

Understanding the Behaviour of Legal Transplants in Asian Contexts: A Cross-jurisdictional Analysis

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Numerous factors affect the nature and structure of a country's legal system and the viability of legal transplants. Various theories have been advanced to predict the viability of legal transplants in specific contexts, including the study of the influence of sociocultural factors on law and the 'mirror theory' of law. This work posits that the multiple factors affect transplantability and they cannot be narrowed down into a 'formula' to predict the viability of a particular transplant in one context as compared to another. In the circumstances, although the theories make an important contribution to the discourse on the transferability of legal models around the world, there is an inherent limitation in broad theories in that they fail to speak to the specificities of local contexts. To that end, they invite further and rigorous inquiry into context-specific analyses to facilitate the gradual harmonization of legal structures, which has proved an important goal of law governing economic activities of local, regional and global actors.

Thus far, however, the working presumption in the field of commercial law has been that because the principles involved in the application and enforcement of principles in the commercial context pertain to economic activity, that culture, history, tradition and social values have little or no influence on the legal principles that are applied, transplanted as they may be for any number of reasons, including the country's historical position as a colonized nation or its commitment to adopting model laws setting out international best practices. Teubner has argued 'we need to get beyond juxtaposing culture and legal insulation or social context and legal autonomy.' Thus far, the debate has been overly simplified to present the matter as one of the relative autonomy of law from social factors. However, little work has been done in specific areas of law in the context of Asian legal transplants to assess the behaviourisms of the transplant in vibrant, thriving, and rapidly modernizing societies that are governed by the hybridity that encapsulates a combination of a formal commitment to provisions and principles that further the economic interests of the country and its core values that bear the hallmark of 'local' culture in terms of attitudes, practices and belief systems and their influence on the workings of the law.

This paper explores some of these questions through a cross-jurisdictional study of five former colonies of the United Kingdom to trace the development and application of the principle of undue influence. The jurisdictions studied include Hong Kong, Malaysia, Singapore, India and Australia to test the reception, effectiveness and rootedness of this doctrine in light of unique cultural, religious and political contexts of the countries. The paper presents an analysis of the factors that influence a finding of undue influence as discerned through decided cases and compares the outcomes with similar cases presented in the UK and Australia. In conclusion, the paper offers insights on the factors that impact the viability of legal transplants in the Asian context in different areas of law.