

The Politics and Incentives of Legal Transplantation

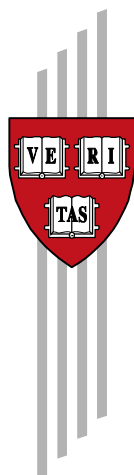
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THE POLITICS AND INCENTIVES OF LEGAL TRANSPLANTATION

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Abstract

The last ten years have seen an exponential increase in the volume of legal transplantation, the process by which laws and legal institutions developed in one country are then adopted by another. Although there is a small literature on the process of legal transplantation, most of that literature presumes that the expected efficacy of the law is the predominant factor in determining which laws are transplanted, from where, and to where. This exploratory paper ventures a series of quite different hypotheses, all premised on the view that donor countries, recipient countries, and third parties (such as NGOs) have political, economic, and reputational incentives that are likely to be important factors in determining the patterns of legal transplants. The paper offers a number of hypotheses about these possible efficacy-independent factors, gives examples to support the possibility that the hypotheses might be sound, and suggests ways in which the hypotheses might be tested in a more systematic way.

Keywords: legal transplants, legal development, legal change

JEL codes: K0, K3

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I

Law has traditionally been among the least global of social phenomena. Largely because the very concept of law has historically been associated with national sovereignty,¹ the idea of law without that sovereignty has been accepted only with the greatest of difficulty. Indeed, the prevalence in so many of the jurisprudential debates of the twentieth century of the question whether international law is law at all² is important testimony to the fact that for many people law and globalization are inherently contradictory ideas.

The association of law with sovereignty has been steadily eroding in the academic discussions of the philosophy of law,³ but less so in popular understanding, or so it seems. In many parts of the world, of which Eastern Europe, South Africa, and the republics of the former Soviet Union provide the best examples, the fact of political transformation has been

¹This is an idea most closely associated with John Austin, especially in The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence (H.L.A. Hart ed., London: Noonday Press, 1954). See also Jeremy Bentham, Of Laws in General (London: Athlone Press, 1970); A.V. Dicey, Introduction to the Study of the Law of the Constitution (10th ed., London: Macmillan, 1959), pp. xxxiv-cxcv, 39-85; Thomas Hobbes, Leviathan (1651); W.J. Rees, "The Theory of Sovereignty Restated," in Peter Laslett, ed., Philosophy, Politics and Society (Oxford: Basil Blackwell, 1956).

²H.L.A. Hart, The Concept of Law (2d ed., Oxford: Clarendon Press, 1994), pp. 213-37; R.W.M. Dias, "Mechanism of Definition as Applied to International Law," Cambridge Law Journal (1954), pp. 226-31; Glanville Ll. Williams, "International Law and the Controversy Concerning the Word 'Law'," British Yearbook of International Law, vol. 22 (1945).

³See H.L.A. Hart, The Concept of Law, *op. cit.*, pp. 236-37.

coupled with a desire on the part of the transformed republic to have a legal regime whose chief characteristic is its indigeneity. To cast off the past is to cast off the law of the past, so it often appears, and to cast off a colonizing (or dominating, as in the case of Eastern Europe) power is to cast off all of the residue and emanations of the colonizing or dominating power's legal structure and legal institutions.

The previous paragraph puts things too starkly, for there are as many counterexamples as there are examples to the claims I have just announced. Nevertheless, recalling the special political and social situation that legal systems have, as symbols as much as anything else, is a useful preface to the idea I wish to put forward here. And that idea is that the transnational and cross-border spread of law and legal ideas is not, as it may be for scientific, technical, and economic ideas, largely a matter of the power and value of the ideas themselves, but may instead be substantially dependent, both on the supply side and on the demand side, on political and symbolic factors that may have more explanatory power in determining how law migrates than do factors that relate to the intrinsic or instrumental value of the migrating law itself.⁴ In this brief paper I will offer a series of testable hypotheses about various factors, other than the factors of inherent value, that may influence the patterns of legal migration and legal transplantation,⁵ and thus of legal globalization. I

⁴For an admirable but unfortunately rare attempt to confront some of these issues, see the various papers in Markku Suksi, ed., Law Under Exogenous Influences (Turku, Finland, Turku Law School, 1994).

⁵On the concept of legal transplants, see generally Alan Watson, Legal Transplants (Edinburgh: Scottish Academic Press, 1974); Alan Watson, "Legal Change: Sources of Law and Legal Culture," University of Pennsylvania Law Review, vol. 131 (1983), pp. 1121-46; Alan Watson, "Legal Transplants and Law Reform," Law Quarterly Review, vol. 92 (1976),

will not set out to test the hypotheses here, but will offer a small bit of evidence for believing each of them plausible enough to be deserving of more rigorous testing and examination.

II

Hypothesis 1: The effect of political, cultural, and social factors extrinsic to legal or economic optimization is greater in determining the patterns of transnational migration of legal ideas, institutions, and structures than it is in determining the patterns of transnational migration of scientific, technical, or economic ideas, institutions, and structures.

As I suggested above, law-making is commonly thought of as a particularly central feature of national sovereignty. What is significant here is not whether this is in fact the case, as a matter of the theory of sovereignty and the theory of nationhood, but rather the very fact of the belief that this is so. For insofar as this belief prevails, nations, especially new and transforming nations, may believe that indigenous law-making is an important marker of a successful transformation, and as a consequence may choose to reject extra-national influence, even under circumstances in which the extra-national influence is perceived to be valuable and well-meaning, in favor of “doing it themselves,” even if that means doing it less well.⁶ Especially in developed but transforming countries, as with most of Eastern Europe, as with the larger of the former Soviet republics, and as with South

pp. 79-96. See also T.B. Smith, “Legal Imperialism and Legal Parochialism,” Juridical Review (New Series), vol. 10 (1965), pp. 39-54.

⁶I exclude from my discussion cases of outright coercion, as with the post-World War II constitutions of Japan and West Germany. See David P. Currie, The Constitution of the Federal Republic of Germany (Chicago: University of Chicago Press, 1994).

Africa, relying too heavily on external advice in law-making appears to be perceived as a sign of weakness, and as a signal for a lack of sophistication or a lack of capacity for independent governance. Where nations have a desire to send the opposite signal, and thus to signal a capacity for independent and sophisticated governance, therefore, what we often see is at best a grudging willingness to accept external advice and models, and a desire to engage in indigenous law-making even when the product of that indigenous law-making may otherwise be sub-optimal.

This is not to say that indigeneity itself may not sometimes be related to legal effectiveness or to the end-states, usually economic, that legal effectiveness is thought to help produce. Research by Stephen Cornell and Joseph Kalt on constitution-making in the American Indian nations⁷ and by Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard on cross-national legal transplants⁸ both provide strong support for the conclusion that the fact of legal transplantation, independent of and controlling for the content of what is transplanted, may be causally related to various measures of legal or economic effectiveness. As Cornell and Kalt demonstrate, what I have referred to as indigeneity may serve not

⁷Stephen Cornell and Joseph P. Kalt, "Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache," Economic Inquiry, vol. 33 (1995), pp. 402-16; Stephen Cornell and Joseph P. Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations," in What Can Tribes Do? Strategies and Institutions on American Indian Reservations (Los Angeles: University of California at Los Angeles, 1992).

⁸Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, "Economic Development, Legality, and the Transplant Effect," unpublished working paper dated November 1999.

merely a symbolic function and have not merely a symbolic effect, but may instead (or may as a consequence of the symbolic effect) be efficacious in producing economic success.

Insofar as an indigenous process of law-making and constitution-making may foster and reinforce the social and political conditions and institutions that are themselves conducive to economic success,⁹ indigeneity may be conducive rather than extrinsic to economic success.¹⁰

In similar fashion, Berkowitz, Pistor, and Richard demonstrate that legal effectiveness (and economic development, insofar as legal effectiveness is conducive of economic development) is not merely a function of the characteristics of formal law, but is also a function of various potential inefficiencies of implementation when law is transplanted into an “alien” implementing or enforcing environment. This effect, which Berkowitz,

⁹One explanation for the phenomenon may be that indigenous law-making operates as a kind of focal point for cooperative law-making behavior that can then serve as the focal point for cooperative economic behavior. Another is that the institutions themselves are necessary for economic development, and that indigenous institutions function better than transplanted ones. On these and related issues, see Douglas North, Institutions, Institutional Change, and Economic Performance: The Political Economy of Institutions and Decisions (Cambridge: Cambridge University Press, 1990); Robert Barro, Determinants of Economic Growth: A Cross-Country Empirical Study (National Bureau of Economic Research Working paper No. 5698, August 1996); Richard A. Posner, “Creating a Legal Framework for Economic Development,” The World Bank Research Observer, vol. 13 (1998), pp. 1-11.

¹⁰In the case of American Indian nations within the United States, the alternative to indigeneity has been law produced in implanted and pre-packaged form by United States federal authority, in particular the production of generic constitutions by the United States Department of Interior pursuant to the Indian Reorganization Act of 1934, 73 P.L. 383, 48 Stat. 984, ch. 576, 25 U.S.C. 461 (1996).

Pistor, and Richard label the “transplant effect,” appears to have substantial negative consequences¹¹ on the effectiveness of laws and legal institutions.¹² As with the Cornell and Kalt findings, therefore, these results indicate that it would be a mistake to treat the distinction between indigenous law-making and transplanted law as entirely extrinsic to the question of legal effectiveness and thus of the optimality of any law or legal regime.

Nevertheless, the point of this first hypothesis is a different one. Even fully taking into account the transplant effect or any of its variants, it may still be the case that various factors extrinsic to legal optimization broadly conceived will influence the final choice between indigenous law-making and borrowing law from abroad. Insofar as these factors, factors relating to the symbolic importance of indigenous law-making as well as to the national self-esteem produced by indigenous law-making, play a role in determining the extent of legal globalization, and in determining the patterns of legal globalization, a model that looks only to optimization will remain necessarily incomplete. For if it is the case that indigeneity for its own sake, as a form of national self-expression, as a method of increasing national self-esteem, and as a form of signalling to the world, is a goal that nations pursue in addition to and not as a part of legal optimization, then it will almost always be the case that these goals and the goals of legal optimization will be in at least some conflict. Moreover, there is some reason to believe this phenomenon is greater for law than it may be for

¹¹Berkowitz, Pistor, and Richard conclude that legality is approximately one third lower in transplant effect countries than where there is no transplant effect, controlling for an impressive range of other variables.

¹²For a similar suggestion, but without the same degree of empirical testing, see A.E. Dick Howard, “The Indeterminacy of Constitutions,” Wake Forest Law Review, vol. 31

indigenous technical, scientific, or economic development. This first hypothesis, therefore, posits that the image of law as specially related to sovereignty, to national self-expression and self-determination, to national reputation, and to national self-esteem will produce pressures towards indigenous law-making that are greater than the pressures towards indigenous institution-creation in non-law domains.

III

Hypothesis 2: Political, social, and cultural factors are more important in determining the patterns of legal migration for constitutional and human rights laws, ideas, and institutions than they are for business, commercial, and economic laws, ideas, and institutions.

Although there is reason to believe that what I have called “extrinsic” factors are at work throughout the realm of legal development and legal migration, there is also reason to suspect that the phenomenon of preferring indigenous law-making for its own sake is especially true with respect to the making of constitutions.¹³ Nations and their political and legal leaders may perceive bankruptcy, securities, and other corporate and commercial laws as largely technical and non-ideological, being largely instrumental to economic development,¹⁴ and thus capable of being borrowed or copied from the analogous laws of

(1996), pp. 383-406, at pp. 402-04.

¹³On a potentially large array of factors that might make constitution-making different from ordinary law-making, see Jon Elster, “Fores and Mechanisms in the Constitution-Making Process,” *Duke Law Journal*, vol. 45 (1995), pp. 364-81.

¹⁴See John J.A. Burke, “The Economic Basis of Law as Demonstrated by the

other nations.¹⁵ But this perception is rarely held in the case of constitutions.¹⁶ For Estonia to have an American bankruptcy law (which it does, drafted largely by faculty and students of the Georgetown Law School¹⁷) seems to most Estonians not much different from drinking French wine and from owning German cars, Japanese televisions, and Taiwanese bicycles.¹⁸

Reformation of NIS Legal Systems,” Loyola International and Comparative Law Journal, vol. 18 (1996), pp. 207ff., offering an account of legal development that is “derivative” of straight economic objectives.

¹⁵This is not to say that such perceptions are correct, for there are ideological and political assumptions built into even the most technical of commercial laws. The decision to choose as a model the highly technical securities laws of California rather than the highly technical securities laws of many other states (and the United States federal securities laws) is to choose a model of substantive regulation over a model of full disclosure, a choice that goes directly to the center of debates about the role of the state and the limits of its authority.

¹⁶On the specially political nature of constitution-making, see Stephen Holmes and Cass R. Sunstein, “The Politics of Constitutional Revision in Eastern Europe,” in Sanford Levinson, ed., Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Princeton: Princeton University Press, 1995).

¹⁷J. Peter Byrne and Philip G. Schrag, “Law Reform in Estonia: The Role of the Georgetown University Law Center,” Law and Policy in International Business, vol. 25 (1994), pp. 449 ff. Similarly, the bankruptcy law in Armenia is largely a product of the University of Maryland, and the non-Romanian but international consulting company Deloitte and Touche had a substantial influence on Romanian bankruptcy law. See Samuel L. Bufford, “Bankruptcy Law in European Countries Emerging from Communism: The Special Legal and Economic Challenges,” American Bankruptcy Law Journal, vol. 70 (1996), pp. 459 ff.

¹⁸Cultural products such as movies, books, and art are different, any many countries treat the indigenous production of these products (and occasionally the indigenous

But to have an American constitution is quite different, and would suggest a loss of sovereignty, a loss of control, and a loss of much of the very essence of what helps to constitute a nation as a nation in the first place.¹⁹ For this reason, among others, the Estonian constitution is largely an internally drafted and internally conceived document, even though some of its drafters recognized at the time and still concede that as a technical legal instrument it leaves much to be desired, and even though those same drafters acknowledge that using a model from some other country would have produced a written constitution that was better structured, more internally coherent, and less likely to be in need of subsequent amendment.²⁰ Similarly, the new Constitution of South Africa, created under conditions in which non-South African observers were omnipresent and non-South African assistance readily available, is almost an entirely indigenous document, bearing occasional parallels in certain provisions to the European Convention on Human Rights but otherwise remarkably

production of culturally significant food products) as being more of an embodiment of national identity than is the case with other products. This is perhaps most true with respect to the mass media, where not only the mass media, but also the laws controlling it, are taken to be of particularly national concern, and thus least susceptible to transplantation. See, for example, "Mass Media Law and Practice: Lithuania, Latvia, and Estonia," in Post-Soviet Media Law and Policy Newsletter, vol. 55 (May 1, 1999), pp. supp. 1-8.

¹⁹On a seemingly similar phenomenon in Poland, see Wiktor Osiatynski, "The Constitution-Making Process in Poland," Law and Policy, vol. 13 (1991); pp. 125-43; Wiktor Osiatynski, "Perspectives on the Current Constitutional Situation in Poland," in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley, eds., Constitutionalism and Democracy: Transitions in the Contemporary World (New York: Oxford University Press, 1993), pp. 312-20.

²⁰Conversation with Eerik-Juhan Truuväli, Tallinn, Estonia, August 1992.

free from external influence.²¹ Indeed, in almost none of the new constitutions drafter in the last ten years has there been the kind of extra-national influence and imprint that one sees frequently in a wide range of economic and commercial laws.²²

It is likely that the same pattern would exist with respect to other laws that reflect central political values, including laws dealing with human rights, laws dealing with immigration, and laws dealing with voting and the other structural devices of political decision-making.²³ Although ordinary (non-constitutional) laws on these subjects are not as

²¹The South African experience suggests that another variable may be at work as well. Constitutions, now if not in 1787 when the fifty-five framers of the American Constitution were literally locked in a room and sworn to secrecy, are often created in extremely public conditions. This produces not only very lengthy constitutions, as in South Africa and Brazil (114 and 229 pages respectively), but, it might be hypothesized, constitutions less externally influenced. Indeed, it might be hypothesized that publicity and political involvement reduces external influence, and that secrecy and bureaucratic and technical control of the process increases external influence.

²²Moreover, as Katharina Pistor has suggested to me, constitutions may be especially immune from the effect on legal migration of being a member of the same legal “family.” Thus, insofar as we might expect common law countries to follow models from other common law countries, civil law countries to follow models from other civil law countries, former French colonies to follow models from other French colonies, Spanish-speaking countries to follow models from other Spanish-speaking countries, and so on, we might hypothesize, plausibly, that this effect would be less in case of constitutions than in the case of other sorts of laws from the pertinent countries.

²³For a general overview of patterns of American influence and American non-influence, see Jacques deLisle, “Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond,” [University of](#)

central to the idea of nationhood as is constitution-making, even ordinary laws on these subjects are, like constitutions, more likely to be perceived as political, and thus more immune from influences that nations are likely to see as irrelevant or intrusive. While this is again a hypothesis and not a demonstration, it seems plausible to hypothesize that the family consisting of laws relating to individual rights, national identity, and political structure would be less influenced by external forces than the family of economic, business, securities, and commercial laws, just as it seems plausible to hypothesize that constitutions would be less influenced by external forces than would so-called “ordinary” legislation.

IV

Hypothesis 3: The political reputation of the donor country, both internationally and in the recipient country, is a causal factor in determining the degree of reception in the recipient country of the donor country’s legal ideas, norms, and institutions, even holding constant the host country’s evaluation of the intrinsic legal worth of those ideas, norms, and institutions, and even holding constant the actual legal worth of those ideas, norms, and institutions.

Hypothesis 4: The desire of a country to be received or respected or esteemed by a particular group or community of nations bears a causal relationship to the degree to which that country will attempt to harmonize its laws with that of the group or community of nations, and also bears a causal relationship to the extent to which the country’s laws will eventually resemble the laws of that group or community of nations.

Although politics in the broad sense may thus influence the decision whether to look abroad or not in the search for law in new and transforming nations, politics is even more apparent in the decision about where to look when it is decided that looking abroad may be useful. In this regard, the experience of Canada as a successful “donor” nation of constitutional ideas provides a useful example. In many countries throughout the world, especially ones with an English language and common law legal tradition, Canadian ideas and Canadian constitutionalists have been particularly influential, especially as compared to the United States.²⁴ One reason for this is that Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier. On issues of freedom of speech, freedom of the press, and equality, for example, the United States is seen as representing an extreme position, whether it be in the degree of its legal protection of press misbehavior,²⁵ in the degree of its protection of racist and other forms of hateful speech,²⁶ or in its unwillingness to treat race-based affirmative action as explicitly

²⁴The phenomenon appears to be strong not only in countries with a British Commonwealth background, but also in countries as culturally removed from the British Commonwealth as Vietnam.

²⁵Largely because of the efforts of American journalists, itself a phenomenon worthy of careful investigation, media lawyers throughout the world know of New York Times Co. v. Sullivan (376 U.S. 254 (1964)), and its role in immunizing virtually all criticism of public officials and public figures, even factually false criticism, from legal liability. Interestingly, recent court decisions in Canada, South Africa, Australia, Spain, India, New Zealand, and the United Kingdom have all made explicit reference to the American approach, but none have chosen to follow this approach.

²⁶The 1965 Convention on the Elimination of All Forms of Discrimination requires

constitutionally permissible.²⁷ People can of course argue about whether the United States is right or wrong, internally, to take these positions, positions which much of the rest of the world sees as extreme, but that is not the point here. Rather, it is the twofold point that, first, ideas that are seen as close to an emerging international consensus are likely to be more influential internationally, and, second, that nations seeking to have more international legal influence may at times, recognizing the first point, create their laws in order to maximize the likelihood of this extraterritorial influence. Canada appears to be a plausible example of both of these, and the influence of Canadian constitutional ideas²⁸ in many parts of the world appears to be partly a function of the extent to which Canada has the virtue of not being the

signatory nations to prohibit the “incitement to racial hatred.” Largely because of the effect of First Amendment decisions such as Brandenburg v. Ohio, 395 U.S. 444 (1969)(protecting the speech of the Ku Klux Klan) and Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978)(protecting the speech of neo-Nazis in Skokie, Illinois), the United States has consistently “reserved” (refused to sign) on this provision, for that which international law and international treaty requires remains under current doctrine plainly unconstitutional in the United States. See Mari Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” Michigan Law Review, vol. 87 (1989), pp. 2320ff.

²⁷In the United States, race-based affirmative action programs are increasingly being evaluated according to the same stringent standards as other race-based classifications (see Adarand Constructors, Inc., 115 S. Ct. 2097 (1995); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996)), but the international trend, as witnessed in Section 15(2) of the Canadian Charter of Rights and Freedoms and Section 8(3) of the Constitution of South Africa, is to create explicit constitutional authorization for race-based classifications designed to “ameliorat[e] [the] conditions of disadvantaged individuals or groups” (Canada) or to “achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination” (South Africa).

United States, but also a function of the extent to which following Canada, or at least being influenced by Canada (as in South Africa, for example), is seen as a wise route towards harmonization with emerging international norms.²⁹

The importance of harmonization exists in other legal domains as well. Those nations who wish to join Europe, both literally and figuratively, appear increasingly to believe that having legal systems that look European will increase the likelihood of their successful entry into the European community.³⁰ And given that Germany is the most legally and economically significant of the European nations, we have seen in the Baltics and in Eastern Europe a substantial effort by various nations to design their laws on German models. Most commonly, this effort is not based on a belief that German law is superior in any way, but rather on the belief that harmonization with Germany will itself make the harmonizing nation look more European, and will itself produce a legal regime that is already coordinated with the trans-national community that the nation wishes to join.

²⁸But not, as noted above, constitutional structure or exact text.

²⁹See Kent Greenawalt, "General Principles of Free Speech Adjudication in the United States and Canada," in Fighting Words: Individuals, Communities, and Liberties of Speech (Princeton: Princeton University Press, 1995), pp. 11-27.

³⁰"The Hungarian Constitutional Court may have held the death penalty unconstitutional at least in part because Hungarian political and legal elites believed that doing so was a precondition for entry into association with the European Union, . . . " Vicki C. Jackson and Mark Tushnet, Comparative Constitutional Law (New York: Foundation Press, 1999), p. 171. See also George P. Fletcher, "Searching for the Rule of Law in the Wake of Communism," Brigham Young University Law Review, vol. 1992, pp. 145-63.

Much the same applies to a larger international community. The new constitution of South Africa, unlike any other constitution in the world, explicitly mandates that the South African Constitutional Court and other courts take into account public international law and explicitly encourages courts to take into account “comparable foreign case law” in interpreting the Constitution of South Africa.³¹ As is clear from the debates leading up to the adoption of this provision, the motivation was only partly the desire to have South African judges learn from experiences elsewhere. Much more was it a reaction against South Africa’s recent history as an outcast or pariah nation, and thus this provision appears to reflect a South African desire to have its judges bring South Africa into harmony with international standards, independent of a normative judgment about the intrinsic desirability of those international standards.³²

This goal of harmonization for the sake of harmonization was especially apparent in the South African debates about whether speeches or publications that incite racial hatred should be subject to punishment, as they are in much of the industrialized world, or whether instead even these utterances should be protected by the ideas of freedom of speech and freedom of the press, as they are in the United States and a small number of other nations.³³ But although there was in South Africa clear knowledge of the American model, and although the American point of view was forcefully presented by a large number of South

³¹Constitution of the Republic of South Africa, §35(1).

³²For discussion of a possibly similar phenomenon in Turkey, see Paul J. Magnarella, “The Comparative Constitutional Law Enterprise,” Willamette Law Review, vol. 30 (1994), pp. 509-32, at p. 516.

³³See note 19.

Africans, at the end of the day it was clear that it was simply politically unacceptable for South Africa, given its history, to refuse to join an international consensus on the importance of restricting communications that would incite or foster racial hatred.³⁴ In the final analysis, it was not the superiority of the idea that determined the outcome, but the fact that the outcomes had vastly different political implications, both internally and externally.

It is worthwhile pausing on the symbolic effect of legal transplantation, an effect I noted above in the reference to Canada having the symbolic advantage of not being the United States. Insofar as “copying” the United States has a bad odor in numerous parts of the world, or in some political quarters, avoiding American influence just because it is American often appears to be a driving force. In other countries the politics and symbols may be different. In interpreting the constitution of the Republic of Ireland, the Irish Supreme Court appears to go out of its way to use American precedents,³⁵ and to go out of its way to avoid English law if at all possible. Possibly concerned about the symbolism of being perceived as the “fifty-first state” of the United States, a worry of many Canadians, the Supreme Court of Canada also relies less on American precedents than one might have predicted if the predictions were based solely on geographic proximity, cultural similarity, or even legal cross-fertilization. In looking for legal models and sources of legal influence, the Vietnamese appear studiously to avoid the French, while at the same time embracing the help

³⁴As exemplified in the 1965 Declaration on the Elimination of All Forms of Discrimination, 660 U.N.T.S. 195. See generally Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” *Michigan Law Review*, vol. 87 (1991), pp. 2320-74, at pp. 2345-48.

³⁵A noteworthy example, not as unrepresentative as one might at first think, is the

of Denmark, which actively attempts to cultivate its legal influence in Vietnam, and Sweden, which maintained a strong diplomatic presence in Vietnam even throughout what the Vietnamese refer to as the “American War.” In contrast to Canada, we see that Israel,³⁶ even though having a quite different legal system from the United States,³⁷ relies heavily on American precedents, while much of Eastern Europe relies equally heavily on the German. While membership in a common legal family (common law, civil law, Commonwealth law, etc.) explains some of the pattern of which countries rely on which other countries, these and other examples suggest that the patterns may be far more politically and culturally complex, and that membership in the same legal family is only one small part of the full story.

Because the citation practices of courts, unlike other forms of legal transplantation, contain an explicit record of what the sources were and where they came from, it is not surprising that judicial citations are especially susceptible to the phenomenon of symbolic

contraception case, *McGee v. Attorney General*, [1974] Irish Reports 284.

³⁶See Dafna Sharfman, *Living Without a Constitution: Civil Rights in Israel* (Armonk, New York, M.E. Sharpe, 1993).

³⁷Israel, New Zealand, and the United Kingdom are the only industrialized democracies without written constitutions. It is intriguing that in the raft of constitution-making that has taken place throughout the world in the past decade, not a single country has chosen to follow the model of these countries. Every transforming country has chosen a formal written constitution, despite what one might think would be a desire on the part of those newly in power to avoid the external constraints that come from written constitutions. This suggests that the very idea of a written constitution has become an international norm, and that the unquestioned political stability of the United Kingdom and New Zealand, even if not Israel, has had remarkably little effect on the globalization of constitutional ideas.

effect.³⁸ Moreover, dramatic changes in the technology of legal information are making it remarkably easy for courts and lawyers to have access to the decisions in other countries.³⁹ Thus, the very ease of access is a factor in legal transplantation, as well as what might be called the politics and sociology (and incentives) of database design. Which countries have put their decisions and laws on the Internet? Which have put their decisions and laws on standard databases such as LEXIS and WESTLAW? Which countries have the database designers at LEXIS and WESTLAW selected for inclusion? Which countries have made their laws and decisions available in languages other than the language of the home country, most commonly English but occasionally French and German? And so on. All of these factors, and more, are likely to influence patterns of citation, and patterns of influence, as much as, if not more than, the inherent persuasiveness or authority of one decision rather than another.⁴⁰

³⁸On national differences in citation practices, see Elisabeth Holzleithner and Viktor Mayer-Schönberger, “Das Zitat als grundloser Grund rechtlicher Legitimität,” in Norm und Entscheidung (Berlin: Springer Verlag, 1999).

³⁹This parallels the same computerization and database expansion that has dramatically increased access by courts to social science data, newspaper articles, and other forms of “non-legal” information. See Frederick Schauer and Virginia J. Wise, “Legal Positivism as Legal Information,” Cornell Law Review, vol. 82 (1997), pp. 1080-1110; Frederick Schauer and Virginia J. Wise, “Non-Legal Information and the Delegalization of Law,” Journal of Legal Studies (forthcoming January 2000).

⁴⁰Much the same could be said about interpersonal influence. Increasingly, lawyers, prosecutors, judges, and other legal officials find themselves personally interacting in various international forums with their foreign counterparts. And, increasingly, the connections and alliances that develop not only influence the development and migration of law across

V

Hypothesis 5: The existence of self-interested and self-protective strategies of institutional influence, whether by governments, non-governmental organizations (NGOs), or private sector entities, plays some causal role in determining the patterns of transnational legal proliferation.

Laws do not have wings. The process of legal migration is not a function of actions by laws themselves or even by some invisible hand. Rather, the transmission of legal ideas is a function of human action, and the humans that are taking the action have their own incentives, motivations, and norms. And this applies much more strongly to organizations and institutions. When the Georgetown Law School becomes heavily involved in the making of Estonian commercial, bankruptcy, and securities law, this involvement is, we can assume for the sake of argument, good for Estonia, but it is also good for the Georgetown Law School, reputationally, and perhaps even financially.⁴¹ And if this is true for the Georgetown Law School we would expect much the same for the American Bar Association, the United States Information Agency, the United States Agency for International Development, the Reporters Committee for Freedom of the Press, and a panoply of other public sector, private sector, and non-profit organizations, to say nothing of parallel organizations in other

borders, but also have a quasi-legal status in themselves. So although in the text I stress the more formal indicia of law, everything I hypothesize likely applies as well to the patterns of interpersonal cooperation, and thus to the migration of legal ideas that are the consequence of this interpersonal cooperation.

⁴¹And for the Georgetown School's self-esteem.

countries. To ignore the effect of the motivations of such organizations on legal migration seems a clear mistake.

We might hypothesize a bit about what that effect might be. For one thing, it might be an effect that inclines towards over-transplantation or over-supply. Whatever complex incentives the various law-supplying entities might have, holding down the supply does not appear to be among them. Moreover, in some cases the same entities that have the ability to supply laws also have the ability to create incentives for other countries to adopt them. The government of the United States, through USAID, USIA, and numerous other governmental or quasi-governmental institutions, can provide assistance to countries that are looking for legal models. But the government of the United States, through the Department of State, evaluates, among other things, the laws of other countries on various human rights dimensions. And although there is no reason to believe that there is close collaboration between the supplying function and the evaluating function, it would also be surprising if having an American style law was not relevant to the evaluation, or at least what the recipient country perceived to be relevant to the evaluation. To the extent that a country preferred to be praised rather than condemned in the Department of State's human rights report, then it is not implausible to suppose that that country might believe, whether correctly or incorrectly, that modeling its human rights laws on those of the United States would be helpful in achieving this goal.

It is also possible that this effect would be one in which less major players, actively trying to create their place, and the esteem in which they are held,⁴² in the international

⁴²On esteem as a motivating force, see Richard H. McAdams, "The Origin, Development, and Regulation of Norms," *Michigan Law Review*, vol. 96 (1997), pp. 338-

community, would expend greater efforts than would more established donor nations. When Danish authorities talk about “positioning themselves” to maximize their contribution to planned Vietnamese constitutional revision, it is no insult to the Danes, but merely an observation about normal human (and national) incentives and motivations, to infer that Denmark is concerned not only about Vietnam but also about Denmark, and that Denmark’s self-interested concerns have something to do with the possibility that a quite small country not generally thought of as a major player in international circles could have a major impact on constitutional development in a large and potentially important nation.

Much the same might apply as well to non-governmental entities. Freedom House, created by the Gannett Foundation, provides the index by which democratic liberties throughout the world, are commonly evaluated, and Freedom House is active in assisting various countries with press laws and press freedom. Transparency International sponsors conferences in order to assist countries in achieving transparency and avoiding corruption, and publishes a highly influential international index of perceptions of corruption. These indices are good for researchers, they are good for the causes of civil liberties and the fight against corruption, but they are also good for Freedom House and for Transparency International.

None of this is pernicious, and I do not mean to be taken as suggesting some grand conspiracy theory. Rather, and benignly, I mean only to suggest that the human and institutional agents of the cross-border transmission of legal ideas and models are more or less well-funded, more or less well-politically-connected, and more or less concerned with preservation of their own reputation, influence, power, wealth, and pleasure. No more but no

less than any other institution, the institutions of legal migration are institutions whose own incentives and structures are likely to be causally relevant to which legal ideas are spread, how often, with what force, by whom, and to whom.

VI

The foregoing impressions, anecdotes, and observations suggest one large hypothesis and numerous sub-hypotheses. The large hypothesis, so obviously true as to be hardly worth examining, is that factors other than the receiving nation's own evaluation of the worth of legal ideas, and other than an objective assessment of the worth of legal ideas, are significant determinants of the patterns of legal transplantation and legal globalization. The sub-hypotheses, however, seem plausibly correct, but look to be ripe candidates for testing. These sub-hypotheses are the ones that I have listed above, and there are no doubt more as well, and they are the ones whose more systematic and rigorous testing might well provide new information about the ways in which legal ideas, legal institutions, and legal structures find their way from one country to another.