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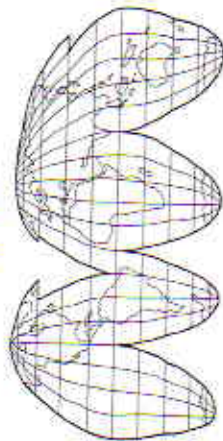
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Reviewed by Julie Mertus*

The field of international and comparative law has long been
concerned with "transplants," that is the moving of law from
here to there.¹ International bodies borrow laws from states' law
and practice, and in the same vein states borrow laws from each
other.² State-based projects, commonly termed "rule of law"
endeavors,³ attempt to transplant laws, and in some cases entire
legal systems, from one place to another. The transferees are

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1. The seminal text on "transplants" is ALAN WATSON, *LEGAL TRANSPLANTS:
AN APPROACH TO COMPARATIVE LAW* (1974) (defining legal transplants as "the
moving of a rule or a system of law from one country to another, or from one people
to another").

2. See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 486-87
(1995). Tracing the history of laws he notes:

There was the reception of Roman law in later Europe, the spread of
English law through the colonies of the British Empire, even into parts of
the United States which had never been under British rule, and the
tremendous impact of the French Civil Code on other civil law systems in
Europe and abroad, and latterly, the spread of American law to Europe

Id. at 486.

3. The "hallmark of the rule of law [is] the claim most commonly made for it,
namely, that under the rule of law the exercise of all power, both private and public,
is limited by law." JOHN REITZ, *Constitutionalism and the Rule of Law: Theoretical
Perspectives*, in *DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE*, 111, 113
(Robert D. Grey ed., 1997). The independence of the judiciary is an important aspect
of the rule of law. See Ralf Dahrendorf, *A Confusion of Powers: Politics and the Rule
of Law*, 40 *MOD. L. REV.* 1, 9 (1977) "such independence of the 'judicial department'
may indeed be regarded as the very definition of the 'rule of law' If the law and
the judiciary come under government control, they cease to be necessary as such; if
courts become a part of political struggles, they merely simulate parliament and
parties and lose their function." *Id.*

usually made from a country perceived as working properly to one deemed to be in great need. At times this process can be said to be utterly without coercion as states freely look outside their boundaries for guidance on law reform, using other states' laws wholesale, or more frequently, adapting the provisions that suit their own needs.⁴ However, the legal transplant process is generally marked by some form of coercion or at least heavy political and economic incentives. Those states that adapt their laws to conform with the laws of politically powerful states are rewarded with economic assistance, advantageous trade arrangements, and other political plums; while those that do not are penalized.⁵

The first wave of legal transplant projects occurred after World War II when the victorious allies rewrote the constitutions of the vanquished to conform to their own ideologies.⁶ The second wave occurred in the 1960s, a time optimistically labeled a "Decade for Development" by the United Nations.⁷ During this period of decolonialism, "departing colonial powers hastily imposed carbon copies of their own documents [and laws], which evolved from different cultural and historical backgrounds."⁸ At the same time, the law and development movement, crafted by American academics and private foundations, sent threes of American lawyers abroad. These American lawyers were mainly sent to Latin America and Africa to train problem-solving legal

4. See Nathan J. Brown, *Law and Imperialism: Egypt in Comparative Perspective*, 29 L. & SOC'Y REV. 103, 105 (1995) (stating that "[e]xines imperialism often worked through, around, or in spite of local elites, we must consider the possibility that these elites may have played an independent role in . . . erecting new legal systems").

5. Cf. Jonathan E. Sanford, *Foreign Debts to the U.S. Government: Recent Rescheduling and Forgiveness*, 28 GEO. WASH. J. INT'L L. & ECON. 345, 383-84 (1995) (explaining that international financial institutions and "Congress [have] often placed broad political or economic conditions on a country's receipt of . . . foreign aid").

6. See, e.g., John M. Maki, *The Japanese Constitutional Style*, 43 WASH. L. REV. 893, 898 (1968) (explaining that following the Second World War, "it immediately became clear that the victorious allies led by the United States were determined to uproot both militarism and authoritarianism").

7. IAN SMILLIE, *THE ALMS BAZAAR: ALTRUISM UNDER FIRE—NON-PROFIT ORGANIZATIONS AND INTERNATIONAL DEVELOPMENT* 7 (1995).

8. Lis Wiehl, *Constitution, Anyone? A New Cottage Industry*, N.Y. TIMES, Feb. 2, 1990, at B6.

engineers⁹ and to promote a modern vision of law as an instrument of development policy along capitalist and democratic lines.¹⁰

The law and development movement featured various models for transfer, including the following:

- (1) direct transfer of legal institutions and instruments,
- (2) indirect transfer of legal concepts and models,
- (3) invited legal transfer, where the initiative and encouragement for the legal transfer process comes from the recipient legal culture, . . . (4) imposed or uninvited legal transfer at the initiative of the "exporting" legal culture[. . .] (5) infused—"premeditated" or "planned"—processes of legal transfer, direct or indirect, wherein the initiative comes from the exporting legal culture, [and] (6) more occasional ad hoc borrowing. . . .¹¹

None of these models worked well to foster positive social change in Latin America. One of the major failings of the law and development movement was its failure to understand that multiple kinds of law can co-exist in society. Law reformers from the outside cannot begin to understand how unwritten community codes for behavior intersect with and influence

9. Advocates of the law and development method frequently used the words of law professor Karl Llewellyn to describe the movement as follows:

The essence of our craftsmanship lies in skills, and wisdoms; in practical, effective, persuasive, inventive skills for getting things done, *any kind of thing in any field*; in wisdom and judgment in selecting the things to get done; in skills for moving men into desired action, *any kind of man, in any field* . . . We are the trouble shooters.

JAMIS A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 14 (1980) (quoting from Karl N. Llewellyn, *The Crafts of Law Revisited*, 15 ROCKY MTN. L. REV. 1, 3 (1942)).

10. See *id.* (explaining that because much of the Third World had adopted constitutions drafted by the colonial powers, specifically France and England, "American legal assistance would function not through the direct export of specific American legal institutions and instruments, but through legal assistance, legal education, and the indirect transfer of underlying legal models, concepts, values, and ideas").

11. *Id.* at 21-22.

formal law.¹² As a result, they cannot see how their proposed legal changes will be filtered through more powerful social networks and other social structures. Another failure of the law and development movement was the inability to appreciate that locals act according to their own self-interest. Local people are actors and not mere subjects; they "generally [turn] American legal assistance to their own ends."¹³ For example, authoritarian forces in Latin America used the law and development movement to solidify power and control. Ultimately, the agenda backfired because instead of promoting democracy, the law and development movement served to strengthen the hold of anti-democratic elites.¹⁴

The fall of Soviet-dominated states in the late 1980s and early 1990s has ushered in a new wave of legal transplants¹⁵ that repeats the techniques of earlier times. An example is sending in lawyers, mainly from the United States and also from Western European states, in an attempt to reconstruct the local legal system in a manner more compatible with U.S. and Western European interests.¹⁶ The earlier focus on transporting

12. See, e.g., Spencer Weber Waller & Lan Cao, *Law Reform in Vietnam: The Uneven Legacy of Doi Moi*, 29 N.Y.U. J. INT'L L. & POL. 555 (1997). For example, in Vietnam, the government's "acknowledgment that the formal law of the central government must defer to the informal law of the village has led to an over-concentration of political and economic power in metropolitan areas and to the underdevelopment of the countryside." *Id.* at 564. Additionally, this dichotomy "forms the operational code of Vietnam, a reality frequently overlooked by Western law reformers and foreign investors." *Id.*

13. GARDNER, *supra* note 9, at 287.

14. See José E. Alvarez, *Promoting the "Rule of Law" in Latin America: Problems and Prospects*, 23 GEO. WASH. J. INT'L L. & ECON. 281, 302 (1991); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1083 (1975) (explaining that "[l]aw and development scholars, somewhat belatedly, are beginning to realize that even in developed societies, and thus the United States, the formal neutrality of the legal system is not incompatible with the use of law as a tool to further domination by elite groups").

15. For the history of borrowing of Western legal models in Central and Eastern Europe, see Giannmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93 (1995).

16. See, e.g., Sherri Kimmel, *For Export Abroad: American Legal Know-How, PA. LAW., Mar.-Apr. 1998*, at 10, 10; James Podgers, *Helping Keep a Peace*, A.B.A. J., Sept. 1997, at 94, 94; Molly Stephenson, *Real Property Lawyers Promote Reform in Central Europe*, PROB. & PROP., May-June 1997, at 12, 12; Joan Davison,

U.S. methods of legal education has been retained, and a new and bolder emphasis on the wholesale rewriting of local law has been added.¹⁷

The transferor/transferee equation has been simplified in recent times. With few exceptions, it can be said that the actors from the United States and the politically powerful Western European countries are on the transferring end of the equation; that is lawyers and politicians from the United States and Western Europe are pushing for other states to change their laws.¹⁸ Few expect that the other state will copy outsider laws, although that would be acceptable in many cases, but merely expect the other state to reform the provisions of its law that violate the most fundamental aspects of *good law* (U.S. or Western European law).¹⁹ Actors from all other countries, but in particular those from politically and economically weak areas, find themselves on the transferee side of the equation.²⁰ Penalties are applied and rewards are given based on their willingness to engage in law reform in this one-directional process.²¹ In the late 1980s and early 1990s, the transferring U.S. and Western European governments and international

America's Impact on Constitutional Change in Eastern Europe, 55 ALB. L. REV. 793, 793-94 (1992); Charles-Edward Anderson, *Exporting Democracy: U.S. Lawyers Help Eastern Europe Draft New Constitutions*, A.B.A. J., June 1990, at 18, 18.

17. The A.B.A. Central and East European Law Initiative (CEELI) plays a central role in such efforts. Funded by the U.S. Agency for International Development (USAID), the American Bar Association (ABA), and other public and private organizations, CEELI supports law reform by sending volunteer lawyers to work with local parliamentarians, judges, law schools and law offices onsite; organizing workshops, training and exchanging judges and lawyers inside the country and in the United States; providing legal assessments of draft legislation and of proposed structural changes in the legal system, with a focus on privatization and commercial law. See *1996 Annual Report*, 1996 A.B.A. SEC. CENT. & E. EUR. L. INITIATIVE 4 [hereinafter *1996 Annual Report*].

18. See GARDNER, *supra* note 9, at 50, 240-41 (finding that the initiative for this legal transfer movement was almost exclusively American with minimal requests for help from the developing nations).

19. See Alvarez, *supra* note 14, at 288 (explaining that current efforts are "intended to encourage reforms sought by beneficiary countries" rather than trying to create exact replicas of the U.S. system abroad).

20. See GARDNER, *supra* note 9, at 6-12 (providing an overview of the law and development movement which intended to use this transfer of law process to help Third World countries develop their legal systems).

21. See Sanford, *supra* note 5, at 383-84.

financial institutions pressured the governments of Eastern Europe to adopt laws consistent with a political democracy and a free market economy.²² By complying formally, if not in practice, with these demands, the governments were rewarded with economic assistance.²³

Many U.S. and Western European scholars have been compliant with this dominant one-directional process, studying the ways in which constitutions and laws in Eastern Europe can, should, and have been reformed to adapt to U.S. and Western European standards.²⁴ As consultants, U.S. and Western European lawyers travel to eastern outposts to offer advice on changes that should be made to administrative, tax, corporate, criminal, and family laws, and to suggest improvements to the overall structure of legal systems, legal education, and law enforcement.²⁵ Many consultants are self-critical, questioning in particular the efficacy of their own work. Nonetheless, few critiques are made of the assumption that the U.S. and Western European models should or can be transplanted. As in earlier times, little recognition is made of the ways in which informal social networks and other mechanisms intersect with formal legal changes. Even fewer critiques are made of the notion that the other state is the one in need of reform and that as such it has little to offer American and Western European legal systems. While many Western European legal scholars, responding to pressures for European unification, examine how their own legal systems could adapt to the practice of other Western European

22. See Ajami, *supra* note 15, at 112 (relating the requirements for acceptance of Central and Eastern European countries into the International Monetary Fund (IMF) and World Bank programs).

23. See Davison, *supra* note 16, at 794 (stating that "the United States government . . . requires democracy, freedom, and a right to private property as a prerequisite for assistance").

24. See DE CRUZ, *supra* note 2, at 488 (noting the history of holding constitutions as *supreme sources of law*).

25. See generally 1996 *Annual Report*, *supra* note 17 (detailing a nation by nation overview of the volunteer program sponsored by the American Bar Association assisting Central and Eastern European nations with their legal reformation efforts).

states,²⁶ fewer U.S. scholars appear interested in how the U.S. legal system can learn from the experience of other states.²⁷

Thomas David Jones is an exception to this general trend. He is a legal scholar committed to law reform in the United States, focusing in particular on issues pertaining to racism and economic and social rights. He is also a scholar of international human rights. While Jones, like many of his colleagues, is interested in the application of international human rights law in domestic courts,²⁸ he adds a unique dimension to law reform analysis. He engages in both a study of international law and a comparative analysis of domestic laws.²⁹ In the days of U.S. consultants going abroad and teaching others about American law, Jones is a rare reverse transplant. He studies the legal practice in other states such as Nigeria, and gleans lessons that could be applied back home.³⁰ The originality of *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations*³¹ rests in his use of the tools of comparative and international law to propose narrowly tailored regulation of racial defamation in the United States.

Other commentators have focused on the international treatment of hate speech, speech that is "abusive, insulting, intimidating, harassing and incites to violence, hatred or discrimination" against a group or a person based on race,

26. See DE CRUZ, *supra* note 2, at 488 (recognizing how the European Union (EU) is following the U.S. model of federalism in that "[t]he European Court of Justice has the power to set aside national laws that conflict with Community law so that like American Federal law, it reigns supreme in certain areas of endeavour").

27. See LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 129 (1978) (suggesting that the United States must have learned from abroad since "[r]espect for the individual is not a Western monopoly, and, moreover, it did not come naturally to the West. It had to be nurtured there").

28. See, e.g., Jordan J. Pavst, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543 (1989) (discussing the history of human rights in the United States, and the current trends in the courts).

29. See THOMAS DAVID JONES, *HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS* 34-42, 87-223 (International Studies in Human Rights).

30. See *id.* at 214-24.

31. *Id.* at 29.