Developing a Decentred Analysis of Legal Transfers

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I Introduction

This chapter aims to develop a theoretical explanation for the transfer of laws into socialist transforming states in East Asia. Legal transfers are one of the main mechanisms used by these states to develop their domestic legal systems. An examination of legal transfers has much to say about comparative law in general, because legal borrowing generates interaction between different systems of laws like few other social phenomena.

The theoretical approach outlined in this chapter evolved out of frustration in applying general theories of comparative law to legal transfers into East Asia. Fieldwork showed that innovative adaptations of legal transfers not only occurred in and around state institutions: they were also happening in self-regulatory practices beyond the formal exercise of constitutionally recognised government. But most comparative law theories were either transfixed by constitutional processes and/or lacked the analytical power to explain the complex processes shaping legal transfers.

For decades comparative law was trapped in the conceptual morass of comparative legal taxonomies. Legal families or traditions make limited sense in European law where classification is aided by a legal scaffolding that insists on “boundaries and boundedness” and a mythology of law as a mechanism of social integration. They make less sense in socialist transforming Asia where law has been conceptualised as a system for a comparatively brief period. Like all classifications, they reduce and distort diversity and define away hybridisation. But their main shortcoming is that taxonomies are descriptive not analytical. Taxonomies use a priori assumptions that presuppose what law in particular geopolitical or religious traditions is meant to look like.

* The author gratefully acknowledges the assistance of many Vietnamese officials and lawyers and funding from the Australian Research Council (Grant DP0665517).

1 See, for example, Randall Peerenboom, China’s Long March toward Rule of Law (Cambridge University Press, Cambridge, 2002).


Examining Practice, Interrogating Theory

After years of neglect, comparative law is now more widely discussed, theorised and researched. During a time of rapid development in technology and economy, and increased reliance on international legal harmonisation programs, the study of ‘other’ legal systems has become more urgent.

Recent comparative theory provides a welcome departure from legal taxonomies. Yet as we shall see, most theorists discuss the transfer of laws across national and cultural boundaries from North American and European perspectives. Working in ‘rule of law’ societies, they see law in terms of institutionalised rules, doctrines and epistemologies that only superficially correspond to East Asian conditions.

A further problem is that most (but not all) comparative theorists understand law in state-centred terms — that is, as emanating from the state, as uniform for everyone, and as exclusive of non-state legal sources. They presuppose that law can and should regulate most social relationships. By assuming that the ‘rule of law’ provides the main ordering effect in recipient countries, they ignore the pivotal role played by private order. They rarely consider comparative scholarship showing that much social regulation is performed by functional equivalents of state based law, such as international quality assurance standards, relational transactions and business networks. Even critics of this aspect of comparative law such as Ewald and Legrand for the most part do not question state-centred assumptions.

This chapter evaluates the capacity of theories based on Western experiences to explain legal transfers into socialist transforming East Asia. It first compares and contrasts the main theoretical explanations for legal transfers. As there are no fully formed transplantation theories derived from East Asian experiences, a preliminary set of working assumptions have been synthesised from existing theories.

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7 This analytical tradition is derived from theorists such as Max Weber and Adamson Hoebel who focussed on institutional responses to social order. See William Twining, Globalization and Legal Theory (Butterworths, London, 2001), pp. 184–186.
