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Taking the interpretation of legal transfers seriously: the challenge for law and development

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The legal transfer has a long history; from the Roman Empire to European colonialism, legal systems around the world have developed through legal transfers.¹ Recently, European harmonisation projects and the reform of 'developing' legal systems in Asia, Eastern Europe, Africa and Latin America all presuppose the transferability of laws and legal institutions. They assume the capacity to transfer existing legal frameworks and institutions into new locations to effect legal reform. This book contributes to the understanding of law and development by challenging this assumption and proposing a shift in analysis to a greater focus on the social demand for reform.

The main protagonists in the reform of developing legal systems around the globe are transnational donors,² and legal transfers are their tools of trade.³ For example, reforms to courts and commercial codes, together with the development of property systems, draw heavily

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¹ As has been noted by Baxi, not only was the transfer a key tool in the colonial project, it is arguably serving a neo-colonial agenda today. U. Baxi, 'The Colonialist Heritage' in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003), pp. 46–75 and U. Baxi, 'Globalization: Human Rights amidst Risk and Regression', *IDS Bulletin*, 32 (1) (2001), 94. See also, M. Chiba, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (Tokai University Press, 1989).

² By transnational donors we mean international development agencies undertaking legal reform projects, whether bilateral or multilateral, working across borders in developing countries.

³ The term 'legal transfer' refers to the globalisation of norms, standards, principles and rules that regulate (shape the behaviour) of the object of the transfer. For example, it may be that businesses are targeted by a particular legal transfer. The term encompasses not only written laws and doctrines, but also spoken and sub-verbal communication.

on diverse legal frameworks operating in Western countries. Similarly, the nascent push to widen the global law reform project from its focus on enabling the market to support poverty alleviation⁴ and human rights sees the use of legal transfers continue. In each case, law and legal principles that are considered ‘international best practice’ in the developed West are transferred into non-Western developing countries.

The financial investment in legal transfers by transnational donors is considerable. For example, in 2008 aid flows disbursed to the legal sector exceeded US\$1.85 billion.⁵ Despite this large investment, there is mixed evidence that legal transfers induce recipients to change their behaviour in the ways envisaged by donor agencies. Generally there is no agreement that law impacts or shapes economic change. In their longitudinal study of legal transfers in Asia, Pistor and Wellons argued that, in the six countries of their case study, law generally reflected, rather than induced, economic reform.⁶ For example, as each of the studied economies moved from being state-led to market-based so did the law, at least on the books. This led the authors to conclude that although law is not irrelevant to economic change, economic policy plays a more determining role in changing economic behaviour. They thought that where legal systems

⁴ In the last ten years there has been a radical increase in the numbers of those who argue that the rule of law reform needs not to be based on institutional reforms alone, but must be accompanied by grass-roots law reform which would, for example, enable access to justice for the poor. See S. Golub, ‘The Legal Empowerment Alternative’ in T. Carrothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, (Carnegie Endowment for International Peace, 2006), pp. 161–91; M. E. McClymont and S. Golub, *Many Roads to Justice: The Law Related Work of the Ford Foundation Grantees around the World* (New York: Ford Foundation, 2000); M. R. Anderson, ‘Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs’, IDS Working Paper 178 (2003).

⁵ This figure is based on a query posed to the OECD database at <http://stats.oecd.org/qwids/>, last accessed 21 October 2010 and refers only to the OECD subcategory of ‘Legal and Judicial Development’. There was probably extra assistance to the broader legal sector under categories such as democratic participation and civil society (US\$1,899.66 million), human rights (US\$876.32 million) and assistance to non-governmental organisations (about US\$1.5 million). Disbursements to the sector by multilateral donors in the same year included US\$59.68 million from the World Bank (IDA) (US\$32.24 million in 2009); US\$151.59 million from EU institutions; US\$9.62 million from UNDP; and US\$4.58 million from UNICEF (US\$ 5.51 million in 2009). Leading bilateral donors were the United States with US\$1,133.36 million; Australia with US\$102.21 million; the United Kingdom with US\$68.14 million; Germany with US\$46.46 million; Canada with US\$43.23 million; and Sweden with US\$36.45 million.

⁶ K. Pistor and P. A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960–95* (Oxford University Press, 1998).

closely replicated economic policies for growth, economic growth was demonstrated.

However, not all are as circumspect on the impact of law on economic development as Pistor and Wellons. The seminal work of La Porta and others argues not only that law is important to economic growth, but that common law, rather than civil systems of law, is more likely to positively influence economic growth.⁷ The ‘legal origins’ argument is controversial.⁸ While it is not for this publication to set out the trends and arguments about the cause of economic growth and the role law plays in that debate, it is relevant that there is little agreement whether law plays a decisive role.⁹

Law and development projects are criticised for being top-down and instrumental, state-focused, insufficiently empirical, biased, ethnocentric and/or politically naive. Some of these comments are made without regard to the ways in which donor activity operates in practice.¹⁰ Indeed some of these criticisms arise from profound disagreement about the politics of aid.¹¹ Yet none of these critiques, whether of law and development in general, case studies of legal reforms in developing countries or general studies of the impact of legal reform on economic development, have diminished the international donors’ faith in or willingness to resort to securing legal and economic development through legal transfers.

A burgeoning literature suggests that this faith is misplaced. In considering the impact of particular reforms, many socio-legal studies of transfers suggest that recipients have failed to change their behaviour in the ways anticipated by the donor. In other words, recipients ‘experience’ or interact with donor-instigated reforms in different ways, with the result that reform projects play out in ‘unintended’ ways or with

⁷ R. La Porta *et al.*, ‘Law and Finance’, *Journal of Political Economy*, 106 (6) (1998) 1113.

⁸ K. E. Davis and M. J. Trebilcock, ‘The Relation between Law and Development: Optimists versus Skeptics’, *American Journal of Comparative Law* (56), 895. See also K. W. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press, 2006).

⁹ Davis and Trebilcock, ‘The Relation between Law and Development’, 895. See also Dam, *The Law-Growth Nexus*; J. Stiglitz, *Globalization and its Discontents* (London: Allen Lane, The Penguin Press, 2002).

¹⁰ B. Van Rooij and P. Nicholson, ‘Trends in Decade of Law and Development’ (2010) copy on file with authors.

¹¹ D. Kennedy, ‘The “Rule of Law,” Political Choices, and Development Common Sense’ in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), pp. 95–173.

‘unintended consequences’.¹² If we source our examples from Vietnam, there are numerous case studies suggesting that legal reforms predicated on legal transfers are not operating as anticipated.¹³

Donor agencies often undertake analyses of these ‘project failures’. Much of the literature produced concerns shortcomings in the conception and delivery of international donor projects, while maintaining faith in the capacity for legal transfers to engineer social change. Donors, for example, admit that legal transfers often produce unintended consequences, but rather than questioning the efficiency of the transfer practice, they search for failure in the inadequate skills and technical competencies of recipients.¹⁴

Donors and commentators writing in the field contend that the greater use of participatory evaluations would better capture how aid-based interventions impact and affect stakeholders.¹⁵ One example of this approach, known as ‘most significant change analysis’, involves assembling ‘telling’ stories of change from the field, which are investigated by a group of relevant stakeholders.¹⁶ As Davies and Dart note, this approach is inductive and well suited to capturing the intangible and unintended consequences of transnational development aid. However, this development within the aid sector does not study the legal landscape before the intervention. It takes as its aim the identification of enablers or obstacles to transnational projects, rather than an analysis of localities and players and how they aspire and conspire to see aid and its transfers

¹² Robert K. Merton first talked of ‘unanticipated consequences of purposive social action’. R. K. Merton, ‘The Unanticipated Consequences of Purposive Social Action’, *American Sociological Review*, 1 (6) (1936), 894–904. Others making a similar point more recently include B. Garth, ‘Rethinking the Processes and Criteria for Success’ in R. V. Van Puymbroeck (ed.), *Comprehensive Legal and Judicial Development* (Washington DC: World Bank, 2001), p. 11; L. Hammergren, ‘Assessments, Monitoring, Evaluation, and Results: Improving the Knowledge Base for Judicial Reform Programs’ (1998): p. 12, www.undp-pogar.org/publications/judiciary/linn1/knowledge.pdf, last accessed 2 November 2011.

¹³ See J. Gillespie, *Transplanting Commercial Law Reform: Developing a ‘Rule of Law’ in Vietnam* (Aldershot: Ashgate, 2006); P. Nicholson, *Borrowing Court Systems: The Socialist Experience of Vietnam* (Leiden: Brill Academic Publishers, 2007).

¹⁴ N. Thin, T. Good and R. Hodgson, *Social Development Policies, Results, and Learning: a Multi-Agency Review* (Department for International Development, 1997), pp. 6, 26; Hammergren, *Assessments, Monitoring, Evaluation, and Results*, p. 15; Garth, ‘Rethinking the Processes and Criteria for Success’ pp. 14, 24.

¹⁵ Merton, ‘The Unanticipated Consequences of Purposive Social Action’, 894–904.

¹⁶ R. Davies and J. Dart, *The ‘Most Significant Change’ (MSC) Technique*, www.mande.co.uk/docs/MSCGuide.pdf, last accessed 2 November 2011.

take shape. It searches for reasons why legal transfers fail to produce desired outcomes in legal reform projects, without fundamentally reappraising the use of legal transfers to effect change, or the underlying demand for change.

In a similar vein it is also necessary to challenge conventional ways of measuring the success of legal transfers. The yardstick used to make this assessment, more often than not, is whether the transplant has been rejected or accepted. This, we suggest, is overly simplistic because it forecloses other possibilities such as transfer permutation, adaptation or partial acceptance.

This book contributes to the understanding of law reform projects by questioning the widespread assumption that laws fail to transfer because of shortcomings in the project design and implementation. We suggest refocusing analysis on the social demand for legal transfers in recipient countries. How do recipients interpret and at times reclaim and deploy legal transfers? This reconceptualisation informs donor activity in two vital respects. First, it will give donors insights into how key recipients are likely to understand their projects. Second, it will enable them to better predict how legal reforms are likely to play out in recipient countries, affording a rethinking of approaches to transnational donor activity.

The contributors to this book show the potential for interpretive understandings to help inform transnational legal reform projects. We will now explore why donors have, to date, largely ignored interpretive approaches to law and development and donor activity. We will then examine the range of theoretical approaches to interpretive studies and show how they offer valuable insights into law and development projects.

Do donors assess the demand for legal projects?

Our contention is that donors do not take domestic demand for legal projects seriously during the design and implementation stages. There is genuine and extensive reflection about the donors' aims and objectives for reform, however, rather less focus upon domestic aims and expectations for transnational aid.¹⁷

As noted above, much analysis of legal transfers assumes that asymmetries in power and economic development among countries correspond to underlying levels of socio-legal and economic development.

¹⁷ Nicholson, *Borrowing Court Systems*, pp. 237–40.

This perpetuates the view among donors that legal knowledge is concentrated in the ‘developed core’ and is suboptimal, albeit evolving, in the ‘developing’ world. From this vantage point, it is easy to assume that ‘good or better’ law (usually from Western sources) should displace or augment regulatory norms existing in non-Western legal systems.¹⁸ Privileging the knowledge and strategies for reform from the West means less emphasis, if indeed any emphasis, is placed on the demands of aid recipients. The focus is squarely on the supply side of the aid equation.

Another reason for this focus on donor aspirations and strategies is the result of assumptions about positivism that continue in law reform projects. ‘International best practice’ is treated as an exogenous variable that can communicate norms, understandings and processes across geopolitical and cultural boundaries. It is assumed to have an inherent and ahistorical meaning that can be decoded by appropriately trained technicians in recipient countries.

As Curtis Milhaupt and Katharina Pistor recently observed,¹⁹ this approach assumes that the supply of new legal rules alone will change underlying legal systems, ignoring the domestic institutional structures required to enforce laws. Also absent from this calculus is an appreciation of how new legal rules will affect the local constituencies (social and political elites) who shape the demand for law as a mode of governance.

The corollary of the donors’ approach is selective or little engagement with socio-legal studies of the countries and contexts in which transnational donors work. More particularly, we suggest that the value of interpretive studies to these projects has been under-explored, if not entirely ignored. Further, the complexity and plurality of regulatory

¹⁸ The most relevant current example of this assumption and approach is the current emphasis on rule of law as a paradigm capable of legal transfer around the globe. As Carothers notes, this is a problematic assumption. T. Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, (Washington DC: Carnegie Endowment for International Peace, 2006). See also J. Ohnesorge, ‘The Rule of Law’, *Annual Review of Law and Society*, (3) (2007), 99; D.M. Trubek, ‘The “Rule of Law” in Development Assistance: Past, Present and Future’ in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) pp. 74–95; E. G. Jensen, ‘The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses’ in E. G. Jensen and T. C. Heller (eds.), *Beyond Common Knowledge, Empirical Approaches to the Rule of Law* (Stanford University Press, 2003), pp. 336–81.

¹⁹ C. Milhaupt and K. Pistor, *Law and Capitalism* (University of Chicago Press, 2008), pp. 203–12.

landscapes and the role of players beyond the state in law reform contexts often fail to be fully explored by transnational donors as well.

Recent reform of donor practices: Tinkering or fundamental change?

Some donors might dispute this assessment. For example they might justifiably point to the increased use of country expertise – whether local or international – to argue that local legal landscapes are now treated seriously. They could also contend that the plurality of legal systems is now recognised by donors. Donors might also note that consultation, with local counterparts informing the ways in which projects unfold, radically distinguishes current transnational law reform from its antecedents. Finally, they could rightly point out that developments in evaluating legal transfers, although not yet mainstream, add to their understanding of aid impacts. However, acknowledgment of local conditions does not necessarily signal a concern for local demand or confirm the significance of interpretive studies in general.

Rather, Gunter Frankenberg's 'tragic comparatist' appears alive and well. Frankenberg calls for the reimagining of law reform in developing countries when he writes

This task calls for a creation of a non-hegemonic, non-ethnocentric understanding of the self – of Western societies and Western law – and requires placing the other – foreign societies, laws and cultures – on an equal footing.²⁰

Having identified the challenge for transnational donor agencies active in law reform, what alternatives do interpretive studies offer?

Interpretive approaches introduced

Scholars approaching the issue of legal transfers today include anthropologists,²¹ socio-legal scholars²² (adopting various social theories of law

²⁰ G. Frankenberg, 'Stranger than Paradise: Identity and Politics in Comparative Law', *Utah Law Review* (1997), 259–74, at p. 269.

²¹ For example: C. Geertz, *The Interpretation of Cultures* (London: Hutchison, 1973).

²² P. Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field', *Hastings Law Journal*, 38 (1987), 814–54; S. Biddulph, 'The Field of Crime Control and Social Order: Prospects for Criminal Procedure Reform and Institutional Change in China' in P. Nicholson and S. Biddulph (eds.), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden: Brill, 2008), pp. 109–45; A. Riles,

such as autopoiesis),²³ regulatory theorists²⁴ and comparatists.²⁵ Within these fields, and among them, rage debates about the utility of any one particular analytical gaze.²⁶ This broad ranging scholarship seeks to understand whether and how transfers take hold.

We argue that mere recognition of plurality and localness of legal systems, and how they influence law and development, is insufficient to advance the field. Rather, what is needed is a theoretical shift to refocus on the interpretation of legal transfers by local stakeholders and actors involved in the field. Further, it is not enough for donors merely to recognise the plurality and path dependence of legal systems; they need to reconfigure donor projects around the way recipients interpret legal transfers. To understand the range of approaches to interpretation we need to consider what is being transferred and who is interpreting the activity.

Assumptions: Revisiting the role of positivism

We argue that analytical approaches based on the positivist assumption that legal transfers have intrinsic meaning and can induce predetermined behaviour in recipient countries often fail to examine the complex

'Comparative Law and Socio-Legal Studies' in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), pp. 775–814; R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot: Ashgate, 2006); M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford and Portland: Hart Publishing, 2004); D. Nelken and J. Feest (eds.), *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001).

²³ G. Teubner, J. Priban and D. Nelken (eds.), *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Aldershot: Ashgate, 2001).

²⁴ J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge; Melbourne: Cambridge University Press, 2000). See also the work of J. Gillespie in *Transplanting Commercial Law Reform: Developing the Rule of Law in Vietnam* (Aldershot: Ashgate, 2006); 'Pushing Back on Globalization: An Introduction to Regulation in Asia' in J. Gillespie and R. Peerenboom (eds.), *Regulation in Asia: Pushing Back on Globalization* (New York: Routledge, 2009) (with R. Peerenboom); 'The Role of State and Non-State Actors in Localising Global Scripts in East Asia' in J. Gillespie and R. Peerenboom (eds.), *Regulation in Asia: Pushing Back on Globalization* (Routledge, 2009).

²⁵ This is, in turn, a broad grouping including W. Menski, *Comparative Law in a Global Context* (Cambridge and New York: Cambridge University Press, 2006); P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003); E. Özücü, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Leiden and Boston: Martinus Nijhoff Publishers, 2004); A. Harding and E. Özücü (eds.), *Comparative Law in the 21st Century* (London and Boston: Kluwer Law International, 2002); K. Zweigert and H. Kötz, *Introduction to Comparative Law* (Oxford University Press, 1998).

²⁶ Nicholson and Biddulph (eds.), *Examining Practice, Interrogating Theory*.

interaction between global laws and local state, non-state and hybrid regulatory regimes.²⁷ As a corrective, we posit that it is the recipients' experience of legal transfers that sheds light on why, how and when some transfers take root and how they permute. As a result, a core project in the contributing chapters is to analyse the impacts and manifestations of transfers in new locations. How have notions of human rights, water regulation, rule of law and family law (to take several of our case studies as examples) been received in diverse locations, and what does the study of the transfer phenomenon tell both transfer and law-and-development scholars and practitioners?

In a recent study about the transfer of global insolvency law into East Asia, Bruce Carruthers and Terrence Halliday²⁸ examined how local actors experienced the new laws. Delving below the surface of legislative adaption, Carruthers and Halliday uncovered a complex story in which the interpretation of the insolvency laws depended on the types of relationships state actors enjoyed with the donor agencies, as well as their powerbase within the Government. Most authors in this volume respond to this notion that power relationships profoundly influence the ways in which recipients comprehend and deploy imported legal rules.

The transfer and its actors

Research considered in this volume suggests that legal transfers not only interact with state-based institutions, but also with a multitude of non-state actors, including businesses, professional bodies, non-governmental organisations (NGOs), social activists and citizens. New modes of global governance, such as supply chain agreements and private standard-setting organisations (i.e. International Organization for Standardization), have also extended their reach. What this suggests is that the key dynamic is not between legal transfers and the state, but rather between legal transfers and the multiple actors (state and non-state) that form domestic regulatory systems. Some contributors to this volume, such as Randall Peerenboom and Pip Nicholson, discuss how global ideas about court reform interact with Chinese and Vietnamese

²⁷ As suggested, our approach explicitly recognises the plurality of local legal systems and notes the challenges this poses for those assuming legal transfers are viable for legal reform of a particular type.

²⁸ See B. Carruthers and T. Halliday, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press, 2009).

governmental approaches. Others, such as Frank Munger, show how global ideas about rights lawyering bypass the Thai state authorities and directly influence local NGOs.

Where does the interpretation of legal transfers take place?

Following from this discussion about legal transfers bypassing the state, we recognise the need to broaden the analysis of legal transfers beyond the nation-state to show that non-state and hybrid actors play an active role. When assessing the interaction between the global and the local, it is vital to look beyond the literature that privileges state institutions as the sole or even primary regulators. It is necessary to recognise that state and non-state actors may view legal transfers through different interpretive positions and regulatory histories. The analysis of legal transfers must be decentred to consider the growing literature seriously considering the role of non-state and hybrid actors in shaping global scripts.²⁹

Interpreting legal transfers to inform donor law-reform activity

Our contention goes beyond a claim that there needs to be research about the local or recipient experience of legal transfers. We suggest that specific conceptual approaches will radically strengthen the way in which legal transfers are analysed and understood. In particular, we argue that the transfer of law has to be understood contextually and empirically, and in this volume we bring together scholars with great expertise in the analysis of law reform through legal transfers.

We asked these contributors to reflect critically on the particular socio-legal approaches they take in their empirical analyses. Further, each scholar was asked to articulate the strengths and constraints of his or her approach for those working in the field of law and development. To this end, contributors investigate how social narratives and epistemic communities shape new meanings for transfers. They consider and analyse the effects of relevant actors and where possible disaggregate these to see who shapes the different understandings of legal transfers. The contributors then reflect on what their findings say about law and development practice and theory. In short, we argue that each interpretive

²⁹ See J. Gillespie, 'Developing a Framework for Understanding the Localisation of Global Scripts in East Asia' in A. Halpin and V. Roeben (eds.), *Theorising the Global Legal Order* (Oxford: Hart Publishing 2009), pp. 209–32.