Completing Teubner: Foreign Irritants in China’s Clinical Legal Education System and the ‘Convergence’ of Imaginations

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I INTRODUCTION

Underlying much discussion of the ‘legal transplant’ paradigm for legal development is a quiet culture war over the notion of legal convergence. Legal convergence is a theory that suggests that as legal systems develop they will ‘converge’ on an ever narrower set of structural, and perhaps substantive, paradigms. In this chapter, I argue that this ideological contestation over convergence is impeding our efforts to develop meaningful ‘comparative’ visions of law and truly comparatively informed visions of legal development.

I will do this by using recent experiences with the development of clinical legal aid and education in China to test certain hypotheses made by Gunther Teubner in his germinal work on ‘legal irritants’.1 Teubner advanced this metaphor of legal irritants as a variation on Alan Watson’s earlier metaphor of legal transplants.2 One of the critiques of Watson’s notion of ‘legal transplants’ focussed on the fact that that notion could be seen as endorsing the claim that legal systems are converging on a single, universal model. Teubner developed the idea of legal irritants in part as a way of preserving what he saw as the explicative power of Watson’s ideas while at the same time expressly allowing for larger, divergent developmental trajectories. On the one hand, I argue that the experience of transplanted clinical legal aid and education models in China did in fact resemble the structural predictions suggested by Teubner’s model of legal irritants. Nevertheless I also argue that this structural evolution is more meaningfully characterised as a convergence, not a divergence.

This is because, ultimately, the modifiers of convergence and divergence only meaningfully apply to dynamics of perception. As I will argue, they have no structural significance — at least insofar as the dynamic development of legal systems is concerned. Therefore, the fact that the general direction of the post-transplant development of China’s clinical legal aid and education framework has been away from the dominant paradigms that heretofore informed our perceptions of clinical legal education in its foreign system of origin does not imply anything that could meaningfully be captured by the metaphor of ‘divergence’. Nonetheless the process of transplantation has set up communicative links that have stimulated

within both systems new perceptions of cross-system commonalities. And this dynamic can meaningfully and fruitfully be captured by a metaphor of ‘convergence’.

More broadly, I also seek to show how the argument over ‘convergence’ ultimately impedes the development of meaningful comparative understanding. Both experience and history suggest that this would be unwise. First, it would deny the many times that different legal systems have successfully developed mutually beneficial, cooperative structures and practices that are best captured by a metaphor of mutual understanding. Secondly, it would deny us our own ability to learn from foreign legal systems.

II Convergence and its Discontents: Comparative Legal Development from Watson to Teubner

A The Convergence Thesis

The debate over the possible teleology of legal convergence is one of the defining comparative issues of our time. Periodically over the past 50 years, the American legal community in particular has become especially interested in promoting the ‘legal development’ of less economically, less socially, and/or less politically developed nations. The belief underlying this interest has been that one of the more effective ways that desirable economic, social and political development can be effected in these countries is by promoting the development of a more effective legal system. Moreover, what constitutes a ‘more effective legal system’ is often an idealised vision of the American legal system or, more generally, an idealised ‘legal system’ that is derived from normative observations about how law works in the industrialised West — what is frequently called ‘rule of law’.

Such a vision implies a developmental trajectory of legal convergence, at least insofar as the legal systems of industrialising countries are concerned (law and development obviously does not concern itself with the legal development of already industrialised nations). It implies, in other words, that as these nations advance toward industrialisation, their legal systems will increasingly resemble those of the already industrialised West. (The movement toward industrialisation is itself generally presumed to be teleological — that is, a necessary step for economic and political ‘development’ as generally defined by the dominant actors in the international legal and economic development communities.)

To many others however, including many Americans, the teleological convergence implied by the law and development movement smacks of neocolonialism. These critics argue that insofar as social justice is concerned, the norms and practices of any individual society are so tied up in the cultural particulars of that society that simply copying the successful legal inventions of some foreign jurisdiction is not likely to benefit, and, often, may well harm, the ordinary citizens of that country. Relatedly, they question whether our legal developmental efforts to date have really improved the economic, social or political systems they have targeted and whether the ‘advanced’ Western industrialised countries really do evince the legal practices that the law and development movement has demanded of develop-