Introduction

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This collection of essays discusses the processes and the effects of legal transplants in a sample of legal systems located in the East Asian and Oceania regions. In particular, this book reports on a selection of the latest legal reforms that are currently reshaping institutional relations, individual rights and the protection of the environment in, among others, China, Singapore, Japan, Hong Kong, Thailand, Myanmar, Australia, and a series of Pacific nations. Most of these reforms were inspired by European and North American institutional experiences; others were derived from recent economic developments imposed by international obligations, or by an increased awareness of global environmental implications of unbridled industrial policies.

Three decades ago, a series of legal reforms in the People's Republic of China prepared the conditions for formidable East Asian economic growth. The development has not been without costs. The unbridled development has proceeded, sometimes, without considering safeguards for investors, workers, the environment, or individual rights. There are, however, indications that legal systems in the regions are preparing for a new wave of legal reforms. The aim of this Volume is twofold. Firstly, it reports on the latest phase of development in the institutional structures of the regions aimed at increasing trust among international traders, the judicial procedures aimed at the resolution of disputes, the management of environmental issues and the protection of rights. For instance, Anthony Gray's chapter discusses the recent development of the doctrine of good faith in contractual relations. Examples are taken from Chinese, Hong Kong, Singaporean and Australian contract law. Colin Campbell and H. P. Lee instead focus on the cross-fertilization of the concept of proportionality between European final appellate jurisdictions and Australia. The current developments are, according to Campbell and Lee, inspired by the jurisprudences of the Court of Justice of the European Union and the

European Court of Human Rights, and the German Constitutional Court's jurisprudence.

Secondly, *Legal Transplants in East Asia and Oceania* delivers accounts of a cluster of epistemic methods that have been developed in different legal systems to implement overseas-inspired institutional reforms. The collection of essays, in particular, tests the correlation between foreign-inspired legal reforms and expected (and unexpected) cultural changes. In the late eighties, the transplant of capitalist principles such as labour and management meritocracy, and competition, into the Chinese legal system delivered, it is reasonable to suggest, the expected economic surplus in the Chinese economy.[1] One could be forgiven for considering the grafting of legal axioms of the market economy onto a socialist society as a success, but the multiplicity of factors that distinguish a modern cross-fertilization of legal, institutional, and economic principles cannot easily be measured. Harding's chapter directly engages with the debate over measuring the success of legal transplants. Perhaps one of the most lucid examples of complexity and the unforeseen effect of legal transplants in South East Asian legal transplants considered in this collection of essays is the case of the grafting of English trust law into Chinese law. Harding noted that China's ruling party actively sought to transplant the English and Welsh trust law into its own legal system. The assumption was that institutions such as the English and Welsh trust law might foster a controlled development of a *quasi*-capitalist legal economy. The results of the reform were probably unforeseen. The case of the unexpected institutional structure of the English–Chinese trust transplant might attract a sceptical view on the benefits – even the conceptual significance – of the idea of transplanting complex legal devices. However, the aims of legal transplants are, it is reasonable to suggest, not to create hollow institutions, nor to translate rules mechanically into a recipient system. Rather, the aim of the majority of the East Asian and Oceania legal transplants is, within the limits of reasonableness related to the assessment of any legal reforms, to alter human conduct in a way that increases prosperity and, sometimes, protects rights. From this perspective, the English–Chinese trust law might have achieved, albeit with a supernumerary of foreign references, its aim, or merely just a quick reprieve before another inevitable institutional reform.

In discussing the farrago of rules associated with the English–Chinese trust law, it might be important to mention that Harding's narrative, as with all the

[1] For an analysis of the political background that led to the establishment of many of the recent Chinese reforms see, for instance: F. Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalisation of Democracy* (Profile Books, 2014) 342–64.

analyses provided in this collection, required an assessment of the probability of the connection and the reasonableness of deductive analyses. To enhance the reader's experience, reasoned effort was made to reduce the extent of tropes that manifest such uncertainty. Thus, tiresome indicators of underlying cognitive processes such as 'in all probability' or 'it appears likely' were omitted whenever possible, yet readers should assume that such cognitive processes were carried out.

It could be argued, and again Harding points out the relative futility of such an exercise, that Chinese equity law has very little in common with the English legal system, and thus, the transplants failed. This would be a persuasive narrative if the aims of the legal reform were to replicate the laws of England in China. However, the example mentioned in Harding's chapter is only one of the many institutional experiences that, in the past three decades, took place in East Asia and Oceania. These new – in terms of comparison to their colonial predecessors – waves of legal transplants are designed to 'fit' into a pre-existing culture. Myanmar, for instance, has recently begun to establish institutions that allow a free flow of ideas and capital. Myanmar is, by way of comparison to China, not a socialist political system. Recent reforms are seeking to balance aspirations for the economic development of a new democracy with safeguarding the stability linked to a pre-existing system of governance. In discussing Myanmar's intention to reform the national bar association in a way that guarantees a level of independence from government, Jonathan Liljeblad's chapter explains the complex mechanisms and the effects that such an aim might have on pre-existing legal cultures.

More generally, Liljeblad's analysis of the reform of the legal profession hints at the lexical inadequacy of the term 'legal transplants'. The term is, it would be reasonable to suggest, misleading. There is, in relation to law, no horticultural or clinical term for such a transplant. Foreign-inspired legal reforms discussed in this book are often elements of wide-ranging socioeconomic policies aimed at fostering specific aims. It is for this reason that *Legal Transplants in East Asia and Oceania* seeks to capture a sample of the methodologies, rather than defining an archetypical model for the implementation of foreign law.

Colin Campbell and H. P. Lee, for instance, explain how the High Court of Australia developed, or is in the process of developing, its own concept of proportionality inspired by the British common law. The term 'proportionality' is a general concept associated in Europe and in the British legal systems with a judicial cognitive process. The court refers to proportionality in instances in which it is asked to qualify and balance, for instance, conflicts between rights. A decision that balances a conflict between rights and freedom

(such as the right to privacy and the freedom of a free press) has general implications and so, Lee and Campbell noted, Australian jurisprudence has been cautious. This point is delicate, so I must be precise. The aim of the collection is not to suggest that legal transplants are risky. Rather, essays such as the ones by Lee and Campbell show that legal transplants are part of a communal learning experience designed to meet the specific demands of a legal culture. Consequently, the collection includes, for instance, an evaluation of legal transplants such as those that resulted in the decolonization in the Pacific regions. Jennifer Corrin discusses the risks associated with the introduction of General Application Statutes in the Pacific islands. However, the majority of the essays included in this endeavour show that legal transplants must fit.

Legal transplants, even during times of colonial exploitation, have seldom been a 'cut-and-copy job'. Corrin, in her chapter, explains how English law was adapted to fit the specific cultural requirements of the British colonies in the Pacific region. The overall exploitative and military strategic aims of colonial transplants, from the outset, outweighed cultural sensibilities. The recent reforms of East Asian legal systems have, Harding suggests, little in common with those colonial experiences. The aims of the new reforms inspired by overseas experiences are, by way of comparison to imperial strategic predecessors, to enhance the commonwealth of the community and to establish a commercial and cultural exchange with an alien system.

Often the migration of legal concepts aimed at enhancing the problem-solving capabilities of a legal system do happen without political prescience. In his contribution to this collection, Drossos Stamboulakis shows how judges and legal professionals working in modern legal systems interpret legal norms based on a series of historically inherited epistemic practices. These practices are perceived by the professional community, for multifarious reasons, as scientifically objective *sic*. The existence of cultural variations in judicial practices is a platitudinous concept and Legrand derives from it an argument against the benefits, perhaps even the reason for the existence of the idea of legal transplants. This deduction is not only contrafactual, as modern legal systems are and, from a historical perspective, have always been inspired by foreign material; but is also epistemically unpersuasive. Most legal systems are the result of multiple layers of legal transplants, which, in many legal systems, commenced with the grafting of Roman law onto local customs. Such a multi-layered system might be due to the competitive nature of litigation (it is expected that the legal counsel will use all legal narratives to support the client's claim) or because the majority of judges do perceive the court system as an imperfect truth-finding device that needs constant tuning.

Independently from this reasoning, there is compelling evidence that legal transplants do occur, and foreign-inspired reforms are changing the legal landscape of East Asia and Oceania. There is, for instance, a long-established cooperation and sharing of training resources between European and Chinese universities. The list of activities of the Sino-German Legal Cooperation Programme is one of the many examples of a long-term exchange of legal expertise between Europe and China, which commenced with the German- (and Japanese-) inspired reform of the Chinese Civil Code. The combination of new training with the consistent development experienced in the regions has also inspired, according to a recent collection titled *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* edited by David Kennedy and Joseph E. Stiglitz, other developing nations.[2]

Again, *Legal Transplants in East Asia and Oceania* will not seek to provide a comprehensive analysis of the legal transplants in a rather large and culturally diverse area of the world. Given the current dynamic nature of the legal systems of East Asia, a book that focuses on describing legal reforms would merely bring a transient benefit to its readership. The descriptive analyses in this Volume will instead inform the readership of the gamut of methods used to implement legal transplants. The range of essays focuses on, for instance, the methods employed in comparative studies (such as the analysis of the cross-fertilization of judicial practices and how to pilot legal reforms inspired by overseas laws).

Thematically, the Volume is divided into three sections. In the first part, contributors discuss the methods (in theory and practice) of modern legal transplants in East Asia and the Pacific. This part includes a critical assessment of imperialistic, so to speak, legal transplants. The second part focuses on legal transplants that seek to increase trade. The third part relating to reforms focuses on environmental protection, and more generally, on the protection of individual rights.

In the first part of this collection, Professor Andrew Harding's chapter describes, by referring to the recent Chinese, Singaporean and Myanmar experiences, the distinctive elements of East Asian legal transplants. The chapter, titled 'The Legal Transplants Debate: Getting beyond the Impasse?' provides a critical overview of the Eurocentric (and mostly hollow) polemic over the role of transplants in modern legal studies. The main

[2] D. Kennedy and J. E. Stiglitz (eds.), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford University Press, 2013).

contention in Harding's chapter is that legal transplants, once the stakeholders have been 'informed' of the ways of the donor legal system, are designed and carefully managed by the receiving legal system. The essay is rich with examples taken from Harding's direct experience as a law teacher in Singapore and as a comparative constitutional law expert.

The breath and the depth of Harding's evaluation sets the theme of the collection. A legal transplant, that is the key contribution of his rich essay, must be 'fit for purpose'. Thus, a foreign-inspired reform must be socially integrated, or at the very least, it must prepare the conditions for its progressive legal and sociological acceptance. It should (short of when a state has the desire to mimic a legal reform to obtain the financial support of international organizations) also facilitate the achievement of a specific aim.

The first test of Harding's contention is in Jennifer Corrin's essay in which she appraises a sample of controversial legal transplants. The paper is titled 'Transplant Shock: the Hazards of Introducing Statutes of General Application' and provides an example of the lingering negative effects of colonial Eurocentric legal transplants. Corrin moves the centre of attention of the collection squarely onto the Pacific region, where she reviews the effect of 'statutes of general application' in, among others, Fiji and the Solomon Islands' legal systems. Statutes of general application graft foreign legal material onto a national legal system. Statutes of general application are typically adopted to prevent a legislative lacuna during the decolonization process, but often, as is the case of the Solomon Islands, their effect lingers on. Reliance on foreign legal expertise and the related case law brings obvious pragmatic advantages but, as Corrin points out, it also increases the level of uncertainty. In areas such as family law, for instance, English jurisprudence has followed (dynamically) the distinctive societal changes of English secular society. It is relatively safe to say that religious attitudes in the Pacific have not followed the path set in England and Wales.

Michihiro Kaino's chapter instead engages the role of legal transplants as a part of social-engineering endeavours. Japan's institutional history is considered, by, for instance, Fukuyama, as the reference point of current economic development in East Asia. Kaino, in his chapter titled 'Bentham's Theory of Legal Transplants and His Influence in Japan', discusses the complex debates and the subsequent adjustments which prepared the route for the modernization process of Japan's legal system. It is reasonable to suggest that the Japanese eighteenth-century process of rapid industrialization, the early twentiethcentury disastrous flirtation with militarism and the present flourishing democracy have all been inspired by European and North American legal institutions. The connection between European and Japanese legal cultures

has been discussed elsewhere, yet Kaino's chapter is revealing because it focuses on the historical narratives that prepared legal transplants in the Japanese legal landscape.

For instance, Bentham's idea of codification was, as Kaino explains, not accepted in Japan. European family law has been perceived as particularly at odds with Japanese culture, but Kaino's contribution to this collection is conceptual. It is, he argues, the dialectical interaction between national aspirations, embedded cultural assumptions and foreign institutions that tilts a legal system towards a specific goal.

The debate over reforms that aim at increasing efficiency is also discussed by Benjamen Gussen's essay. Gussen, by drawing from his experience as an engineer, drafts a complex narrative that focuses on the comparison between the Australian, American, and Canadian federal systems. The Australian Constitution is, Gussen points out, one of the examples of a legal transplant grafted onto a decolonization process. The Federal Constitution was largely inspired by America's constitutional experience that developed a two-tier state/federal sovereignty, but the jurisprudential interpretation of the text was left to judges who were trained in a British, and distinctively English and Welsh, public tradition. Gussen points out the negative implications in economic terms and the potential solutions to dealing with an uncoordinated legal transplant. In this intricate analysis, he suggests an alternative to Harding's analysis of modern legal transplants in East Asia.

The second part of *Legal Transplants in East Asia and Oceania* discusses legal reforms aimed at increasing trade and national economic efficiency. The shift is both methodological and thematic. The first chapter of this section is authored by Anthony Gray and it focuses on the cross-border fertilization of the principle of contractual good faith. Good faith is often perceived in codified European legal systems as a cornerstone of contractual relations.

In civil law systems, the concept defines, via the implementation of the jurisprudence of the 'mistake', the set of criteria necessary for the completion of a contract. In common-law jurisdictions, the idea of good faith in a contract has not travelled well. *Baird Textile Holdings Ltd* v. *Marks & Spencer plc* is the leading case in English and Welsh law. Yet, Gray shows in his rich chapter that Singapore and Hong Kong, as well as Australia and New Zealand, have all been reluctant to accept the role of the concept of good faith in contractual relations. The chapter is aptly titled 'The Incomplete Legal Transplant: Good Faith and the Common Law.' The difficulties of expanding the role of good faith in East Asian and Oceanic common-law jurisdictions are analyzed in detail and Gray shows that a more expansive role of the concept might serve both the aim of increasing economic efficiency and the coherence of common

law jurisdictions. Again, the resistance to adopt a legal concept does not prove, as Kaino persuasively argued, the infeasibility of a legal transplant. Rather, it shows the effects of idiosyncratic assumptions and the potential benefits that a foreign-inspired reform might have had.

The resistance to change a legal system, as introduced by Gray, is also discussed in Jessica Viven-Wilksch. The aim of her essay is to evaluate the transplant of the UNIDROIT Principles of Commercial Contracts and the Convention on the International Sale of Goods in Australia. The chapter is titled: 'How Long Is Too Long to Determine the Success of a Legal Transplant? International Doctrines and Contract Law in Oceania'. There is, Viven-Wilksch argues, a dichotomy between the formal and substantive implementation of, for instance, UNIDROIT Principles in Australian law. The lack of jurisprudential implementation has, among other pernicious effects, a negative impact on international trade for Australia. The conditions for a transplant of the UNIDROIT Principles in Australia, Viven-Wilksch persuasively argued, have been well prepared and the recipient legal system should increase the speed of adoption.

As mentioned earlier, Campbell's and Lee's contribution analyses the Australian High Court's development of the concept of proportionality inspired by English and Welsh law jurisprudence. The concept of proportionality has been in the daily diet of the jurisprudence of the final appellate of European national and international jurisdictions. The European Court of Justice, European Court of Human Rights, the UK Supreme Court and the German Constitutional Court have all referred to it. However, the argument defended in this technical analysis is that a distinctive English and Welsh idea of proportionality is 'trickling into' several areas of Australian law. High Court judges do refer to the concept of proportionality as elaborated by Law Ladies and Lords in Britain. Again, Australian jurisdiction appears, in Campbell's and Lee's analysis, and by way of comparison to other common-law systems, extremely cautious.

The distinctive Australian – at least in the examples considered in this collection – resistance towards the adoption of foreign law is made more evident in the conclusive chapter of this section on trade and economic efficiency. Stamboulakis's essay focuses on the procedures of the Singapore International Commercial Court. The debate over the procedural distinctiveness of the Singapore International Commercial Court is a proxy for the debate over the acceptance of alien legal material in home jurisdictions. Stamboulakis argues, in a nutshell, that the Singapore International Commercial Court is currently positioning itself as the court of choice for international disputes in the Asia and Pacific regions.

Stamboulakis's essay on protecting contractual commercial relations provides the springboard for the last section of this collection in which legal transplants protect individual rights and the environment. The development of trade and the promotion of private initiatives might have been, among others, two of the driving elements of the economic renaissance of East Asia and the Pacific regions. Yet, there is an increased awareness of the detrimental effects of exploitative industrial policies. The third part of this Volume focuses on legal transplants aimed at protecting rights and the environment. The aims of these foreign-inspired legal reforms are to increase the commonwealth and to reduce the gap between the quality of life between Western-style democracies and East Asian legal systems. Again, the dilemma that contributors were asked to engage with was whether the implementation of international commitments was *in practice and in theory* fitting of a distinctive legal culture.

The part opens with Erika Techera's essay on the protection of the marine environment. More specifically, in her essay titled 'Shark Sanctuaries As Vehicles for Transplanting Conservation Tools in Disparate Legal Jurisdictions', Techera shows the clearest example of a direct correlation between social attitudes, legal transplants and, in this case, international environmental policies. As is the case for the industrialization of North America and Europe, the economic development of East Asia had, it is reasonable to suggest, a detrimental effect on the marine environment. The detrimental effects on EU fisheries due to increased demand is well known, but the depletion of shark populations has been particularly associated with East Asian cultural practices. Techera does not dwell on that. Her essay focuses instead on testing the cultural interdependencies that facilitated (or hindered) the establishment of marine sanctuaries aimed, among other aspects, at the protection of a depleting shark population. This process has been defined by borrowing legal concepts and by legal transplants. One of the most interesting observations in Techera's essay is that Pacific nations that are heavily dependent on sea resources but where shark protection is linked to animist beliefs tend to be willing recipients of environmental policies. This is the case even if such policies might have, by way of comparison to other more industrialized and wealthier nations, a substantial burden on individual and national prosperity.

Sophia O'Brien's chapter continues the analysis of the protection of rights by focusing on the general development of a human rights culture in East Asia. The essay discusses the increased level of accountability expected from perpetrators of crimes against humanity. In her paper titled 'Global Norms; Local Resistance: Addressing Impunity in Japan and Beyond', she provides an analysis of the establishment of a multifaceted human rights culture in the

East Asian legal system by considering the Japanese legal system. In East Asia, human rights are still perceived as a mildly elaborate manifestation of cultural imperialism or, in the case of Australia, as an unnecessary set of legal devices in a common-law tradition. By considering the processes put in place by successive governments, O'Brien makes a cogent case for the expansion of institutional accountability. The analysis again shows what Harding would describe as a tension between what is perceived as culturally appropriate and the legalist implementation of foreign law.

Tiziana Torresi's chapter discusses the potential benefits, rather than the limits, of inserting foreign legislation into East Asian legal systems. This essay is, compared to O'Brien's contribution, a theoretical analysis of the beneficial effects of allocating a series of rights, *à la* citizenship of the European Union so to speak, to East Asian immigrants. The set of rights included in the citizenship of the European Union were introduced as one of the many measures to ensure peace and stability in Europe. In the 1950s, European leaders actively signed a series of international agreements which, for instance, opened the markets for coal, steel and, later, atomic energy. An open market, it was surmized, would discourage European member states from seeking military expansion at the expense of neighbouring countries. The opening of the human capital market arrived later but it was one of the policies that ensured, it could be reasonably argued, peace and prosperity in the region. Torresi's chapter focused on the effect that an analogous allocation of a set of rights to East Asian immigrants might have in the region. Again, the chapter includes an evaluation of the cultural limits of such a courageous transplant.