corporations in East Asia. In Singapore, 80 per cent of businesses are family businesses and they are overwhelmingly Chinese.[119] Indeed, ethnic Chinese capital has formed a 'World Wide Web' of business and emerged as a global economic power.[120] The extraordinary growth and success of ethnic Chinese family businesses is recognized as the basis of the economic miracle of the Asian tigers. This has generated research which shows that in both organizational and management behaviour Chinese family businesses in overseas Chinese societies have distinct characteristics influenced by Confucian values,[121] despite inevitable modernization and

[116] H Rosemont, 'Kierkegaard and Confucius: On Finding the Way' (1986) 36 Philosophy East and West 207; H Rosemont, 'Whose Democracy? Which Rights? A Confucian Critique of Modern Western Liberalism' in Kwong-loi Shun and Wong (n 103) 49.

[117] A MacIntyre, *After Virtue: A Study in Moral Theory* (2nd edn, University of Notre Dame 1984).

[118] M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983).

[119] Wee-Liang Tan and Siew Tong Fock, 'Coping with Growth Transitions: The Case of Chinese Family Businesses in Singapore' (2001) 14 Family Business Review 124. The ethnic Chinese share of market capitalization amounts to 81 per cent in Singapore: Lai Si Tsui-Auch, 'The Professionally Managed Family-Ruled Enterprise: Ethnic Chinese Business in Singapore' (2004) 41 Journal of Management Studies 693.

[120] Tsui-Auch, ibid, 696.

[121] See eg G Redding, *The Spirit of Chinese Capitalsim* (de Gruyter 1990); F Fukuyama, 'Social Capital and Global Economy' (1995) 74 Foreign Affairs 89; M Weidenbaum, 'The Chinese Family Business Enterprise' (1996) 38 California Management Review 141; Heh Seow Wah, 'Chinese Cultural Values and Their Implication to Chinese Management' (2001) 23 Singapore Management Review 75.

adaptation.[122] Consistent with the discussion above, they include:[123] the unquestioned authority of the patriarch who is the head of the business; the participation of family members and friends in running the business; the priority of collective interests; the virtues of frugality, hard work, self-effacement and self-sacrifice; the avoidance of conflict and restraint of personal desires and emotions; the concern to preserve relationships; and the treatment of the business as a family, not personal, asset that will benefit everyone and typically pass to the sons. Chinese family businesses will often provide lifetime employment to employees in the absence of major wrongdoing; they are treated as 'honorary' family members. The duplication of the family structure in business merges the life domains of work, family, and friendship, reinforcing the Confucian values in all. Analogies can, of course, be found outside Chinese families and businesses, but they are instrumental rather than deontological in basis.[124]

Research on conflict management in the West tends to assume that decisions are driven by concern for self and for others. Study of the Chinese family business introduces a third set of concerns: preservation of relationships,[125] observance of family and interpersonal norms, and furtherance of collective interests.[126] This explains the tendency, when faced with interpersonal conflicts, to lean against decisions that would upset the accepted norms of dealing, and towards accommodation, avoidance, or compromise.[127]

The significance of these features of Chinese families and family businesses for the family guarantee situation is clear. The demand for right conduct in accordance with one's place in the hierarchical order in furtherance of the collective good heightens the danger of blind unquestioning trust. Refusal to obey the patriarch's requests is difficult, if not impossible for family members and employees.[128] Indeed, the values are so deeply ingrained that a subordinate may find it emotionally distressing to disobey,[129] and, even if inclined to

[122] For example, a shift towards the professionalization of operational management in large firms while retaining control over strategic decision-making within the family patriarchal structure; the demographic trend towards smaller-nuclear families means a decline of large extended business families and an increasing willingness to absorb female members and outsiders into the upper echelon; Tsui-Auch (n 119) 718–19.

[123] eg ibid 695–6; MH Bond and KK Hwang, 'The Social Psychology of the Chinese people' in SG Redding, GYY Wong and MH Bond (eds), *The Psychology of The Chinese People* (Oxford University Press 1986); M Orrú, NW Biggart and GG Hamilton (eds), *The Economic Organization of East Asian Capitalism* (Sage 1997); Jun Yan and RL Sorenson, 'The Influence of Confucian Ideology on Conflict in Chinese Family Business' (2004) 4 International Journal of Cross-Cultural Management 5.

[124] RS Snell, 'Obedience to Authority and Ethical Dilemmas in Hong Kong Companies' (1999) 9 Business Ethics Quarterly 523.

[125] Interpersonal relationships (*guanxi*) are regarded as a long-term investment for future help and support when conducting business or other affairs. Such personal loyalties and commitments take precedence over all others except family; see J Scarborough, 'Comparing Chinese and Western Cultural Roots: Why East is East and . . .' (1998) 41 Business Horizons 15.

[126] Yan and Sorenson (n 123) 5–6.

[127] ibid 11.

[128] Tan and Fock (n 119) 125.

[129] Snell (n 124) 509, 521.

disobey, render him or her highly vulnerable to pressure to conform. These are precisely the gist of undue influence. Western views about 'honest confrontation' and 'clearing the air' are unacceptable. It would cause the superior to 'lose face' by challenging his presumed superiority. Conversely, success of the family business gives 'face' (it glorifies the ancestors and protects the family's good name) and this can lead to distinct reluctance to request assistance from those outside the kinship group,[130] to upset confidence in the business and to wind up the business even if it has proven unprofitable.[131] This exacerbates the pressure on family and employees to prop up a failing business.

The divergence in interpretation of the undue influence doctrine in family guarantee situations is also reflected in employer-employee guarantee cases. In the English case of *Credit Lyonnais v Burch*,[132] a junior employee of ten-years' standing gave a personal guarantee and an unlimited charge on her flat to secure her employer's existing debt and slightly extend his overdraft facility, totalling £270,000. Undue influence was found although the employer did not coerce her, there was little evidence of a potentially exploitative relationship[133] and the employee had declined the bank's suggestion to obtain independent advice on three occasions. However, Millet LJ found the transaction to be 'one which, in the traditional phrase, "shocks the conscience of the court" ',[134] particularly since she had no direct interest in her employer's company nor a romantic relationship with him. Millett LJ explains that while the improvidence of the transaction to the complainant is not enough in itself to raise the presumption of undue influence:[135]

> where it is obtained by a party between whom and the complainant there is a relationship like that of employer and junior employee which is easily capable of developing into a relationship of trust and confidence, the nature of the transaction may be sufficient to justify the inference that such a development has taken place; and where the transaction is so extravagantly improvident that it is virtually inexplicable on any other basis, the inference will be readily drawn.

A very different approach is evident in the Singaporean case of *Hong Leong Finance Ltd v Tay Keow Neo*.[136] Two employees of nine- and ten-years' standing guaranteed the debts of their employer's business to the tune of $S10million. The employees' earnings had never exceeded $S600 and $S2000 per month respectively. Both were made nominee directors of the company although they never exercised the duties or powers of a director. They were loyal and dedicated employees who unquestioningly did whatever their

[130] O Shenka and S Ronen, 'The Cultural Context of Negotiations: the Implications of Chinese Interpersonal Norms' (1987) 23 Journal of Applied Behavioural Science 266.
[131] Tsui-Auch (n 119) 717.
[132] *Credit Lyonnais Bank Nederland v Burch* (n 57)
[133] She had sometimes baby-sat and visited his family in London and Italy.
[134] *Credit Lyonnais Bank Nederland v Burch* (n 57) 152.
[135] ibid 154–55.
[136] *Hong Leong Finance Ltd v Tay Keow Neo and Another* [1992] 1 SLR 205.

employer required of them, as he expected them to do. They signed documents whenever and wherever they were asked, without reading them and without being told of the nature of the documents or their contents by anyone. The court found no undue influence because: 'the conduct of both defendants in this regard reflects an act of abiding faith in the ability of Ho [their employer] as opposed to a situation where they were coerced or bulldozed into doing an act'.[137]

5. Public policy

In Singaporean society, Confucian ideals are evident in government policy. A clear instance is the Maintenance of Parents Act 1995 (Cap 167B). This allows Singapore residents, 60-years-old and above who cannot adequately maintain themselves, to claim maintenance from their children, either as a lump sum or as monthly allowances. In 1982 the government launched the Confucian Ethics Campaign, introducing Confucian ethics as an option in the required religious education course for secondary students with the explicit purpose of strengthening family ties in a rapidly modernizing society.[138] It sought to give young educated Singaporeans, particularly the English educated Chinese, the cultural ballast against the less desirable aspects of Western (Anglo-American) culture,[139] and to promote Confucianism as a moral and cultural foundation of Singaporean society. Even the way these values were promoted, that is, top-down, evinces the force of paternalism in Singapore's ideological system. The campaign was strongly supported by the political leadership, by the press and by public lectures, seminars, forums and conferences.[140] But it also attracted criticism as a conspiracy of the ruling party in political socialization and ideological indoctrination aimed at legitimizing an authoritarian system,[141] and obstructing the development of democracy and human rights.[142] Given the ethnic, religious, and linguistic diversity of Singapore, a more pan-Singaporean ideology was substituted in 1991, but its consistency with Confucian values is clear. The *White Paper on Shared Values*[143] highlights the importance of: (1) nation before community, society above self; (2) family as the basic unit of society; (3) community support and respect for

[137] ibid 218.

[138] See Eddie Kuo, 'Confucianism as Political Discourse in Singapore: The Case of an Incomplete Revitalization Movement' in Wei-ming, Tu (ed), *Confucian Tradition in East Asian Modernity* (Harvard University Press 1996) 294.

[139] NA Englehart 'Rights and Culture in the Asian Values Argument: the Rise and Fall of Confucian Ethics in Singapore' (2000) 22 HR 555.

[140] Kuo, 'Confucianism as Political Discourse in Singapore: The Case of an Incomplete Revitalization Movement' (n 138) 305–6, Phang (n 14) 146–7.

[141] ibid 295.

[142] See eg, Kim Dae Jung, 'Is Culture Destiny?' 73 Foreign Affairs 189; see also Englehart (n 139).

[143] The White Paper *Shared Values* (Singapore National Printers, Cmd 1 of 1991) was presented to Parliament on 5 January 1991. A nationwide debate followed as well as in Parliament; the House adopted the five statements as the nation's Shared Values on 15 January 1991.

the individual; (4) consensus in conflict, and (5) racial and religious harmony. The Singapore Prime Minister has recently reiterated the importance of strong families as 'the foundation of a cohesive, harmonious society',[144] and the Acting Minister for Community Development, Youth and Sports has cited Confucius to the same effect.[145]

The *White Paper on Shared Values* also states that:[146]

> [t]he concept of government by honourable men (*junzi*) who have a duty to do right for the people, and who have the trust and respect of the population, fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise.

Indeed, the former Prime Minister Lee Kuan Yew was praised by his successor as a 'modern Confucius'.[147] Consistently, the fundamental principle of the rule of law has been 'Singaporeanized' to secure social stability and attract foreign investment rather than to facilitate political liberalization.[148] The prioritization of community interests is again rationalized by reference to Confucian values. Thus, Lee Kuan Yew stated that, 'Singapore depends on the strength and influence of the family to keep society orderly and maintain a culture of thrift, hard work, filial piety, and respect for elders and for scholarship and learning. These values make for a productive people and help economic growth.'[149] He supports Singapore's release 'from the confines of English norms which did not accord with the customs and values of Singapore society,' as a result of its 'traditional Asian value system, which places the interests of the community over and above that of the individual.'[150]

The Confucian concept of *junzi* is also evident in the 'Singaporeanization' of defamation law, which has operated to silence political opposition. The former and current Prime Ministers have never lost a defamation action. While defences such as justification and fair comment are recognized, they can be

[144] Prime Minister Lee Hsien Lung, '2012 Chinese New Year Message' (15 Jan 2012) <http://www.pmo.gov.sg/content/pmosite/mediacentre/speechesninterviews/primeminister/2012/January/prime_minister_2012_chinesenewyearmessage.html> accessed on 23 March 2012.

[145] Mr Chan Chun Sing, 'Foreword' in National Family Council *State of the Family Report* (2011) <http://www.nfc.org.sg/pdf/Requestor_SOFR%202011%20Cicada%20v8%20Final.pdf> accessed on 23 March 2012.

[146] White Paper on Singapore's Shared Values (n 143) 8.

[147] *Straits Times*, 24 April 1990, 3.

[148] L-A Thio, 'Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore', (2002) 20 UCLA Pacific Basin Law Journal 1, 22, 24–26; L-A Thio, 'Rule of Law within a Non-Liberal "Communitarian" Democracy: The Singapore Experience' in R Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (Routledge 2004) 192–3.

[149] Lee Kuan Yew, *From Third World to First, The Singapore Story: 1965–2000* (2000), 49; see also E K-B Tan, '"We" v. "I": Communitarian Legalism in Singapore', (2002) 4 Australian Journal of Asian Law 11–18; Li-Ann Thio 'Lex Rex or Rex Lex', ibid, 27.

[150] Lee Kuan Yew, First Prime Minister of the Republic of Singapore, 'Speech at the Opening of the Singapore Academy of Law' (31 Aug 1990), (1990) 2 Singapore Academy of Law Journal 155.

given an exceptionally narrow scope.[151] Again, the convergence on the surface of the law contrasts with the practical divergence in application. The difference springs from the courts' acceptance that to accuse politicians of, for example, corruption, is 'an attack on the very core of their political credo [and] would undermine their ability to govern',[152] and that '[m]oral authority is the cornerstone of effective government. If this moral authority is eroded, the government cannot function.'[153]

6. Summarizing the impact of Singapore's informal legal order

Confucianism in Singapore has evolved to keep pace with its urban-industrial social structure and will necessarily continue to adapt to the evolving economic, political and cultural order.[154] Nevertheless, as Kuo concludes, Confucianism remains a core component in Singaporean society. Its moral teachings are transmitted down the generations, in the educational tradition and in the values and relationships found in traditional Chinese organizations.[155] The undue influence doctrine evolved from a very different world-view in England. Its emphasis is on the claimant as an *individual* rather than as part of the collective, largely ignores the implicit reciprocity entailed in relational altruism, and regards unquestioning trust, obedience and self-sacrifice, not as virtues, but as conditions that may demand the protection of equity.

Finding undue influence in the context of the Singaporean family business would grate against the informal legal order of the prescribed hierarchy of authority, of the priority of the collective over the individual and of obedience to roles. It amounts to saying that the husband-father does something wrong in inducing his wife or children to support the family business. It would impliedly sanction patriarchal loss of face by the disobedience of his wife or child. It would support shameful conduct, confrontation and disharmony. It is unsurprising then that Singaporean courts applied the undue influence doctrine in a way that accommodates its cultural values but in contradiction of its interpretation by English courts. Indeed, the opposite would be surprising.

[151] See generally C Sim, 'The Singapore Chill: Political Defamation and the Normalization of Statist Rule of Law' (2011) 20 Pacific Rim Law & Policy Journal Association 319.

[152] *Lee Kuan Yew v Vinocur* [1995] SGHC 201, [1995] 3 SLR 491, [55].

[153] *Lee Kuan Yew v Seow Khee Leng* [1988] SGHC 78, [1988] 2 SLR 252, [1989] 1 Malayan LJ 172, [25].

[154] See Kuo, 'Confucianism and the Chinese Family in Singapore : Continuities and Changes' (n 87).

[155] Kuo, 'Confucianism as Political Discourse in Singapore: The Case of an Incomplete Revitalization Movement' (n 140) 301.

E. The Nature of the Transplanted Law

A fourth factor influences the development of legal transplants. This relates to the source and nature of the transplant, and the extent to which there is scope for 'tuning' of the transplanted rule. First, if the foreign rule is transplanted via legislation, it will generally be forward-looking, likely to be tuned to the local conditions before adoption, removed from the individual case and easy to find. In contrast, reception via precedents will be backward-looking and developing only when litigation provides opportunity, not generally tuned to local conditions before adoption, and may be difficult to find since the precise *ratio decidendi* may be open to argument. Second, the greater the generality of the rule (the wider the range of situations that the rule applies to), the greater will be the need to tune its application to the particular circumstances of the case. Third, the clearer the meaning of the transplanted rule, the less room there is for creative interpretations; for example, we can compare the signature rule (which is relatively certain) with notions of good faith and reasonableness (which are abstract, open-ended, and more susceptible to variable interpretation). However, judicial discretion resides not only in any broad standards contained in the doctrine itself, but also in the latitude that courts have in fact-finding and in the selection of the applicable legal principle. Thus, value judgments may, consciously or unconsciously, influence the courts' application of discretionary standards, finding of facts, and selection of applicable rules.

Applying the undue influence doctrine to the Singaporean family guarantee situation, it is evident that there is considerable need, and considerable room to 'tune' its application in order to reduce its dissonance with the recipient system's informal legal order. Its reception via precedent means that it was not tuned to local conditions before adoption; it applies to a wide range of cases; its meaning is hardly self-evident;[156] and broad qualitative standards reside in the definition of undue influence (a 'relationship of influence', a 'transaction calling for an explanation', the application of 'undue influence', and 'emancipation' from the influence).

F. The Nature of Undue Influence

The Singaporean decisions throw some light on the nature and basis of undue influence itself. This is a matter of some controversy in English law. The debate has ossified in bipolar form:[157] the doctrine is presented either in terms of a concern with the claimant's impaired consent, or with the defendant's

[156] See the discussion in P Birks and NN Chin, 'On the Nature of Undue Influence' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 57.

[157] ibid; R Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"' 16 OJLS 503; R Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 23 OJLS 65.

reprehensible use of influence in procuring the claimant's consent. A third argues for a relational theory to accommodate the subtle and complex dynamics of trusting relationships.[158] *Allcard v Skinner* describes the doctrine as 'a fetter placed upon the conscience of the [trusted party], and one which arises out of public policy and fair play'.[159] *Etridge* describes it in terms of the defendant 'preferring his own interests' and 'failing to protect the claimant's interests',[160] but the language of reprehensible conduct designates an omission: the defendant's failure to protect the claimant's interest *as the parties' relationship require*.

Relationships are vital to our quality of life. Close relationships such as marriage, romance, family, care and friendship trigger implicit *relational norms* about how people in such relationships treat each other. They determine the appropriate range of *behaviour* and *outcomes* that are constitutive of the relationship and implicit in the distinction between 'due' and 'undue' influence. Undue influence targets the unfair outcome procured by the defendant's violation of the implicit *substantive* norm of the parties' relationship of influence by acceptance of a benefit, which entails glaring disadvantages to the claimant. It also targets the defendant's violation of the implicit *procedural* norm of the parties' relationship. What amounts to an improper outcome or improper coercion depends largely on the *nature of the relationship* and the character of parties. A defendant who violates either of these norms cannot enforce or retain the benefit of the transaction even if he or she has done nothing unlawful to procure it, and even absent any conscious intention to exploit the claimant.

If we regard the basis of undue influence as either the claimant's impairment or the defendant's improper conduct, then it is much more difficult to reconcile the English and Singaporean cases. Impairment and improper conduct are qualitative standards, but once content is given to them they become relatively absolute concepts (analogous to the doctrines of incapacity and misrepresentation). *If this content is adopted*, its application should be relatively independent of the cultural context of the recipient legal system. This is contradicted by the Singaporean cases. On the other hand, a relational approach based on the procedural and substantive *norms of the parties' relationship* invites calibration by reference to the particular community's values, customs and expectations. These are built into the constituents of the undue influence doctrine; namely, that in the presence of a 'relationship of influence' between the parties, a transaction will be set aside if either there was 'undue' pressure, or the outcome is a 'transaction which calls for an explanation'. On this basis, a transaction between family members (or an employer and employee) that falls

[158] M Chen-Wishart, 'Undue Influence: Beyond Impaired Consent and Wrong-Doing, Towards a Relational Analysis' in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press 2006) 201; M Chen-Wishart, 'Undue Influence: Vindicating Relationships of Influence' (2006) 59 Current Legal Problems 231.

[159] *Allcard* (n 21) 190.

[160] *Etridge* (n 18) [9].

outside the relational norms in England may not necessarily do so in Singapore. Thus, consideration of culture and society may act as a guide to analysis and understanding of the law.

III. CONCLUSION

We need to be clear about the precise question being addressed. If it is whether legal transplants are possible, the answer, as Watson and the Singaporean experience demonstrate, is patently 'yes'. But, if the (arguably more important) question is how the transplant develops in the recipient legal system, then focusing on the point of transplant is like preparing for parenthood by sole focus on the event of giving birth. Instead, we must turn our attention to the large number of variables that may give rise to a whole spectrum of possibilities. Watson's insulation thesis, positing the closure of law from society is merely one of these variables, albeit a very important one. Just as law and other sectors of society can develop along separate evolutionary paths, different areas within law may show different degrees of connectivity with the recipient society, 'from loose coupling to tight interwovenness'.[161] There is no alternative to careful case studies to identify the factors at work in particular areas of the law.

Comparative lawyers have for long compared private law in a detailed, technical, and doctrinal way from a European perspective. This article has examined some reasons for the surprising interpretation of the undue influence doctrine in recent Singaporean family guarantee cases. In doing so, it also takes up Harding's challenge[162] to engage with the neglected law in South-East Asia in comparative law and comparative sociology, to venture a 'comparison of the contexts of rules . . . in a non-technical, sociological way from a global perspective'.[163] In a small way, the study seeks to bridge this gulf of ignorance in the West.

A number of conclusions and observations may be ventured. First, the study shows that while legal transplant of the undue influence doctrine into Singapore is, in a sense, perfectly easy, Harding's observation of transplants into South-East Asia is particularly apposite: 'The notion of a smooth transition from custom to modernity, from status to contract, through a process of "development" led by legal reform may be far too simple.'[164] The subject matter touches on special points of connectivity with the predominantly Confucian culture of Singapore (namely, family and family businesses).

[161] Teubner (n 8) 18.

[162] Harding (n 61) 199; 'South East Asia . . . [is] an ideal laboratory. The region has an abundance of legal traditions, practically all of them having been "received" in one sense or another, and encompassing all the world's major legal world-views and systems. If the crossroads of legal traditions are nodal points where comparatists are to be found, then one ought to be tripping over them in South East Asia.'

[163] Harding (n 62) 12.

[164] ibid 40.

They trigger a tuning (or transposition or transformation) of the law on the books when it is put into action. In this way, Singapore absorbs the borrowed law without eradicating what is authentically local, and it does so without overtly recognizing any intentional departure,[165] bringing to mind what anthropologist Geertz calls a 'working misunderstanding'.[166]

Secondly, the reconstruction of the undue influence doctrine by Singaporean courts does not mean that the transplant is a failure. On the contrary, it shows that the doctrine has found fertile soil and taken root. The contents of the doctrine are merely culturally adjusted – 'Singaporeanized'. The result is not sameness but it is harmony with the acceptance of difference. The doctrine will 'bite' where the circumstances leading to, or the outcome of, the contract fall outside of the acceptable range *for the particular relationship*, according to cultural and social norms. For example, in a series of Singaporean cases undue influence has been found when siblings have agreed to very unequal division of property on the death of the parents;[167] when an elderly and infirm parent has made a transaction in favour of one child and against the interests of the other children;[168] and where a solicitor purchased his client's property at a greatly undervalued price.[169]

Thirdly, law is a continual process of transposition and adjustment even within the originating jurisdiction. Legal systems, especially common law systems, are constantly mixing, blending, melting, and then solidifying into new shapes. The *Etridge* decision itself represents a pro-creditor shift to promote security in lending, so that the wealth tied up in the family home can be used for commercial purposes.[170] In order to increase the creditor's

[165] Compare, for example, *Invercargill City Council v Hamlin* (1994) 3 NZLR 513, [1996] AC 264 where the Privy Council expressly allowed for the possibility that a House of Lords decision on the law of negligence may be adjusted to suit the general local pattern of socio-economic behaviour in New Zealand.

[166] C Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective' (1983) 175 Local Knowledge: Further Essays in Interpretive Anthropology 215.

[167] In *Pek Nam Kee v Peh Lam Kong* [1994] SGHC 163 D induced his step-siblings to sign a deed of family arrangement on their parents' death. D duped them out of their fair share by, *inter alia*, actual and presumed undue influence—some, and implied threats that division of the estate would be held up indefinitely and they would not receive the money they badly needed if they did not sign. In *Che Som bte Yip and others v aha Pte Ltd and others* [1989] SGHC 62 a man obtained a guarantee from his mentally unsound younger brother.

[168] *Tan Teck Khong and another v Tan Pian Meng* [2002] SGHC 152 and *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong and another (committee of the estate of Pang Jong Wan, mentally disordered) and others* [2005] SGHC 61, [2005] 2 SLR(R) 694. In contrast, *no* undue influence was found against the benefiting child in *Hooi Cheng Kwong Michael and another v Hooi Cheng Cheong Paul* [1980] SGHC 35 where the inequality was explicable; the mother's will merely corrected previous inequality (when the defendant obtained considerably less under the father's will). Nor in *Susilawati v American Express Bank Ltd* [2007] SGHC 179, [2008] 1 SLR 237, where the wealthy and independent claimant supported her son-in-law's borrowing in order to support her daughter; she only complained when her daughter's marriage foundered.

[169] *Mookka Pillai Rajagopal and another v Khushvinder Singh Chopra* [1996] SGCA 58.

[170] In *Etridge* (n 18) [34], Lord Nicholls points out that 95 per cent of all businesses in the UK are small businesses responsible for about one-third of all employment and their most important source of finance is bank loans raised by second mortgages on the domestic home.

confidence in the enforceability of its securities and so be willing to lend, *Etridge* broadened, but crucially also lowered, the creditor's duty to take reasonable steps. It may be suggested that the same motivation provides the complete explanation for the Singaporean cases because of the importance of the financial sector in Singapore. After all the English and Singaporean cases ultimately reach the same pro-creditor result—no relief is given, leaving the creditor free to enforce. However, this would miss a crucial difference. The English cases lowered the hurdle for creditors to secure and so encourage lending. But the Singaporean cases raised the hurdle of undue influence to reduce the dissonance with the prevailing local values and this would apply even if no creditors were involved. Where creditors *are* involved, the increase of security in lending is an incidental, if desirable, side effect.

Fourthly, local norms are neither immutable nor necessarily 'good' and the transplanted law will open the door to its re-evaluation. In the reciprocal cultural conversation that takes place *sub silentio* when transplanted law is applied, that law may not only be tuned to the local context, but may also 'irritate' the context and trigger a reconstruction of the local social discourse. This may, in turn, be fed back into the law, thereby creating new divergences within the recipient system itself. *Bank of India v Sujanani Thakur Rochiram & Ors*[171] may represent such a strand of divergence. In a rare departure, the Singaporean court adopts a more 'English' interpretation in finding actual undue influence. A 25-year-old son working for the family business on low pay, signed a guarantee for $S1.7 million at his father's request. This was a traditional close-knit family in which the son was very strictly brought up to be obedient, filial and show reverence for his father. He was rarely permitted to go out with friends, eat out, sleep late or have girlfriends. His parents made all the important decisions affecting him; they refused to allow him to study abroad or to pursue his aspiration to be a writer and photographer. Lee J comments that: '[i]t may never be known whether it is better not to have a father at all than to have one who overwhelms his son and dominates him completely. The father did not seem to leave his son much room to develop.'[172] The son's guarantee was unenforceable because the Bank had actual notice of the father's undue influence: the Bank's officers dealt only with the father, knew very well that he was in the driving seat and used him to get the son to sign the guarantee.[173] Although the case involves an Indian rather than Chinese family business, this does not seem enough to account for the difference in approach since the values of collectivism, hierarchy and obedience to the patriarch is equally strong in the Indian culture.[174] Only time will tell whether the case signals a divergent approach challenging the dominant approach, or is merely an aberrant outlier.

[171] *Bank of India v Sujanani Thakur Rochiram & Ors* [1999] SGHC 185.
[172] ibid [13].
[173] ibid [34].
[174] See eg S Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Age* (Cambridge University Press 1999); A Chowdhury, 'Families in Bangladesh' (1995) 26 Journal of Comparative Family Studies 27; S Dasgupta, 'Gender Roles and Cultural Continuity

Lastly, at the heart of comparative law is the study of *relationships* – between law and society, between the social discourse in the originating and receiving cultures, and between the evolution of the law in the originating and receiving systems. To understand the development of a transplant in another society, we have to step outside our own world and enter the world of that other. This is more difficult than we may imagine for we are all captives of the pictures in our head – of our belief that the world we have experienced is the world, as it exists. It is difficult to imagine how a different society works – how it may be put together in an entirely different way with its own distinctive values and world-view. We have seen that the patterning of a Chinese society is radically different from that found in the West; the latter emphasizes the good of respect for the individual, while the former that of the good of belonging and contributing to the community. Even if we can point to similar beliefs within our own tradition, we may not be able to appreciate their appeal, share the beliefs, and place the same importance on their value relative to other values we hold. But, we should try. Each tradition focuses on a different good that can reasonably occupy the centre of an ethical and flourishing life and it may be impossible to reconcile them perfectly in a single ethical ideal. The concern with Western cultures is the prevalence of an individualism in which people think of themselves in isolation and imagine that they control their whole destiny. The concern with Confucian rooted societies is that it has tended to value social harmony at the cost of insufficiently protecting dissenters. The task here is not to say which is better, East or West, but rather to increase our awareness of the deeply entrenched and otherwise unquestioned assumptions of one's own legal system as a means of understanding how a transplanted doctrine has been applied in a particular context.

in the Asian Indian Immigrant Community in the US' (1998) 38 Sex Roles: A Journal of Research 953; GR Gupta, 'The Family in India: The Joint Family' in *The Family in Asia* Das Man Singh and Bardis, (eds), (Allen and Unwin 1979) 72; S Jithoo, 'Indians in South Africa: Traditions vs Westernization' (1991) 22 Journal of Comparative Family Studies 343; L Mullatti, 'Families in India: Beliefs and Realities' (1995) 26 Journal of Comparative Family Studies 11; P Uberoi (ed), *Family, Kinship and Marriage in India* (Oxford University Press 1993); R Sinha, *Dynamics of Change in the Modern Hindu Family* (South Asia Books 1993); R Dugsin, 'Conflict and Healing in Family Experience of Second-Generation Emigrants from India Living in North America' (2001) 40 Family Process 233; S Sahay and G Walsham 'Social Structure and Managerial Agency in India' (1997) 18 Organization Studies 415; S Derne, *Culture in Action: Family Life, Emotion, and Male Dominance in Banaras, India* (State University of New York Press 1995); D Sinha and RC Tripathi, 'Individualism in a Collectivist Culture: A Case of Coexistence of Opposites' in HC Kim et al (eds), *Individualism and Collectivism: Theory, Method, and Applications. Cross-Cultural Research and Methodology Series*, Book 18 (Sage 1994) 123. Analysis along the lines of Part D above is beyond the scope of this article.