

TOWARDS A DISCURSIVE ANALYSIS OF LEGAL TRANSFERS INTO DEVELOPING EAST ASIA

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I.	INTRODUCTION	658
II.	DESCRIBING LEGAL TRANSFERS	662
	A. <i>What Are Legal Transfers?</i>	662
	B. <i>Terms and Metaphors</i>	664
III.	THEORIZING LEGAL TRANSFERS	666
	A. <i>Legal Evolution</i>	666
	B. <i>Legal Autonomy Theories</i>	669
	1. <i>Limited Legal Autonomy</i>	670
	2. <i>Legal Autonomy</i>	673
	C. <i>Conceptual Problems with Legal Autonomy</i>	674
	D. <i>Sociological Scholarship on Law and Globalization</i>	678
	E. <i>Systems Theory</i>	679
IV.	DISCOURSE ANALYSIS AS METHODOLOGY	683
	A. <i>Legal Transfers as Regulatory Conversations</i>	683
	B. <i>Synthesizing a Methodology from Discourse Analysis</i>	684
	1. <i>"Semi-Autonomous" Discourse Modes</i>	685
	2. <i>Interpretive Communities</i>	685
	3. <i>Discursive Strategies</i>	686
	C. <i>Assessing the Success of Legal Transfers</i>	688
V.	A BRIEF OVERVIEW OF LEGAL TRANSFERS INTO VIETNAM	689
VI.	DEVELOPING A CORPORATE LAW REGIME IN VIETNAM	693
	A. <i>(Re)introducing a Corporate Law Regime</i>	694
	B. <i>Drafting the Enterprise Law 1999</i>	699
	1. <i>The Role of Interpretive Communities in Lawmaking</i>	700
	2. <i>Non-State Regulatory Discourse</i>	705
	C. <i>Unified Enterprise Law 2005</i>	708

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	D. <i>Local Implementation of the Enterprise Laws</i>	709
VII.	MODELING LEGAL TRANSFERS	713
	A. <i>Contests and Negotiations</i>	714
	B. <i>Discursive and Non-Discursive Communication</i> . .	715
	C. <i>Interpretive Communities</i>	716
	D. <i>Strategic Discourse</i>	716
	E. <i>Power Relationships and Regulatory</i> <i>Conversations</i>	717
	F. <i>The Fragmentation of Legal Meaning</i>	718
VIII.	CONCLUSION: APPLYING THE INTERPRETIVE MODELS	718

I. INTRODUCTION

Scholarly interest in the transnational circulation of legal ideas has increased along with the growth of global and regional trading blocks and law reform projects in developing countries.¹ With few exceptions, most theoretical discussion about legal transfer comes from the “country and western” tradition, which emphasizes formal law or “parent” civil and common law legal systems from the European and North American experiences.² This tradition tends to de-emphasize or entirely ignore other legal traditions and less formal kinds of law, such as the massive flow of legal knowledge into and among developing East Asian countries.³ More research and new the-

1. The literature on this subject is vast. See generally ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001); Symposium, *Mixed Reception: Culture, International Norms, and Legal Change in East Asia*, 27 MICH. J. INT'L L. 687 (2006).

2. The “country and western” comparative law tradition derives its name from its preoccupation with state-based (formal) legal systems and legal systems in the civil and common law styles. See William Twining, *Social Science and Diffusion of Law*, 32 J. L. SOC'Y 203, 204-07; Mathias Reiman, *The Progress and Failure of Comparative Law*, 50 AM. J. COMP. L. 671 (2002). For examples of “country and western” comparative law, see William Twining, *A Fresh Start for Comparative Legal Studies?: A Collective Review of Patrick Glenn's Legal Traditions of the World, 2d Edition*, 1 J. COMP. L. 100 (2006); Esin Örucü, *Family Trees for Legal Systems*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 359, 365-75 (Mark Van Hoecke ed., 2004).

3. Those writings that do discuss East Asia in this context tend to focus on Japan and China and to a much lesser extent South East Asian countries. See, e.g., Takao Tanase, *Global Markets and the Evolution of Law in China and Japan*, 27 MICH. J. INT'L L. 873 (2006); Randall Peerenboom, *What Have We Learned About Law and Development?: Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823 (2006); Michael Dowdle, *Of Parlia-*

oretical approaches are needed to understand legal transfers in this region, which is home to the world's fastest-growing economies and arguably the most rapidly changing legal systems as well.

Most commentators construct theories about the transfer of laws across national and cultural boundaries from North American and European perspectives.⁴ Working in mature constitutional societies that order social life through a hierarchy of legal rules, they understand law in state-centered terms as emanating from the state, uniform for everyone, and exclusive of non-state legal sources. From this perspective, law consists of institutionalized rules, doctrines, and epistemologies that only superficially correspond to current social, market, and political conditions in East Asia.

A unifying feature of this scholarship is the presumption that law can and should regulate most social relationships. But in assuming that the "rule of law" provides the main ordering effect in recipient countries, commentators de-emphasize the pivotal role played by private order. They rarely consider comparative scholarship showing that much social regulation is performed by systems that are the functional equivalents of state-based law, such as relational transactions and self-regulatory regimes.⁵ Even internal critics of the "country and west-

ments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China, 35 N.Y.U. J. INT'L L. & POL. 1 (2002); Jianfu Chen, *Market Economy and the Internationalization of Civil and Commercial Law in the People's Republic of China*, in LAW, CAPITALISM AND POWER IN ASIA 69, 76-86 (Kanishka Jayasuriya ed., 1999). For East and South East Asian commentaries, see, for example, Bruce G. Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 LAW. & SOC. INQUIRY 521, 521-84 (2006); Andrew Harding, *Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din,"* in ADAPTING LEGAL CULTURES, *supra* note 1, at 199, 199-220; Penelope Nicholson, *Borrowing Court Systems: The Experience of the Democratic Republic of Vietnam, 1945-1976* (2000) (unpublished Ph.D. Thesis, University of Melbourne) (on file with author); JOHN GILLESPIE, *TRANSPLANTING COMMERCIAL LAW REFORM: DEVELOPING A "RULE OF LAW" IN VIETNAM* (2006).

4. See WILLIAM TWINING, *GLOBALIZATION AND LEGAL THEORY* 184-89 (2000). For a useful review of this literature, see David Nelken, *Towards a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES, *supra* note 1, at 1, 7-51.

5. See, e.g., Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 L. &

ern” tradition of comparative law, such as William Ewald and Pierre Legrand, for the most part do not challenge its state-centered assumptions.⁶

Some recent scholarship in the socio-legal field provides a welcome departure from the “country and western” tradition. A significant body of knowledge is accumulating around the emergence of global norms in business, the environment, and trade.⁷ An ever-increasing number of studies use quantitative analysis to explain why laws and legal institutions seem to transplant more easily into some legal systems than into others.⁸ Yet these studies demonstrate a reluctance to use fine-grained analysis to examine the interaction between the local and global. They have therefore been criticized for reducing complex and contested ideas to unrepresentative generalizations.⁹

The theoretical approach outlined in this Article evolved out of frustration in applying existing theories of comparative law to legal transfers into developing East Asia.¹⁰ The fieldwork I conducted showed that innovative implementation of

SOC'Y REV. 193, 194–204 (1994); Robert Cooter & Janet T. Landa, *Personal Versus Impersonal Trade: The Size of Trading Groups and Contract Law*, 4 INT. REV. L. & ECON. 15, 16–19 (1984); John O. Haley, *Relational Contracting: Does Community Count?*, in JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM 167, 167–80 (Harold Baum ed., 1997).

6. See, e.g., William Ewald, *What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1999); Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262 (1995) (reviewing PETER DE CRUZ, *A MODERN APPROACH TO COMPARATIVE LAW* (1993)).

7. See generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); Gunther Teubner, *Global Bukovina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 3-14 (Gunther Teubner ed., 1997) (analyzing global law emerging from multiple sectors of society).

8. See, e.g., Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Raphael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997).

9. See Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT'L L.J. 95, 98-103 (2004).

10. “Developing East Asia” is a subjective construct, but for our purposes it includes Cambodia, China, Laos, Malaysia, Myanmar, North Korea, the Philippines, Thailand, and Vietnam. Masaji Chiba developed the only comparative technique based on East Asian experiences, but his distinctions between the different levels of reception are difficult to conceptualize, much less to apply to case studies. See Masaji Chiba, *Introduction to ASIAN INDIGENOUS LAW: AN INTRODUCTION TO RECEIVED LAW* 1, 4-6 (Masaji Chiba ed., 1986).

legal transfers not only occurred in and around state institutions, but also in self-regulatory practices beyond the formal exercise of constitutionally-recognized government.¹¹ State-centered theories provided little assistance in analyzing this phenomenon, because they were transfixed by constitutional and legal processes and, as a consequence, lacked the methodological tools to analyze the global and local exchanges taking place outside the state orbit.

This Article aims to advance the theoretical understanding about transfer of laws into developing states in East Asia. Part II begins by describing the different forms of legal transfers. In Part III, I identify the use of legal culture as the key shortcoming with “country and western” theoretical explanations for legal transfers. I then argue that in treating legal transfers as communicative events, systems theory avoids most of the unwieldy definitional and conceptual problems associated with legal cultural analysis. Systems theory thus provides a theoretical architecture for analyzing legal transfers; however, it lacks a methodology for understanding how communicative events convey laws and legal principles across geopolitical and cultural borders. Part IV aims to remedy this problem by synthesizing three methodological tools from the diverse range of techniques present in discourse analysis. These methodologies are employed to evaluate whether communicative acts convey meaningful legal concepts and practices from donors to recipients. Although discourse analysis evolved from Western experiences, unlike “country and western” comparative techniques, it does not presuppose particular state institutions or formal laws. In focusing on what people say about legal transfers, discourse analysis offers a promising way to understand how recipients interpret and implement imported laws and legal principles.

Part V provides a brief history of the ways in which legal transfers have shaped law reform in Vietnam. In Part VI, I develop a case study about the transfer of corporate law into Vietnam. I use discourse analysis to understand how communicative events slowly changed the way elite-level lawmakers interpreted and implemented imported corporate laws and principles.

11. For a comprehensive account of this research, see GILLESPIE, *supra* note 3, at 266-82.

In Part VII, I distill from the case study six interpretive models that are designed to understand how communicative events transfer laws and legal principles to recipients. The models are a preliminary step towards developing a conceptual framework in which to place and analyze legal transfers in developing East Asia. While drawing on Vietnam for specific examples, the models have general application to developing countries elsewhere in East Asia (especially China).

In Part VIII, I conclude that we cannot easily understand legal reforms in developing East Asia using “country and western” state-centered theories about legal transfers, because such theories propose misleading criteria to explain how legal transfers interact with local regulatory practices. Finally, I propose six interpretive models to explain integration of legal transfers into recipient regulatory systems, each of which attempts to refocus analysis on the discourse and tacit assumptions that give meaning and structure to legal transfers into developing East Asia.

II. DESCRIBING LEGAL TRANSFERS

A. *What Are Legal Transfers?*

Comparative lawyers generally understand legal transfers as the horizontal (state to state) and vertical (international organization to state) movement of laws and institutional structures.¹² Such transfers can be imposed or voluntary, encompass entire legal systems or single legal principles, and integrate similar or different cultures. Within recipient countries, legal transfers may permeate state and non-state social institutions; or, in the case of many developing countries, such transfers may be formulated as state law superimposed on indigenous legal structures. Legal transfers are increasingly linked to international legal harmonization projects sponsored by large trading nations, international donor agencies, and transnational corporations. In addition, there is a circularity between the domestic laws of national states and transnational law.¹³ Much transnational law, for instance that found in in-

12. See, e.g., ESIN ÖRÜCÜ, *CRITICAL COMPARATIVE LAW: CONSIDERING PARADOXES FOR LEGAL SYSTEMS IN TRANSITION* (1999); Nelken, *supra* note 4, at 15-21.

13. See, e.g., Teubner, *supra* note 7.

ternational treaties, is derived from domestic law, while domestic law is increasingly based on the domestic reception of transnational law. The transfer of legal knowledge also takes place when international and foreign actors bring foreign expertise home.

A central question in the literature is what is meant by *legal* in legal transfers. The positions taken in this debate are predicated on different understandings of law, legality, and the divisions between law and non-law. From a structuralist perspective, legality is confined to constitutional configurations that include legislation, legal principles, and doctrines.¹⁴ For others, legal transfers are part of broader global processes involving non-state law such as relational connections, supply-chain agreements, voluntary business codes of conduct, and international quality assurance standards.¹⁵ The term “legal diffusion” is sometimes used to signify the movement of legal ideas through diverse channels that only notionally recognize national and cultural boundaries.¹⁶

What constitutes legal transfer is revisited later in the Article, but for the present the term is given an expansive meaning that encompasses the transfer of legal meaning by communicative acts across geopolitical and cultural boundaries. This dialogical definition includes written and unwritten communication that is designed to achieve certain regulatory objectives. Our discussion stops short of considering the diffusion of philosophy, ethics, literature, and music, although they too may influence the way recipients adopt and implement legal transfers.

Finally, this Article is only concerned with one stage of the series of dialogical exchanges that transfer laws and legal prin-

14. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

15. This type of non-state law is called “soft” law, and some theorists believe that it “breaks the frame” of state monopolies over legal transfers. See Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149 (1997) (reviewing MICHEL VAN DE KERDROVE & FRANCOIS OSS, *LE DROIT OU LES PASACHOTES DU JEU* (1992)); MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY 190-95* (1996) (discussing the importance of international business networks).

16. See David Westbrook, *Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless*, Keynote Address at the Harvard International Law Journal Symposium (Mar. 4, 2006), in 47 HARV. INT’L L.J. 489 (2006).

ciples from donors to recipients. It does not discuss the dialogue between countries and the international agents that transmit laws and legal principles. There is a vast literature dealing with exchanges in and around international chambers of commerce, international trade organizations (e.g., the World Trade Organization and certain United Nations bodies), international donor agencies (e.g., the World Bank, International Monetary Fund, and bi-lateral aid donors), multinational companies, and international lawyers.¹⁷ This Article concentrates on the less well-understood dialogue within recipient countries, where laws and legal principles that are primarily derived from Western systems engage at close range with East Asian actors.

B. *Terms and Metaphors*

The many terms and metaphors used to describe and explain legal transfers each have advantages and weaknesses. Expressions like legal harmonization, unification, borrowing, and convergence emphasize the compatibility and co-evolution of legal systems.¹⁸ Terms such as legal transplantation, meanwhile, are used to denote the transfer of law or legal systems into recipient countries in order to achieve a fixed result.¹⁹ When used by theorists such as Alan Watson, transplantation denotes the technical adjustment required to engineer legal reforms.²⁰ Other theorists use this metaphor with more circumspection.²¹ They believe that some laws and legal principles transfer more easily than others. “Mechanical” transplants, those concerning technical legal rules, often occur easily, while “organic” transplants, those involving institutional structures and processes, require careful selection and adapta-

17. There is a broad literature in this area. See generally BRAITHWAITE & DRAHOS, *supra* note 7.

18. The literature on this subject is vast, but for recent writings see Markovits, *supra* note 9; Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004); Esin Örüçü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205 (2002).

19. See WATSON, *supra* note 14, at 21.

20. See ALAN WATSON, *THE EVOLUTION OF LAW* (1985).

21. See, e.g., Otto Kahn-Freund, *On the Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

tion of the relevant norms for them to flourish in new legal environments.

Gunther Teubner uses the term “legal irritant” to indicate that legal transfers do not automatically displace pre-existing legal meanings and practices, but instead trigger a new set of unpredictable choices and outcomes. He uses this metaphor to avoid “the false dichotomy” suggested by legal transplantation, which is the binary image of recipients either repulsing or accepting legal transfers.²² As a metaphor, “legal irritant” is limited by some conceptual shortcomings. It is suggestive of the processes that occur once law has transferred into a new system, but it says little about how, why, and when foreign laws are selected for reform. David Nelken goes further in suggesting that, as metaphors, “legal transplantation” and “legal irritants” share much in common, as they both “direct our gaze mainly to the regulatory problems of trying to use law to change other legal and social orders.”²³

Esin Örüçü devised the metaphor of “legal transposition” to overcome perceived limitations in the legal transplantation terminology. She emphasizes the diverse ways international agencies and recipients interpret rules, stressing that the “tuning [of the transposed laws] that takes place after transposition by the appropriate actors of the recipient is the key to success.”²⁴ She also notes that recipients frequently apply the wrong epistemology to the interpretation of borrowed legal texts and, as a result, misread them.

This Article suggests that commentators pay too much attention to descriptive metaphors in formulating their theories. Metaphors are, after all, only suggestive, and they oversimplify reform processes. They also lack the predictive power to specify what reforms are likely to succeed or fail. A more complete understanding requires a theory that provides criteria that measure transplant success and acknowledge endogenous contributions to legal development.

22. Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *MOD. L. REV.* 11, 12 (1998).

23. See David Nelken, *Beyond the Metaphor of Legal Transplants?: Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation*, in *LAW'S NEW BOUNDARIES: THE CONSEQUENCES OF LEGAL AUTOPOIESIS* 265, 269-75 (Jiri Prihan & David Nelken eds., 2001).

24. See, e.g., Örüçü, *supra* note 18, at 205-08.

III. THEORIZING LEGAL TRANSFERS

Most attempts to understand legal transfers are strongly conditioned by socio-legal theories that understand law as forming part of more general social systems. From this perspective, the central question is whether laws evolving in the specific historical conditions in one country can transplant into different cultural settings in other countries. If legal transfers are to organize political, economic, moral, and other patterns of behavior, then they must “fit” or “comport” with conditions in recipient societies.²⁵ The transferability of law is thus largely determined by the autonomy of law from society and the openness of recipient legal systems.

Three main approaches to legal transfers are discernible in the socio-legal literature: legal evolution, limited legal autonomy, and legal autonomy. There is not complete coherence within each approach, and most theorists argue elements taken from several approaches. Nevertheless, they are broadly illustrative of the main legal transfer theories. This discussion presents these theories and critiques their shortcomings as analytical frameworks for understanding how legal transfers shape legal knowledge and practices in recipient societies. I then present alternative theories that more accurately explain this complex interaction.

A. *Legal Evolution*

Legal evolutionary theory links legal transfers to dynamic social processes in recipient countries.²⁶ In an age of laissez-faire capitalism and colonial empires, early twentieth-century evolutionists like Sir Henry Main recalled social Darwinist claims that “primitive” legal systems evolve into “progressive” Western ones.²⁷ In a similar vein, French administrators invoked a “survival of the fittest” rationale to justify imposing colonial legality in Vietnam.²⁸

25. MARK VAN HOECKE, *LAW AS COMMUNICATION* 37-39 (2002).

26. See PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* 23-29 (1980).

27. See HENRY SUMNER MAINE, *ANCIENT LAW* (Thoemmes Press 1996) (1861).

28. See JOHN DEFRANCIS, *COLONIALISM AND LANGUAGE POLICY IN VIET NAM* 119-21 (1977) (analyzing a letter from Paul Bert to Truong Vinh Ky exposing the French colonial mentality).

Later, Max Weber ascribed legal development to private wealth accumulation, freedom of labor, free movement of goods, and a social need for calculable law and rational public administration.²⁹ He attributed development in Western legal systems to “concrete political factors, which have only the remotest analogies elsewhere in the world.”³⁰ Weber’s subtle theory recognized the possibility of co-evolution between different cultures. But in finding modern European law complete and rational, he inferred that what existed elsewhere was incomplete and irrational.

Influenced by notions of social and economic efficiency, contemporary evolutionists contend that less developed legal systems will inexorably absorb laws from more mature and efficient ones.³¹ Some theorists within this tradition contend that rational decisionmaking is a universal human characteristic that explains all human behavior.³² Cultural difference is marginalized in this calculus, because personal values are considered non-comparable. On this view, legal systems will, over time, choose the most efficient rules and institutions from a selection of solutions found in different national systems.³³ Given that Western legal systems are more systematized than those in developing East Asia, the logical corollary is that East Asian systems will evolve into or converge with those in the West.

29. See David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 731-46 (1972); Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber’s Sociology of Law*, 21 L. & SOC’Y REV. 487, 488-93 (1987).

30. See MAX WEBER, *ECONOMY AND SOCIETY* 695-99 (1968).

31. See Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT’L L. 65, 70-72 (1996). For an evolutionary account of legal reform in post-communist Russia, see Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 93-99 (1995).

32. The term neo-liberal economics refers to a philosophy whose basic units are individuals who make rational self-interested decisions according to prevailing circumstances and available information. For a discussion of this philosophy in the context of legal development, see Elizabeth Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Robert Cooter, *The Theory of Market Modernization of Law*, 16 INT’L REV. L. & ECON. 141, 142-49 (1996).

33. See Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 3 (1994); Cooter, *supra* note 32, at 141.

The globalization of law, which is energized by international trade agreements, foreign investment, communication, travel, and education, appears on the surface to support the notion of legal evolution. The diffusion of "efficient" Western law into developing East Asia occurs when international treaties bind two or more nations to common (generally Western) legal rules. As members of the World Trade Organization (WTO), countries such as China, Indonesia, and Vietnam are required to harmonize their domestic law with a wide range of customs, trading, and intellectual property conventions and protocols. The globalizing influence of private business transactions is another potential catalyst for legal evolution.³⁴ According to Lawrence Friedman, businessmen are the contemporary "carriers of translational law": "[T]here is a tremendous amount of globalization in businesses and the economy, and the law follows along."³⁵ Globetrotting lawyers, financial advisors, and related professionals transfer laws to protect capitalist investors throughout the world. Western (primarily Anglo-American) commercial law is also globalized by "offshore" dispute resolution centers.³⁶

The findings from a wide-ranging survey of legal development in East Asia contest the assertion made by economic evolutionists that decisionmakers everywhere reach similar "rational" conclusions when confronted with equivalent economic problems.³⁷ Instead, the survey found that "throughout much of Asia's legal history, law preceded economic development, but economic development was an important condition for the acceptance and use of laws."³⁸ Each country surveyed developed according to its own unique and historically deter-

34. For a discussion about the globalizing role of businesses, see Wolf Heyderbrand, *From Globalization of Law to Law under Globalization*, in ADAPTING LEGAL CULTURES, *supra* note 1, at 117, 117.

35. Friedman, *supra* note 31, at 75; see also YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 6 (1996).

36. See Yves Dezalay, *The Big Bang and the Law*, in GLOBAL CULTURE 279, 279 (Mike Featherstone ed., 1990). Commercial law is used in a broad sense to denote laws and legal principles that regulate business activities.

37. See KATHARINA PISTOR, PHILIP WELLONS & JEFFREY SACHS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT: 1960-1995*, at 272-73, 278-86 (1999).

38. *Id.* at 50; see also Berkowitz, *supra* note 8 (discussing the importance of economic development for legal reform).

mined economic, political, and social conditions—in short, its own path-dependencies.³⁹ Path-dependent development contradicts legal evolution by showing that culture, as well as economic efficiency, plays an important role in the way recipients implement legal transfers.

Others contest the assumption underlying legal evolution that the legal systems in developing countries in East Asia will inevitably converge with global (more precisely Anglo-American) legal practice.⁴⁰ They point to the narrow range of elites participating in globalization and the many examples of domestic legal divergence.

B. *Legal Autonomy Theories*

Some theorists believe that the transferability of laws can be assessed by examining the congruence or nexus between laws and underlying social forces, a model known as legal autonomy theory. They take positions on a theoretical continuum that ranges from laws with limited autonomy from underlying social forces to fully autonomous laws. Their theoretical positions have a direct bearing on the way they conceptualize legal transplantation. If laws are merely sets of bare propositional statements, as proponents of full autonomy seem to believe, then legal transplantation is comparatively easy, because autonomous laws are not historically or culturally connected to society in any meaningful way. If, on the contrary, laws cannot be de-coupled from their social moorings, they have limited autonomy and require careful adaptation to fit the underlying social structures in recipient countries. Both approaches draw support from the uneven history of legal transplantation.

There is a tenuous correspondence between legal autonomy and legal evolution theories. Limited legal autonomy theorists, who might agree with the premise underlying legal evolution that there is a connection between economic conditions in recipient countries and legal transferability, would disagree with the proposition that legal systems are converging.

39. Path-dependency refers to change that is strongly influenced by a particular set of legal, political and social conditions. *E.g.* PISTOR ET AL., *supra* note 37.

40. See Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321 (2001); Nelken, *supra* note 4, at 31-35.

Legal autonomists, meanwhile, take issue with the nexus between economic needs and legal transferability but agree with the convergence thesis.

1. *Limited Legal Autonomy*

Montesquieu is credited with the belief that law is culturally embedded with little autonomy. He opined that “the political and civil laws of each nation . . . must be so peculiar to the people for whom they are made; it is a very great accident should those of one Nation suit another.”⁴¹ This assertion is based on the belief that laws mirror environmental and social forces in each country. Legal change is path-dependent in the sense that it can only occur within the narrow parameters permitted by underlying social forces and the change engendered by historical cycles. “Mirror theory,” which has developed from Montesquieu’s work, claims that law mirrors society or some aspect of it in a theoretically identifiable manner.

Faced with the reality of massive legal transfers over the last century, contemporary limited-autonomy theorists concede that legal rules transfer but argue that legal cultures and epistemological assumptions do not travel.⁴² For Pierre Legrand, “a crucial element of the ruleness of the rule—its meaning—does not survive the journey from one legal culture to another.”⁴³ This is because culture provides the framework that gives meaning and sense to laws. Laws that result from legal transfers might look the same and be administered by similarly configured institutions, but they are implemented by officials with radically different legal mentalities. For this reason Legrand believes that “transplants are impossible.”⁴⁴

Legrand implies that untenable legal transfers are not only ineffective or short lived; they also may stimulate destabilizing tensions that cause greater problems than the ones they

41. CHARLES DE SECONDAT MONTESQUIEU, *DE L’ESPIRIT DES DROIS* [THE SPIRIT OF LAWS] 74 (J. P. Mayer & A. P. Kerr eds., 1970).

42. See Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L L.J. 517, 522-25 (2006); Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997); Pierre Legrand, *What “Legal Transplants”?*, in ADAPTING LEGAL CULTURES, *supra* note 1, at 55, 55-68 [hereinafter Legrand, *Legal Transplants*].

43. Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. COMP. L. 111, 117 (1997).

44. *Id.* at 114.

were intended to rectify.⁴⁵ This comes about because people in recipient countries interpret imported legal texts using local mentalities that reconstitute the legal meaning of those texts. Compatible mentalities are necessary for effective legal transfers.

Legrand's analysis contains the theoretical ingredients for a decentered approach to legal transplantation.⁴⁶ For example, he stresses that the *legal*, the laws themselves, cannot be analytically separated from the *non-legal*, their cultural context.⁴⁷ In so doing he implicitly rejects Weber's linkage between formal rationality and legal certainty. Legrand draws ideas from anthropologists such as Clifford Geertz and Claude Levi-Strauss about the underlying cognitive structures or mentalities that characterize legal culture. All this suggests that Legrand's theory might search for transplant effects beyond the rules, institutions, and mentalities of the rule of law.

Yet his writings focus almost exclusively on state institutional notions of legal transfers. He discusses, for example, differences separating civil and common law mentalities, legal reasoning, and court culture without considering what ordinary people engaging in self-regulation think about imported law. His analysis locates the interaction between legal imports and recipient societies in state-based institutions, precepts, and processes without contemplating the pluralistic state and non-state regulatory systems that order business activities in Western societies, systems that are even more important in developing East Asian societies.

Legrand's claim that legal cultural differences are unbridgeable (or at least highly problematic) fails to account for those legal transplantation experiments that have proceeded rapidly and smoothly.⁴⁸ There is abundant evidence that legal elites sharing similar educational, epistemological, and regulatory preferences routinely transfer legal knowledge among dif-

45. See also Tahirih V. Lee, *Risky Business: Courts, Culture, and the Marketplace*, 47 U. MIAMI L. REV. 1335, 1338 (1993) (noting that transplanted law is particularly susceptible to creating "chaos"); Marcus Radetzki, *From Communism to Capitalism in Laos: The Legal Dimension*, 34 ASIAN SURV. 799, 802 (1994).

46. See, e.g., Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L. Q. 52, 58-64 (1996).

47. *Id.* at 58.

48. See Markovits, *supra* note 9, at 98-100; Lee, *supra* note 45.

ferent national systems.⁴⁹ As the corporate law case study discussed later in this Article shows, globalized legal knowledge and practices spread quickly among cosmopolitan elites.

Legrand further claims that legal epistemologies in recipient countries are slow to change. While some research supports this view, there are other examples where basic legal epistemologies changed relatively swiftly—indeed, within a generation.⁵⁰ For example, a study of legal reform between 1965 and 1995 in six Asian countries found a discernible shift from local discretionary rules to imported Western commercial legal norms.

Otto Kahn-Freund's writings come closer to explaining the uneven history of legal transfers by employing the important insight that "there are degrees of transferability."⁵¹ Like Legrand, Kahn-Freund reasons that since most laws are deeply embedded in their social and institutional matrices, "we cannot take for granted that rules or institutions are transplantable."⁵² But unlike Legrand, he believes that some laws are more autonomous than others and can transplant across socio-political boundaries.

In Kahn-Freund's estimation, transferability depends on the interconnectedness between legal transfers and political, legal, economic, and cultural institutions in recipient countries.⁵³ At one end of a continuum, a "flattening out of economic and cultural diversity" means that some laws can be decoupled from society and are relatively easy to transplant.⁵⁴ At the other end, laws "designed to allocate power, rule making, decision making, and above all, policy making power" remain deeply embedded in social institutions, and are consequently unlikely to take root in foreign legal terrain.⁵⁵ Kahn-Freund claims that the environmental, socio-economic, and cultural impediments to transferability posited by Montesquieu have

49. See Burkhard Schäfer & Zenon Bankowski, *Mistaken Identities: The Integrative Force of Private Law*, in *THE HARMONISATION OF EUROPEAN PRIVATE LAW* 21 (Mark Van Hoecke & François Ost eds., 2000); Teubner, *supra* note 22.

50. See PISTOR ET AL., *supra* note 37, at 280-84.

51. Kahn-Freund, *supra* note 21, at 6.

52. *Id.* at 27.

53. *Id.* at 7.

54. *Id.* at 9.

55. *Id.* at 17.

lessened in importance over time, while political elements have gained significance.⁵⁶

2. *Legal Autonomy*

Undoubtedly the most extreme articulation of legal autonomy is found in the work of Alan Watson.⁵⁷ The strong version of Watson's theory maintains that small groups of professional elites composed of lawyers borrow laws without reference to social context. Guided by lawyers, autonomous laws operating beyond the realm of social needs transfer freely across cultural borders. According to Watson, if laws ever reflected the spirit of peoples and nations, a long-term process of social differentiation and internationalization has decoupled this linkage. Processes of change are endogenous, he believes, because "to a large extent law possesses a life and vitality of its own; there is no extremely close, natural or inevitable relationship between law, legal structures, instruments and rules on the one hand and the needs and desires and political economy of the ruling elite or of members of the particular society on the other hand."⁵⁸

Some passages of Watson's work support the position that compatibility between donor and recipient legal systems is unnecessary for successful legal borrowing. Elsewhere, he seems to express a less extreme position, wherein legal traditions and doctrines—rather than laws—are autonomous or insulated from society. Ultimately, however, he believes that legal development has evolved through legal transfers and borrowing without significant reference to endogenous social, political, or economic factors. Watson's theories address only one part

56. *Id.* at 8. He believed that industrialization, urbanization, and global communications had "flattened" some of Montesquieu's inhibiting factors. *Id.* at 9.

57. Watson has authored over fifty books and hundreds of articles chronicling a rich history of legal transplants. *See, e.g.*, WATSON, *supra* note 20, at 94; WATSON, *supra* note 14, at 95; Alan Watson, *Aspects of the Reception of Law*, 44 AM. J. COMP. L. 335, 346-50 (1996). For a good overview of Watson's protean utterances, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 498-502 (1995) and also see Roger Cotterrell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 13 (David Nelken ed., 1997).

58. Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 314-15 (1978).

of the legal transplantation puzzle. They examine why elites select foreign laws, but say little about the effects imports have on social change or the implementation and adaptation of borrowed law.

C. *Conceptual Problems with Legal Autonomy*

Though portrayed as adversaries by some commentators, Legrand, Kahn-Freund, and Watson occupy different positions on the same socio-legal theoretical continuum.⁵⁹ Legrand is conceptually closest to mirror theory, which links law with “felt social needs,” while Kahn-Freund and especially Watson lean toward legal autonomy. Their different positions on the continuum produce divergent understandings about the possibility of effective legal transfers.

For Legrand, laws have limited autonomy from economic, political, and moral influences. They are unlikely to transfer successfully if there are discrepancies between the legal myths, narratives, and epistemologies in donor and recipient countries. By contrast, Watson contends that laws are autonomous from their social moorings and readily transfer among globalized legal elites. Legal transfers encounter resistance not from underlying social conditions, but rather from resistance by organized pressure groups in recipient countries. Yet “some degree of correlation *must* exist between law and society. . . . [though] legal rules by no means accurately reflect the needs and desires of society.”⁶⁰

Legrand and Watson disagree about whether law mirrors society, but they agree that laws transfer readily between similar professional legal cultures. Their main disagreement with each other concerns the impact of legal transfers on social conditions in recipient countries. Watson sees few points of interaction between law and society, making transplantation easy, whereas Legrand sees so much interaction that legal

59. See, e.g., Steven J. Heim, *Predicting Legal Transplants: The Case of Servitudes in the Russian Federation*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 187, 190-92 (1996); Ewald, *supra* note 57, at 498-502. Nelken points out that when stripped of its anti-mirror theory polemic, Watson's work only differs from mirror theorists in the ease with which he thinks laws can be transplanted. See Nelken, *supra* note 4, at 12-15.

60. Watson, *supra* note 58, at 321.

transfers generate too many variables and too much uncertainty to readily succeed.

A shortcoming with Legrand and Watson's methodologies is their emphasis on the transfer of formal law from Western "parent" legal systems. They presuppose how legal transfers should behave in recipient countries, potentially marginalizing the role played by less formal kinds of law in ordering social behavior. Watson assumes that laws emanate from the state and have little meaningful interaction with social, religious, and moral values external to the legal system. By placing law in a broader social context, both Kahn-Freund and Legrand remain theoretically open to non-state sources of social ordering (though in practice they focus almost exclusively on state laws, institutions, and organizational mentalities).

As this Article demonstrates, the legal system in Vietnam (and elsewhere in developing East Asia) operates on a different set of assumptions than Western systems. Its centralized elites are less attuned to global laws and principles than their Western counterparts. But more importantly, below the central level, local officials are enmeshed in relational networks and deal with globalization on their own terms. At this level, the legal system is arguably more epistemologically open to underlying non-state sources of ordering than to transnational legal precepts and practices.⁶¹

A significant problem in applying state-centered methodologies in developing East Asia is the uncertainty regarding the boundaries of state power.⁶² A case can be made for state-centered analysis in rule of law societies where law in theory, if not always in practice, clearly and universally delineates the boundaries separating the public and private spheres. But societies may exist in which party and state power is polycentric and the meaning of law contested among different levels of the ruling party and government as well as between social groups. In such a polity, state-centered understandings make

61. See GILLESPIE, *supra* note 3, at 186-92.

62. For a discussion about the polycentric power structures in developing East Asia, see generally MICHAEL BARRY HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975); MARTIN GAINSBOROUGH, *CHANGING POLITICAL ECONOMY OF VIETNAM: THE CASE OF HO CHI MINH CITY 19-32, 101-04* (2003).

little sense without taking into account the legal transfers taking place at the periphery of formal constitutional structures.

Another difficulty with autonomy theories is their reliance on the fit or congruence between legal transfers and recipient legal systems to assess transferability. This approach reflects the central mission of comparative law, which is to contrast one legal system with another. From a comparative perspective, transferability is determined by the compatibility between donors and recipients and the correlate methodology is to search for a fit between legal systems.

It is difficult to measure or evaluate fit. Most theorists in this tradition explicitly or implicitly rely on some variant of legal culture to compare and contrast different legal systems. However, there are three interrelated shortcomings with this methodology.

First, legal culture as a term is inherently vague.⁶³ It is so broad that it could encompass almost any phenomenon.⁶⁴ Scholars have long debated a suitable universal definition with only marginal success. Even advocates of cultural analysis concede that legal culture is an abstraction and a slippery one.⁶⁵ In mature legal systems with large and active legal professions that formulate and define legal doctrines and processes, such as the United States, the idea of a legal culture makes limited sense. In developing East Asian countries like Vietnam—where incipient legal professions have not developed clear legal hierarchies—analysis does not progress far without also having to consider other sources of social ordering such as political and moral rule. It is difficult in these countries to distinguish legal from political or moral culture.

Second, and following from the first point, it is no longer as clear as it once seemed that representations of culture made by national elites universally reflect core cultural values held

63. The term “legal culture” is used to mean the “specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts.” John Bell, *English and French Law—Not So Different?*, 48 CURRENT LEGAL PROBS. 63 (1995).

64. See Lawrence M. Friedman, *The Concept of Legal Culture*, in COMPARING LEGAL CULTURES, *supra* note 57, at 33, 34-36; Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in LAW IN THE DOMAINS OF CULTURE 1 (Austin Sarat & Thomas R. Kearns eds., 2001).

65. See, e.g., Stephen Greenblatt, *Culture*, in CRITICAL TERMS FOR LITERARY STUDY 225 (Frank Lentricchia & Thomas McLaughlin eds., 1997).

by citizens.⁶⁶ For some theorists, the global diffusion of knowledge is so extensive that national borders do not signify the starting points for culture.⁶⁷ As Teubner put it, “[t]oday’s society does not present itself to law as the mystical unity of nation, language, culture and society . . . but rather as a fractured multitude of social systems which allows accordingly only for discrete linkages with these fragments.”⁶⁸ If core national values are difficult to ascertain, transnational cultural comparison becomes even more complex, demanding an analytical approach that recognizes difference across cultural sub-systems in recipient countries.

Third, legal culture is a descriptive rather than an analytical concept. It was developed to describe the underlying characteristics of particular legal systems such as the professionalization of legal institutions or the boundaries between public and private rights. When used comparatively, it registers inconsistencies and incompatibilities between different legal cultures, but as a concept it has no way of evaluating or categorizing interaction between cultures or explaining why the cultures differ.⁶⁹ Because cultural analysis assumes so much about the subject under investigation, the conclusions that will be reached are frequently predetermined. For these reasons, cultural comparison lacks the methodological tools required to assess the transferability of law. The point is not that culture is meaningless or irrelevant, but rather that attempts to harness it are inadequate to deal with its complexity, diversity, and ambiguity. It is instructive to note that attempts by some theorists to give legal culture more specificity have turned to “dialogic exchanges”⁷⁰ and attitudes, uses, and discourses about law.⁷¹

66. See Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 COLUM. J. TRANSNAT’L L. 7, 8-15 (1998).

67. See Westbrook, *supra* note 16, at 490, 501-04; Rosemary Coombe, *Contingent Articulations: A Critical Cultural Study of Law*, in LAW IN THE DOMAINS OF CULTURE, *supra* note 64, at 21.

68. Teubner, *supra* note 22, at 22.

69. See Patrick Glenn, *Legal Cultures and Legal Traditions*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW, *supra* note 2, at 1, 7-20.

70. See Jeremy Webber, *Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken*, 29 AUSTL. J. L. PHIL. 27 (2004).

71. David Nelken, *Rethinking Legal Culture*, in 8 LAW AND SOCIOLOGY: CURRENT LEGAL ISSUES 2005, at 200, 200-24 (Michael Freeman ed., 2006).

D. *Sociological Scholarship on Law and Globalization*

Some recent sociological studies avoid conceptualizing legal transfers as cultural artifacts by focusing on the intermediaries who bridge global legal texts and local understandings.⁷² Yves Dezalay and Bryant Garth pioneered this actor-centered approach to explain how commercial arbitration disseminates legal ideas and practices around the world.⁷³ By examining the personal histories of the main actors and the institutions they served, this study found that the localization of global law depends on who supports this process, whether they are located in the structure of government, and whether they enjoy close working relationships with the international agencies promoting legal reform.

Dezalay and Garth “do not believe that it is helpful to ask whether a transplant fits or does not fit the culture.”⁷⁴ Drawing on Bourdieu’s field analysis, they argue instead that legal transferability depends on power relationships and the distance between global and local actors. They concentrate on how “international strategies are played out within—and transform—local structures.”⁷⁵

In focusing on social actors, their analytical approach represents a significant advance over legal autonomy theories. It avoids the confusion generated by legal culture by encouraging researchers to consider how social actors select and implement legal transfers. More work is needed, however, to explain how relationships between social actors that are based on “power differentials,” “distance,” and “international strategies” combine with broader social forces such as pressure groups and business networks to shape legal transfers. The scope of analysis needs to expand in order to provide a better understanding of what a wide range of state and non-state recipients think about legal transfers.

72. See, e.g., Yves Dezalay & Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars*, in ADAPTING LEGAL CULTURES, *supra* note 1, at 241, 241-53; Carruthers & Halliday, *supra* note 3.

73. See DEZALAY & GARTH, *supra* note 35.

74. Dezalay & Garth, *supra* note 72, at 253.

75. *Id.*

E. *Systems Theory*

Systems theory proposes a way to refocus attention on what recipients think and how they deploy legal transfers. Niklas Luhmann, the architect of systems theory, regards law as a system of communications.⁷⁶ He does not claim there is no external objective reality, but rather that meaningful human action is revealed and structured through communication. Recalling Durkheim, Luhmann believes that society is highly differentiated. But unlike Durkheim, Luhmann sees differentiation in numerous self-referential modes of communication. People within institutions, such as companies, political bodies, or universities, use communication to create their own kind of reality and meanings.⁷⁷ Virtually the whole of society is fragmented into sub-systems that have become so self-referential that they understand their environments from internal frames of reference.⁷⁸ The legal system is no exception.

Systems theory navigates between the extremes of limited and full-blown legal autonomy theory. It suggests that legal systems are “operationally closed” but “cognitively open.”⁷⁹ Legal systems are “cognitively” open to external social facts and norms. Rather than laws simply mirroring society, external facts and norms are integrated into the system according to legal criteria. This requirement is not unexpected, because legal systems could not stay socially relevant without remaining open to external norms, precepts, and practices.

The most controversial aspect of systems theory is the claim that legal systems are operationally closed. The salient point in Luhmann’s complex reasoning is that communica-

76. The literature on systems theory is vast. See, e.g., LUHMANN ON LAW AND POLITICS: CRITICAL APPRAISALS AND APPLICATIONS (Michael King & Chris Thornhill eds., 2006); RICHARD NOBLES & DAVID SCHIFF, A SOCIOLOGY OF JURISPRUDENCE (2006).

77. See NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW (Elizabeth King & Martin Albrow trans., Martin Albrow ed., 1985); Niklas Luhmann, *The Unity of the Legal System*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 12, 21-35 (Gunther Teubner ed., 1988).

78. See Anthony Beck, *Is Law an Autopoietic System?*, 14 OXFORD J. LEGAL STUD. 401, 404-15 (1994); Hugh Baxter, *Autopoiesis and the “Relative Autonomy” of Law*, 19 CARDOZO L. REV. 1987 (1998).

79. See John Paterson, *Reflecting on Reflexive Law*, in LUHMANN ON LAW AND POLITICS, *supra* note 76, at 13, 16-17; NOBLES & SCHIFF, *supra* note 76, at 19-47.

tion is divided into operationally closed autopoietic systems. Luhmann borrowed the term autopoieses from biological research, where it is used to describe self-replicating organic sub-systems.⁸⁰ Communicative sub-systems are operationally closed because they select and adapt information coming from outside according to the internal logic of the system. In other words, legal systems are cognitively open to external knowledge such as legal transfers, but they self-referentially decide how this information is understood and integrated into the recipient system.

In a singularly influential article published in the *Modern Law Review* in 1998, Gunther Teubner applied systems theory to explain the transfer of civil law doctrines of “good faith” into English law.⁸¹ He argued that recipient legal systems are never entirely closed to legal transfers. Foreign laws function like external “perturbations” that, if constantly repeated, shape the way the system understands and integrates external knowledge.⁸² Legal transfers are made possible by lawyers in donor and recipient countries communicating with each other in a mutually comprehensible code or grammar based on a binary division between legal and non-legal. Through a succession of communicative events, lawyers change legal structures in recipient countries.

For Teubner, legal transfers act like “legal irritants in host-country legal systems. They unleash an evolutionary dynamic in which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change.”⁸³ Systems theory challenges the instrumental notion that legal transfers can simply create new legal rules that will induce predetermined behavior among recipients.

This novel way of understanding legal transfers as communicative events avoids most of the unwieldy definitional and

80. Humberto Maturana developed “autopoieses” (also known as systems theory) to explain homeostasis, which is a natural biological state stabilized by complex systems of information and control such as chemical messages in cells. See HUMBERTO MATURANA & FRANCISCO VARELA, *AUTOPOIESIS AND COGNITION* 78-82 (1980).

81. Teubner, *supra* note 22, at 15-25.

82. According to David Nelken, Teubner does not clearly explain how law that is closely coupled to society can in some circumstances de-couple and transfer easily. See Nelken, *supra* note 23, at 269-75.

83. Teubner, *supra* note 22, at 12.

conceptual problems associated with legal cultural analysis. By focusing on how legal transfers are understood and deployed by recipients, it also broadens the analytical framework beyond actor-centered approaches. In addition, systems theory de-centers comparative analysis by finding legal transfers in both state and self-regulatory discourse.

Finally, systems theory rejects the notion that legal transferability depends on a fit or congruence between what is transferred and its recipients. For systems theorists, humans are not simply passive receivers of information from an already-formed external reality—they are actively involved in producing the reality.⁸⁴ In this view, laws transfer across geopolitical and cultural boundaries not because a given rule is autonomous, universal, and enduring, simply awaiting eventual recognition by the recipient, but rather because the rule conveys meaning to social actors in recipient countries. By influencing local thinking, legal transfers shape contingent practices, assumptions, goals, and categories of thought in recipient countries. Knowledge about the correspondence or fit between legal transfers and social conditions in the recipient country is useful only to the extent that it tells us what information is transferred to the recipients. What really matters is how recipients understand and deploy legal transfers.

Some theorists applaud the insights generated by systems theory but believe that Luhmann overstates the epistemological divisions within society.⁸⁵ David Nelken, for example, challenges the assertion that legal transfers are primarily communicated through binary legal/non-legal codes of thinking.⁸⁶ The difficulty for Nelken is that “autopoietic theory would seem to be unable to recognize differences between legal discourses in different cultures except as differences between law

84. For an overview of this position, see STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989); Richard Rorty, *Justice as a Larger Loyalty*, in *JUSTICE AND DEMOCRACY: CROSS-CULTURAL PERSPECTIVES* 9 (Ron Bontekoe & Marietta Stepanints eds., 1997).

85. See Baxter, *supra* note 78, at 1987; Robert Post, *Introduction to LAW AND THE ORDER OF CULTURE* vii, vii-ix (Robert Post ed., 1991); ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY* 166, 320 (1993).

86. See Nelken, *supra* note 23, at 282-86; see also Roger Cotterrell, *The Representation of Law's Autonomy in Autopoiesis Theory*, in *LAW'S NEW BOUNDARIES*, *supra* note 23, at 90, 90-94.

and other social communications.”⁸⁷ This criticism is somewhat overstated. Teubner in particular acknowledges that most regulatory conversations are conducted in more than one mode of thought and that the dominant mode merely orients the emphasis placed on subordinate modes.⁸⁸

Other theorists have taken from systems theory the notion that “legal acts are those communicative events that change legal structures” without also accepting that societies are divided into “discrete discursive systems.”⁸⁹ They envision a less divided world comprised of “semi-autonomous” communicative sub-systems that, albeit imperfectly, converse with each other. Their observations are relevant to this discussion for two reasons. First, they show that it is possible to separate the useful notion that law is a series of communicative acts from the more extreme position that social sub-systems cannot communicate with each other. This extreme view only permits legal transfers between like-minded lawyers and cannot explain the diffusion of legal ideas through political, business, religious, and education networks.⁹⁰ Second, they point to a weakness with systems theory. It provides a rich conceptual framework, but only a thin methodology to understand how communicative acts transfer laws and legal principles. In order to correct this shortcoming, the following discussion synthesizes from discourse analysis a methodology that analyzes the communicative acts that Teubner believes convey legal transfers into recipient countries.

87. See Nelken, *supra* note 23, at 285. Nelken’s objection arises from a broader concern that if legal subsystems are autonomous from other social processes, how do they adapt and change to reflect non-legal ideas and practices?

88. Teubner’s approach to discourse theory is influenced by Jurgen Habermas and Michel Foucault, and he cannot be easily characterized as an autopoietic theorist. See Michael King, *The Truth About Autopoiesis*, 20 J.L. Soc’y 218, 224 (1993).

89. See VAN HOECKE, *supra* note 25, at 203-07 (stating that communication is at the heart of law); Michael Hill, *The Construction and Demolition of the Luhmann Heresy*, in *LAW’S NEW BOUNDARIES*, *supra* note 23, at 123, 123; Julia Black, *Proceduralizing Regulation: Part I*, 20 OXFORD J. LEGAL STUD. 597 (2000); JURGEN HABERMAS, *BETWEEN FACT AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 461-62 (William Reng trans., MIT Press 1996) (1992).

90. See BRAITHWAITE & DRAHOS, *supra* note 7, at 479-506.

IV. DISCOURSE ANALYSIS AS METHODOLOGY

A. *Legal Transfers as Regulatory Conversations*

Why use discourse analysis as a methodology? Because social action, including legal transfers, is primarily (although not entirely) cognizable and effectuated through communication.⁹¹ The interpretation, selection, adaptation, and implementation of legal transfers involves discourse. Discourse is taken to mean “all forms of spoken interaction, formal and informal, and written texts of all kinds,” especially political, economic, moral, cultural, and legal modes of communication.⁹²

Discourse analysis brings human agency into the lawmaking calculus. Communicative acts do not just passively reflect what people think about legal transfers but also actively shape behavior—they have a regulatory function.⁹³ As the corporate law case study highlighted in this Article demonstrates, discussions about legal transfers are designed to achieve certain ends, construct standards that govern behavior, and coordinate the way groups of recipients behave. In short, discussions about legal transfers regulate behavior. For the purpose of this Article, regulation involves a sustained attempt to alter behavior according to defined standards for identified purposes.⁹⁴ It can exist in conversations that are not exclusively performed by the state. No particular institutional or organizational arrangements are assumed in this definition, nor are any particular modes of communication or normative standards.

Discourse analysis collapses the distinction between state and non-state business regulation. In the context of commercial law, this allows analysis of legal transfers with little or no connection to formal state order, such as supply-chain agree-

91. See Margaret Wetherell, *Themes in Discourse Research: The Case of Diana*, in DISCOURSE THEORY AND PRACTICE: A READER 14, 16 (Margaret Wetherell et al. eds., 2001); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 7-15 (2d ed. 2004).

92. JONATHAN POTTER & MARGARET WETHERELL, DISCOURSE AND SOCIAL PSYCHOLOGY: BEYOND ATTITUDES AND BEHAVIOR 7 (1987).

93. See Julia Black, *Regulatory Conversations*, 29 J.L. SOC'Y 163, 174 (2002).

94. The literature on this subject is vast. See, e.g., Christine Parker et al., *Introduction to REGULATING LAW* 1, 1-12 (Christine Parker et al. eds., 2004); Christine Parker & John Braithwaite, *Regulation*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 119, 130 (Peter Cane and Mark Tushnet eds., 2003); Julia Black, *Critical Reflections on Regulation*, 27 AUSTL. J. LEGAL PHIL. 1, 1-26 (2002).

ments, voluntary business codes of conduct, and international quality assurance standards. It also directs our attention beyond the regulatory conversations associated with constitutional organs towards discussions in and around “hybrid” government and private organizations, as well as regulatory networks at the periphery of state power. Research presented in this Article suggests that such regulatory conversations are the principal conduit through which laws and legal principles transfer into developing East Asia.

B. *Synthesizing a Methodology from Discourse Analysis*

In this Section, I synthesize from the many streams of discourse analysis three methodological approaches that offer promising ways to understand how communicative acts transfer laws and legal principles. Discourse analysis provides a set of tools to assess whether recipients are likely to learn from and adopt legal transfers. A unifying feature of the many strands of discourse analysis is the understanding that “communicative interaction produces meaning, and that understanding is situated.”⁹⁵ Put differently, people who share common epistemological frameworks and tacit understandings are likely to learn from each other.⁹⁶ Meaning is inter-subjective, in the sense that shared understandings are generated largely within epistemologically compatible social or organizational groups.

This situated understanding of legal meaning refines and refocuses Legrand’s claim that compatible legal epistemologies are necessary for effective legal transfers. Instead of searching for a fit between legal transfers and recipients, discourse analysis suggests that it is the shared or overlapping epistemologies and tacit understandings within social or organizational groups that give legal transfers meaning and regulatory force.

95. For a general review of law and communication, see David Nelken, *Law as Communication: Constituting the Field*, in *LAW AS COMMUNICATION* 3, 3–30 (David Nelken ed., 1996) and also see Black, *supra* note 89 (discussing how normative ideas ideally emerge from a deliberative process); Teun A. van Dijk, *The Study of Discourse*, in *DISCOURSE AS STRUCTURE AND PROCESS* 1, 3–20 (Teun A. van Dijk ed., 1997).

96. Similar observations are made in the socio-legal literature. See, e.g., Carruthers & Halliday, *supra* note 3, at 528.

1. "Semi-Autonomous" Discourse Modes

Discourse analysis offers promising techniques to assess whether conversations about legal transfers convey meaningful concepts and information. Each discourse mode has its own criteria or codes, often referred to as its epistemologies, for prioritizing the relevance and value of external information. Groups that share common or compatible criteria or modes of thinking are more likely to learn from each other. For example, research shows there is a strong legal interchange or transfer in conversations among Western lawmaking elites conducted in a mutually comprehensible legal language.⁹⁷ Conversely, groups that use different modes to discuss the same law may reach contradictory conclusions. For example, the corporation case study shows that lawmakers are more receptive to views expressed in legal modes than those based on moral or sentimental arguments. In reality, however, people, including lawyers, rarely communicate in one discursive mode; rather, they simultaneously deploy multiple modes to learn from each other.⁹⁸ For this reason, it is important to understand which discursive modes are most receptive to legal transfers.

2. Interpretive Communities

Discourse analysis holds that laws appear the way they do because people interpret them from particular sets of beliefs, practices, and goals, not because laws compel people to reach certain conclusions. As Robertson observed, "being embedded in a background context of beliefs, practices, goals, etc. is what makes perception of anything possible, and is also what gives that perception its 'shape.'"⁹⁹ Research in different societies shows that the deep beliefs of an interpretive tradition or community form "a lattice or web whose component parts are

97. See, e.g., James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555, 561 (1995); Basil Markesinis, *The Destructive and Constructive Role of the Comparative Lawyers*, 57 RABLESZ 438, 443 (1993) ("[F]oreign law is not very different from ours but only appears to be so.")

98. See VAN HOECKE, *supra* note 25, at 49-50.

99. Michael Robertson, *Picking Positivism Apart: Stanley Fish on Epistemology and Law*, 8 S. CAL. INTERDISC. L.J. 401, 417 (1999). Others argue that the history of philosophy and intellectual thought is the history of groups. See RANDALL COLLINS, *THE SOCIOLOGY OF PHILOSOPHIES* 379-83 (1998).

mutually constitutive' and determine what ideas, arguments and facts members find compelling."¹⁰⁰ Legal transfers, for example, may appear logical and desirable for those embedded in one interpretive community, but inappropriate and alien to members of a different interpretive community. Interpretive communities are constitutive of regulatory preferences, because they build common epistemological assumptions about the nature of regulatory problems and the appropriate regulatory responses.

There is no fixed definition of what constitutes an interpretive community.¹⁰¹ Most theorists agree, however, that members of an interpretive community are those who willingly or even unknowingly share common epistemological frameworks and tacit understandings about regulation. According to Alfred Schutz, most assertions and propositions that constitute this knowledge are "just taken for granted until further notice."¹⁰² Rather than identifying interpretive communities by their level of mutuality, theorists believe it makes more sense to mark out boundaries between communities. Factors that differentiate communities will vary among different societies but include different validity claims, sets of epistemologies and tacit understandings, and a willingness to identify with a particular community.

3. *Discursive Strategies*

Discourse analysis insists that the meaning of language is not fixed, because social actors deploy language in strategic ways to achieve certain ends.¹⁰³ Social actors may unknowingly or deliberately invest borrowed ideas with new meanings to secure particular advantages. For example, Dezalay and Garth showed how Latin American elites used imported laws in "pal-

100. STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 280 (1999). For complementary views derived from research in non-Western settings, see Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805 (1987).

101. See generally FISH, *supra* note 84, at 141-60; BRIAN TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY* 170-72 (1998).

102. I ALFRED SCHUTZ, *COLLECTED PAPERS: THE PROBLEM OF SOCIAL REALITY* 7 (Maurice Natanson ed., 1962).

103. See POTTER & WETHERELL, *supra* note 92, at 7; see also Van Dijk, *supra* note 95, at 3; TAMANAHA, *supra* note 101, at 170-72.

ace wars” to advance their power bases.¹⁰⁴ Non-elite groups also organize to support or resist imported laws. This strategic dimension is highly relevant to our discussion, because it raises the possibility that the meaning of legal transfers is contested within recipient countries.¹⁰⁵

Discourse analysis avoids many of the tautological problems that limit the analytical power of “country and western” approaches to legal transfers. Few assumptions are made about legal transfers other than that they are comprised of regulatory conversations of one kind or another. Nevertheless, researchers applying discourse analysis need to avoid filtering their observations through Western assumptions about which kinds of conversations are important. Without this adjustment, discourse analysis could project Western assumptions about “rational” discourse onto radically different socio-legal landscapes. By examining what is said about legal transfers, discourse analysis refocuses attention on indigenous contributions to legal development.

The methodological approaches synthesized from discourse analysis have the potential to improve our understanding about legal transfers in three respects. First, they provide a methodology for assessing whether social actors discussing legal transfers are likely to learn from each other. Second, they highlight the important constitutive role played by “interpretive communities” in building new regulatory solutions from legal transfers. Third, they sensitize the discussion to the possibility that legal transfers generate different regulatory outcomes among state and non-state interpretive communities. These interpretive tools compel researchers to consider how competing interpretive communities contest legal transfers as something that does (or does not) or should (or should not) work.

104. See Dezalay & Garth, *supra* note 72, at 241, 246-57; see also Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L. & COMP. L.Q. 495, 516-19 (1998).

105. Dezalay and Garth claim that legal transfers show the triumph of personal connections. Yves Dezalay & Bryant Garth, *Law, Lawyers and Social Capital: “Rule of Law” versus Relational Capitalism*, 6 SOC. & LEGAL STUD. 109, 110 (1997); see also Carruthers & Halliday, *supra* note 3, at 525-32.

C. *Assessing the Success of Legal Transfers*

A difficulty in measuring the success of legal transfers is finding appropriate criteria. Is success determined by transferring a legal idea into a host country's legislation? Must transplants induce behavioral change of the kind contemplated by donor or host-country lawmakers? Or is it sufficient for legal transfers to act as catalysts that stimulate behavioral modifications in ways that may be unforeseen by lawmakers?

The idea of success assumes that laws have measurable goals. For Watson, most legal transfers are viable simply because legal borrowing is a major source of law reform around the world.¹⁰⁶ Legrand, on the other hand, argues against an instrumental understanding because it conveys the misapprehension that legal transfers are about social engineering.¹⁰⁷ Though reaching different conclusions about the role of legal transfers, both theorists agree that success must refer in some way to changing legal behavior in the recipient country. Otherwise, by definition, there is no transplant, only an indigenously law with foreign provisions or an institution with a foreign name.

A related issue is determining from whose perspective success should be measured. Legal imports may appear useful for one social group but useless for another. By challenging established patterns of behavior, imported laws have the capacity to create winners and losers. For Western foreign investors in developing East Asia, rights-based legal transfers may appear authentic and useful, but for domestic entrepreneurs the same laws may seem inauthentic and imposed. As Roger Cotterell observed, "the way law is conceptualized . . . colors the way that the success (indeed, the very possibility) of legal borrowing is judged."¹⁰⁸

Discourse analysis suggests that success cannot be assessed from an outside "objective" position. If legal transfers are conceptualized as regulatory conversations, then it makes sense that different regulatory narratives will have different criteria for success. For example, state-centered narratives are more likely to link success to state policy objectives than to non-state

106. See Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121 (1983).

107. See Legrand, *Legal Transplants*, *supra* note 42, at 63-66.

108. Cotterell, *supra* note 86, at 79.

business narratives. It is likely that what constitutes success will be contested, since it determines how legal transfers will regulate behavior in recipient countries. All this suggests that success has multifaceted meanings that influence the way legal transfers are interpreted and deployed by recipients. Before applying discourse analysis to the corporate law case study, it is useful to set the stage by briefly describing the history of legal transfers into Vietnam.

V. A BRIEF OVERVIEW OF LEGAL TRANSFERS INTO VIETNAM

When French colonial officials imported civil and commercial codes into Vietnam during the late nineteenth century, domestic resistance arose from sources beyond the standard narrative of an uneasy encounter with a different intellectual system and colonizing power.¹⁰⁹ Although such factors were undoubtedly important, resistance arose primarily from a profound difference in mental categories or modes of thought, and from differences in the conception of human agency. Much of what colonial law had to say about individual legal rights, legal doctrines, and a democratic liberal rule of law made limited sense in a society governed according to virtue-rule and neo-Confucian and traditional village-based principles.¹¹⁰

Following the declaration of independence in 1945, it took decades for the incipient Democratic Republic of Vietnam to entirely replace the colonial legal system with Soviet-inspired laws and institutions.¹¹¹ Vietnamese versions of socialist institutions governed Vietnam for thirty years until *doi*

109. See John Gillespie, *Globalization and Legal Transplantation: Lessons From the Past*, 6 DEAKIN L. REV. 286, 308 (2001).

110. See MILTON OSBORNE, *THE FRENCH PRESENCE IN COCHINCHINA AND CAMBODIA: RULE AND RESPONSE (1859-1905)*, at 118 (1969). The term “virtue-rule” refers to governance through the moral leadership of emperors and mandarins. See Ta Van Tai, *The Rule of Law in Traditional China and Vietnam: Traditional East Asian Legal Practice in the Light of the Standards of the Modern Rule of Law*, 4 VIETNAMESE STUD. 128, 130–35 (2001).

111. See PHAM VAN DONG, MAY VAN DE COT YEU CUA CHINH QUYEN DAN CHU NHAN DAN VIET NAM [SOME CRUCIAL ASPECTS OF THE PEOPLE’S DEMOCRATIC REGIME IN VIETNAM] 7-19 (1952).

moi (renovation) reforms introduced by the Sixth Party Congress in 1986 opened the country to Western legal ideas.¹¹²

By the mid 1980s, rampant inflation, falling production, a vibrant informal economy, and the booming economies of Vietnam's capitalist neighbors could no longer be ignored.¹¹³ Party leaders feared that unless Vietnam rapidly expanded its industrial and technological sectors, the economy would fall further behind, ultimately compromising Party legitimacy and national sovereignty.¹¹⁴ In short, Vietnam faced a national crisis and needed to establish a legal system that would attract foreign direct investment and allow its economy to catch up with the world.

The first wave of new commercial laws, comprised of the Law on Foreign Investment 1987 and the Ordinance on Economic Contracts 1989, were closely modeled on Chinese market reforms.¹¹⁵ Only in areas where China lacked appropriate experience were laws imported from the capitalist West. But lawmakers sought to tame imported market legal principles with discretionary licensing powers.¹¹⁶ Unlike in the former socialist countries in Eastern Europe, the "state economic management" (*quan ly kinh te nha nuoc*) powers designed to regulate a command economy have eroded but not entirely collapsed in Vietnam.

Large-scale commercial legal importation did not begin in Vietnam until the early 1990s, when international economic integration gained political momentum. For example, the Law on Business Bankruptcy 1993, the Commercial Law 1997,

112. For a discussion comparing Soviet and Western legal thinking in Vietnam, see John Gillespie, *Concept of Law in Vietnam: Transforming Statist Socialism*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.* 146, 149-69 (Randall Peerenboom ed., 2004).

113. See Do Muoi, *Political Report to the Mid Term National Party Conference* (Hanoi Voice of Vietnam Network broadcast Jan. 20, 1994), translated in *FBIS EAST ASIA DAILY REPORT* 94-015, Jan. 24, 1994, at 68-70.

114. See Central Committee of the CPV, *Resolution on Industrialization from the Central Committee Seventh Party Congress*, *VOICE OF VIETNAM*, Aug. 11, 1994, translated in *BBC MONITORING SERVICE ASIA-PACIFIC*, Aug. 19, 1994.

115. See JEROME COHEN, *INVESTMENT LAW AND PRACTICE IN VIETNAM*, at xi-xii (1990).

116. See Nguyen Nien, *Several Legal Problems in the Leadership and Management of Industry Under the Conditions of the Present Improvement of Economic Management in Our Country*, 14 *LUAT HOC* 33, 33-35 (1976).

and the Enterprise Law 1999 were inspired by legal models supplied by bilateral¹¹⁷ and multilateral agencies.¹¹⁸

The importation of Western rights-based laws presented an ideological dilemma for Party leaders. Private property and contractual rights were incompatible with socialist ideology and had the potential to undermine party supremacy. Party leaders sought to resolve this conflict by adding two new ideological sources to the long-standing socialist legality (*phap che xa hoi chu nghia*) doctrine privileging Party paramouncy.¹¹⁹

The first new ideological source was the “law-based state” (*nha nuoc phap quyen*), a set of principles based on the Soviet *pravovoe gosudarstvo*, which advocated a form of *Rechtsstaat* in which the government ruled through law rather than policy instruments.¹²⁰ The second new ideological source was derived from Ho Chi Minh’s eclectic writings, which embraced an eclectic array of Western legal principles, socialism, and neo-Confucianism.¹²¹

117. These were, primarily, the Japanese International Cooperation Agency (JICA), the Australian Agency for International Development (AusAID), and the French government.

118. For example, the World Bank, the Asian Development Bank (ADB), and the United Nations Development Program (UNDP). See Politburo Res. No. 48-NQ/TW, The Strategy for the Development and Improvement of Vietnam’s Legal System to the Year 2010 and Directions for the Period up to 2020 (May 24, 2005), available at [http://www.moj.gov.vn/webfile/download.php?sub_dir=%2FTrungDung%2FNQ%2F2007%2F&file=NQ+48++LSDS+STRATEGY+_Resolution+\(English\).doc](http://www.moj.gov.vn/webfile/download.php?sub_dir=%2FTrungDung%2FNQ%2F2007%2F&file=NQ+48++LSDS+STRATEGY+_Resolution+(English).doc).

119. For a recent examination of the changing meaning of socialist legality, see Hoang Thi Kim Que, *Nhan Dien Nha Nuoc Phap Quyen [Identification of the State Under the Law-Based State]*, 5 TAP CHI NGHIEN CUU LAP PHAP 16-23 (2004).

120. See SUA DOI HIEN PHAP XAY DUNG NHA NUOC PHAP QUYEN VIET NAM DAY MANH SU NGHIEP DOI MOI [AMENDING THE CONSTITUTION, ESTABLISHING A “LAW-BASED STATE,” AND PROMOTING DOI MOI ACHIEVEMENTS] 30, 32-33, 37 (1992). *Rechtsstaat* promotes the implementation of state policy through legislation. It de-emphasizes social customs and precedents derived from sources outside the state that are capable of checking political and bureaucratic power. Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat)*, in TOWARD THE “RULE OF LAW” IN RUSSIA?: POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD 43, 46-47 (David Barty ed., 1992).

121. See, e.g., Tran Dinh Huynh, *Moi Quan He Giua Tri Luc—Dao Duc—Phap Luat Trong Quan Ly Dat Nuoc Cua Chu Tich Ho Chi Minh [Relationship Between Intelligence and Morality Law in Ho Chi Minh: Thoughts on Administration]*, 5 TO CHUC NHA NUOC 3, 3-5 (1999); Nguyen Nham, *Why is the Manage-*

This syncretic mix of old and new thinking opened ideological space for drafters to smuggle Western legal rights into legislation without openly challenging socialist orthodoxies. For example, some legal writers have enlisted Ho Chi Minh's vague and eclectic teachings to invest imported political-legal ideas with political respectability. They argue that Ho Chi Minh supported the rule of law principle that law should constrain political power when he demanded constitutional rule for colonized people in 1919.¹²² Others creatively use Ho Chi Minh's thought as a "political umbrella" to introduce democratic liberal precepts such as legal "transparency" (*ro rang*) into the legal discourse.¹²³

After Vietnam entered a bilateral trade agreement with the United States in 2001, the rate of legal borrowing dramatically increased. Compliance rules for international treaties, especially the WTO, compelled Vietnam to introduce dozens of commercial laws and amend many more to recognize property rights and level the "playing field" between foreign and domestic investors.¹²⁴ At the same time, foreign investors and lawyers have been importing legal doctrines and procedures into commercial contracts that bypass state structures and directly influence domestic business behavior. In 2005, more than a decade after the introduction of the law-based state doctrine, Party leaders accepted the core rule of law principle that businesses can carry out any activity that is not directly prohibited by law.¹²⁵

ment of the State by Law Still Weak?, QUAN DOI NHAN DAN, June 13, 1997, translated in FBIS EAST ASIA DAILY REP. 97-203.

122. See Tran, *supra* note 121.

123. Le Hong Hanh, GIAO TRINH LY LUAN NHA NUOC VA PHAP LUAT [TEXT BOOK ON STATE LAW] 322-23 (1998).

124. See Pham Duy Nghia, *Phap Luat Thuong Mai Viet Nam Truoc Thach Thuc Cua Qua Trinh Hoi Nhap Linh Te Quoc Te* [Commercial Law Faces the Challenges of International Economic Integration], 6 NHA NUOC VA PHAP LUAT 9 (2000); Pham Duy Nghia, *Tiep Nhan Phap Luat Nuoc Ngoai—Thoi Co va Thach Thuc Moi Cho Nghien Cu Lap Phap* [Transplanting Foreign Law—Chances and Challenges for Legislative Studies in Vietnam], 5 TAP CHI NGHIEN CUU LAP PHAP 50, 53-56 (2002); Le Minh Thong, *Mot So Van De Phap Ly Cua Qua Trinh Toan Cau Hoa* [Some Legal Issues on Globalization], 1 TAP CHI NGHIEN CUU LAP 65-75 (2003).

125. See Politburo Res. No. 48-NQ/TW, *supra* note 118, § II, ¶ 3 (stating the need "[t]o improve the mechanism to protect the freedom of business activity, based on the notion that a citizen may do all those things that the law does not prohibit").

The study of corporate law reform clearly illustrates the way regulatory discourse influences legal transfers into Vietnam. As the following discussion suggests, corporate law is a central tenet of capitalism. Its introduction into Vietnam during the early period of socialist reforms directly confronted deeply entrenched epistemological views about economic regulation. Later, as rule of law ideas entered elite-level discourse, corporate law was seen by economic reformers as an instrument to break down official resistance to capitalist modes of production. Corporate law reforms chronicle the changing attitudes among lawmaking elites. Discourse analysis adds to this story by providing a methodology for analyzing how communicative events transferred corporate law principles to Vietnamese recipients.

VI. DEVELOPING A CORPORATE LAW REGIME IN VIETNAM

Some commentators believe that, in addition to pursuing catch-up development, Party leaders in the late 1980s were struggling to control a vibrant entrepreneurial economy.¹²⁶ In order to regain control they decided to prepare a company law (CL) that legally recognized private economic activity. The contests, negotiations, and compromises involved in the selection, adaptation, and enactment of the law resist classification as a fit or congruence between legal transfers and recipients. By focusing attention on regulatory conversations, discourse analysis enables a closer analysis of the interaction between legal transfers and the principal actors shaping corporate law.

This study is based on over ten years of research into legal change in Vietnam. Working with international agencies and domestic law firms, I was able to gain close access to officials, legal advisors, documents, and discussions.¹²⁷

126. See ADAM FFORDE & STEFAN DE VYDLER, FROM PLAN TO MARKET: THE ECONOMIC TRANSITION IN VIETNAM 3-4 (1996); Carolyn Gates, *Foreign Direct Investment, Institutional Change, and Vietnam's Gradualist Approach to Reform*, SOUTHEAST ASIAN AFFAIRS 1995, at 382 (1995).

127. I worked as a consultant for the World Bank, UNDP, International Finance Corporation (IFC), and bilateral agencies such as AusAID and Danida on numerous legal reform projects in Vietnam from 1994–2006. I also conducted many academic research projects funded by the Australian Research Council and university grants. For a comprehensive account of legal reform in Vietnam, see GILLESPIE, *supra* note 3.

A. *(Re)introducing a Corporate Law Regime*

The Politburo in 1988 instructed the Central Institute for Economic Management (CIEM), a research organization attached to the State Planning Commission, to draft a law that regulated private commercial organizations.¹²⁸ During this early stage of *doi moi* reforms,¹²⁹ private trading was still unconstitutional—a situation that was not remedied until the new Constitution of 1992. In the meantime, Politburo Resolution 16 of 1988 paved the way for a company law by recognizing legal equality for all economic sectors, freedom for private enterprises to conduct business activities, and the right to own and bequeath “the means of production.” The Party’s instructions to CIEM nevertheless stressed the need to balance private business freedoms with discretionary controls to preserve “state economic management” (*quan ly kinh te nha nuoc*).¹³⁰ As we shall see, drafters interpreted these instructions to mean that they should subordinate private corporate rights to the “state benefit” (*loi ich cua nha nuoc*).

Corporate law based on the French *Droit de société* existed in the North before partition in 1954 and until reunification with the South in 1975. However, by the 1960s, the legal system in the North did not sanction a role for private commercial organizations and only permitted state owned enterprises (SOEs) and cooperatives.¹³¹ When drafters commenced work on the CL, the official discourse regarded companies as colo-

128. Politburo Res. No. 48-NQ/TW, *supra* note 118. The drafting committee comprised representatives from line-ministries (such as the Ministry of Trade and Ministry of Heavy Industry), the Ministry of Justice, and the Central Internal Affairs Commission (CIAC).

129. *See supra* Part V.

130. Information about the draft Company Law was primarily derived from interviews with officials supporting the drafting committee. Interviews with Nguyen Dinh Cung, Dir., Macro Regulation Dep’t, Cent. Inst. of Econ. Mgmt., in Hanoi (Sept. 1994, Mar. 1999, Sept. 1999); Interview with Dang Duc Dam, Vice Dir., Cent. Inst. of Econ. Mgmt., in Hanoi (Dec. 1996). Further information was gained from members of the drafting committee. Interview with Luu Van Dat, in Hanoi (Jan. 2001); Interviews with Phan Huu Chi, former advisor to the Minister of Justice, in Hanoi (Jan.–Feb. 1994); Interview with Le Dang Doanh, in Hanoi (Apr. 2004).

131. *See* NGUYEN THI DOAN & DO MINH CUONG, TRIET LY KINH DOANH: VOI QUAN LY DOANH NGHIỆP [THE BUSINESS PHILOSOPHY OF THE MANAGEMENT OF ENTERPRISES] 92-93 (1999); Pham Thanh Vinh, *The Obligatory Nature of Planning Targets*, 12 REV. CONTEMP. L. 89, 89-97 (1966).

nial and capitalist artifacts standing outside indigenous experience. There were few domestic laws or institutional practices to guide the drafters, who were compelled to search for inspiration beyond the socialist world.

The main difficulty facing members of the drafting committee was their lack of knowledge about Western commercial law. With the exception of Luu Van Dat and Phan Huu Chi, French-trained lawyers, other drafters knew and cared little for market principles and corporate law. Their attitudes were conditioned by an interpretive tradition that preferred concessionary licensing to private commercial rights as well as the tacit assumption that private businesses required strict state management. For decades, a potent combination of neo-Confucian anti-mercantilism and socialist class theory had instilled state bureaucrats with antipathy toward the private sector.¹³² Surveys show that many bureaucrats considered private entrepreneurs incompetent and probably fraudulent and corrupt.¹³³ Such views were inimical to the neo-liberal market principles and private rights underpinnings of Western corporate law.

The drafting committee initially considered borrowing corporate law from the former Republic of Vietnam (RV).¹³⁴ However, the Party rejected this initiative on political grounds because the adoption of a law from the RV would confer too much legitimacy on the discredited “Sai Gon government.” Instead, the committee based the CL on French Law 66-537 on Commercial Companies 1966 (the “French Law”). With a mere 46 articles, the new Vietnamese CL was a skeletal facsimile of the 509 provisions in the French Law. Though brief, the CL contained most elements of modern corporate law, such as limited liability, corporate governance rules, and provisions es-

132. See MEKONG PROJECT DEVELOPMENT FACILITY, PRIVATE SECTOR DISCUSSION PAPER NO. 9, PRIVATE COMPANIES IN VIETNAM: A SURVEY OF PUBLIC PERCEPTIONS (1999), available at [http://www.ifc.org/ifcext/mekongpsdf.nsf/AttachmentsByTitle/PSDP+9/\\$FILE/PSDP-No-9-EN.pdf](http://www.ifc.org/ifcext/mekongpsdf.nsf/AttachmentsByTitle/PSDP+9/$FILE/PSDP-No-9-EN.pdf) [hereinafter MPDF DISCUSSION PAPER NO. 9].

133. See MPDF DISCUSSION PAPER NO. 9, *supra* note 132; Luu Quang Dinh, *Dung Do Loi Cho Luat Doanh Nghiep (Do Not Blame the Enterprise Law)*, LAO DONG, July 30, 2001, at 3.

134. See Le Dang Doanh, *The Enterprise Law and the Development of the Domestic Private Business Sector in Vietnam*, 38 VIETNAM'S SOCIO-ECON. DEV. 6, 6-7 (2004).

tablishing shareholding companies (*cong ty co phan* or *société anonyme*) and limited liability companies (*cong ty trach nhiem huu han* or *société à Responsabilité Limitée*).¹³⁵ In short, the drafters imported the legal rules that enabled entrepreneurs in the Western world to create wealth from the “surplus value” of employees while protecting personal assets from business losses. But, as we shall see, the imported principles were subordinated to the discretionary powers of state officials.

The few changes made to the French legal template reflected the drafters’ Soviet legal training.¹³⁶ For example, drafters varied the French law by giving limited liability companies with fewer than twelve members the right to appoint only one director to act on behalf of the company.¹³⁷ In Soviet law there was no need for executive directors and boards of directors to represent SOEs, because supervising authorities, such as ministries and people’s committees, ran SOEs like administrative agencies.¹³⁸ In another example, the drafters did not see the need for complex corporate governance rules, especially directors’ duties, because in the command economy supervising authorities used discretionary administrative penalties to discipline wayward SOE directors. In both cases, drafters reinterpreted Western corporate governance rules to reflect the prevailing understanding that state authorities were responsible for the internal management of companies.

Drafters were concerned that, left unchecked, the neo-liberal economic principles codified in the French corporate law would enable private companies to nurture a new capitalist class.¹³⁹ They learned from Chinese legislative experiments

135. For a detailed discussion about the contents of the Company Law, see John Gillespie, *Corporations in Vietnam*, in *COMPANY LAW IN EAST ASIA* 297 (Roman Tomasic ed., 1999).

136. Interview with Phan Huu Chi, former advisor to the Minister of Justice, in Hanoi (Apr. 1992).

137. Law on Private Enterprises (promulgated by the Nat’l Assembly, Dec. 12, 1990, amended June 22, 1994) (Vietnam), available at <http://hannover.park.org/Thailand/MoreAboutAsia/vninfo/docs/t339.html>.

138. See OLYMPIAD S. IOFFE & PETER B. MAGGS, *SOVIET CIVIL LAW IN THEORY AND IN PRACTICE* 34-46 (1988); Stephen Lucas & Yuriy Malter, *The Development of Corporate Law in the Former Soviet Republics*, 45 *INT’L & COMP. L.Q.* 365, 366-68 (1996).

139. See generally Duong Dang Hue, *Phap Luat ve Viec Cap Giay Phep Thanh Lap Doanh Nghiep Dang Ky Kinh Doanh o Viet Nam: Thuc Trang va Mot Vai Kien Nghi* [Legal Regulations in Relation to Issuance of Permits to Establish Enterprises

conducted in Shenzhen and Shanghai during the 1980s that instilling economic management powers in state officials gave them discretion to control the exploitation and social harm caused by private companies.¹⁴⁰ In order to promote state economic management over companies, drafters gave government officials broad licensing powers to limit the scale of private business activities and economic sectors in which they could operate.¹⁴¹

Drafters imposed operational restrictions on companies by broadly interpreting the doctrine of *ultra vires*.¹⁴² They understood legal personality in a highly state-centered context as an institution created and limited by law.¹⁴³ Without traditions of natural rights theory and individualism (*chu nghia ca nhan*), drafters did not consider that corporate rights could be equated to a natural or human legal capacity to conduct businesses.

The legal capacity of companies to conduct business was determined by the “rights and obligations” set out in company licenses. Operational objectives were prescribed with considerable precision by licensing authorities. General powers to pursue authorized objectives appeared in the CL,¹⁴⁴ but companies were not permitted to expand their business capacity by adopting a “shopping list” of associated and tangential objectives. Local authorities (people’s committees) used capitalization, education, and health permits to guide private capital proactively into state-sanctioned areas. Administrative and

and Business Registration in Vietnam: The Present Situation and Some Recommendations], 4 NHA NUOC VA PHAP LUAT 20 (1994).

140. Interviews with Phan Huu Chi, *supra* note 130. See generally Chuan Roger Peng, *Limited Liability in China: A Partial Reading of China’s Company Law of 1994*, 10 COLUM. J. ASIAN L. 263, 264-269 (1996).

141. Law on Private Enterprises, *supra* note 137.

142. Literally meaning “beyond power,” the doctrine implies that companies only have the capacity to form legal relationships in areas expressly permitted in incorporation documents.

143. Interview with Luu Van Dat, *supra* note 130; Interviews with Phan Huu Chi, *supra* note 130. For a general discussion about the role of corporations in the economy, see Nguyen Ngoc Tuan, *Renovating the Enterprise Model in Our Country*, 12 TAP CHI CONG SAN 1, 29-33 (1993); Nguyen Nhu Phat, *Conceptions on the Legal Status of Entrepreneurs in the Market Economy*, 2 NHA NUOC VA PHAP LUAT 1, 25-27 (1993).

144. Law on Private Enterprises, *supra* note 137.

criminal penalties applied to company officials who strayed beyond the authorized parameters.¹⁴⁵

In summary, during the early stages of *doi moi* reforms, the rights-based ideas underpinning corporate law conflicted with the state management principles that animated official thinking. Drafters of the CL belonged to an interpretive community that privileged state management and ownership over market allocation and private capital accumulation. Few drafters possessed the linguistic and epistemological knowledge required to converse meaningfully with the French and UNDP legal advisors assisting the drafting project.¹⁴⁶ Adding to the drafters' isolation from global legal discourse, the international legal advisors were only in-country to discuss the draft law for short periods. This left them insufficient opportunity to persuade the drafters that entrepreneurs could be trusted to make sound commercial decisions and to behave in a socially responsible fashion.

However, it is unclear whether better communication would have significantly changed the outcome. Although Vietnamese authorities requested Western technical assistance, it is likely that drafters were under strict political instructions to control private rights. The final draft placed private corporations firmly under a concessionary licensing system that gave state officials broad discretionary powers to limit the scale of private business activities and economic sectors in which they could operate.

The CL commenced operation in 1990, but within five years concessionary regulation was already beginning to constrain domestic investment.¹⁴⁷ In 1995, the Eighth Plenum of the Party Central Committee instructed CIEM to draft a new company law to implement three main reforms: legal equality, market reforms, and legal harmonization.¹⁴⁸ Le Dang Doanh,

145. *Id.* art. 26.

146. Drafters were mainly assisted by French legal advisors, but some seminars on corporate law in civil and Anglo-American jurisdictions were run by the UNDP.

147. See Nguyen Trinh Binh, *Da Den Luc Phai Sua Doi, Bo Sung Luat Cong Ty (It is Time to Amend the Law on Companies)*, SAIGON GIAI PHONG, July 3, 1995, at 3.

148. See Le Dang Doanh, *Enterprise Law: A Must for Further Development of Multi-Sectorial Economy*, 56 VIETNAM L. & LEGAL F. 11 (1999).

the market-reform minded director of CIEM, established a new drafting committee in 1998.¹⁴⁹

B. *Drafting the Enterprise Law 1999*

Much had changed in the cognitive landscape since the CL was drafted in the late 1980s. The 1992 Constitution not only recognized private business; it also introduced the “law-based state” (*nha nuoc phap quyen*) ideas that provided the ideological space to roll back state economic management and proactive business licensing. International economic integration was also gaining momentum in Vietnam during this period, especially after the Communist Party agreed in 1996 to enter negotiations to join the WTO. Perhaps more importantly, Party leaders reached a consensus in 1997 about an action plan to improve the environment for private sector development and combat the economic downturn precipitated by the Asian Economic Crisis.¹⁵⁰

The Party’s drafting instructions to CIEM, which eventually resulted in the Enterprise Law 1999 (EL), reflected an increased willingness to engage with Western regulatory ideas.¹⁵¹ Nevertheless, differences of opinion emerged within the drafting committee about the ongoing role of state economic management in regulating private companies. Drafters representing ministries that directly regulated the economy, such as the Ministries of Transport and Industry, vigorously opposed any relaxation of the state economic management controls over market entry. Drafters from the Ministry of Transport, for ex-

149. Vietnamese Government Establishes a Formal Drafting Committee, Decision 37/QĐ-TTg (Jan. 13, 1998). Representatives from the following agencies participated in the drafting committee: the Central Institute of Economic Management, the Ministry of Justice, the Office of National Assembly, the Ministry of Trade, the Ministry of Industry, the State Inspection Commission, the Economic Commission of the Central Party Committee, and the Vietnam Chamber of Commerce and Industry. See RAYMOND MALLON, *MANAGING INVESTMENT CLIMATE REFORMS: VIET NAM CASE STUDY 25* (2005), available at http://siteresources.worldbank.org/INTWDR2005/Resources/477407-1096581040435/mallon_vietnam_case_study.pdf (detailing key policy initiatives in the Enterprise Law reform process).

150. See MALLON, *supra* note 149, at 14-15.

151. The case study on the Enterprise Law is based on interviews with Le Dang Doanh, the head of the drafting committee, and Nguyen Dinh Cung, the secretary to the drafting committee. Interview with Le Dang Doanh, *supra* note 130; interviews with Nguyen Dinh Cung, *supra* note 130.

ample, argued that licensing provisions were necessary to prevent private transport companies from exploiting the working class. Ministry representatives also advanced the political argument that market liberalizations compromised Party leadership. CIEM drafters believed these notions were raised as a pretext to preserve discretionary (and frequently corrupt) powers over market entry.¹⁵²

CIEM drafters, together with like-minded officials in the Vietnam Chamber of Commerce and Industry (VCCI), counter-argued that deregulating licensing provisions in the CL would unleash domestic capital investment.¹⁵³ Companies, they believed, should be able to operate in any economic sector without being constrained by business licenses. Their proposal to abolish licensing marked a radical shift from socialist proactive market management to neo-liberal facilitative regulation.

With the assistance of the VCCI, CIEM officials compiled case studies to show the economic costs produced by administrative barriers to market access.¹⁵⁴ Licenses and permits governing education, health, and capital requirements, which were designed to exclude unwanted investment, were criticized for failing to distinguish good investments from poor ones. CIEM officials used empirical evidence to show that business licenses increased the time and cost of incorporation and deterred potential investors.

1. *The Role of Interpretive Communities in Lawmaking*

Policy changes by the Party and state only partly account for the shift from socialist concessionary to neo-liberal economic thinking within CIEM. The political economy undoubtedly also influenced elite thought, but it does not explain why CIEM drafters considered neo-liberal deregulation a solution to the economic slowdown, while drafters from other ministries did not. Institutional self-interest also fails as an explana-

152. Interview with Le Dang Doanh, *supra* note 130.

153. Interviews with Dang Duc Dam, Vice Dir., Cent. Inst. of Econ. Mgmt., in Hanoi (Nov. 1997); Interviews with Nguyen Dinh Cung, *supra* note 130.

154. VIEN NGHIEN CUU QUAN LY KINH TE TRUNG UONG [CENTRAL INSTITUTE OF ECONOMIC MANAGEMENT], DANH GIA TONG KET: LUAT CONG TY VA KIEN NGHI NHUNG DINH HUONG SUA DOI CHU YEU [REVIEW OF THE CURRENT COMPANY LAW AND KEY RECOMMENDATIONS FOR ITS REVISION] (1998).

tion. Some ministries with a direct stake in preserving state economic management, such as the Ministry of Trade, tentatively supported deregulatory reforms.

Discourse analysis provides a fuller explanation, because it offers reasons why some drafters were more cognitively receptive to neo-liberal arguments than other drafters. It points out that preference convergence of the kind required to change regulatory perspectives is most likely to occur when drafters discuss ideas from similar epistemological perspectives in unmediated environments. Discussions between CIEM drafters, who advocated neo-liberal economic solutions, and drafters from conservative ministries, who favored concessionary arguments, were generally unproductive because the epistemological assumptions underpinning these positions provided little common ground for consensus and compromise. CIEM and VCCI officials, on the other hand, shared similar neo-liberal deregulatory positions that facilitated a close working relationship.

In contrast to the long-distance legal assistance given to the CL drafting committee, the main international agencies assisting the EL drafting committee localized their support by maintaining long-term project offices and personnel in Vietnam.¹⁵⁵ In another change, the international agencies used locally-based international and domestic consultants and foreign and domestic law firms to bridge the cognitive gap between global laws and principles and local precepts and conditions. A decade earlier, these professional services were unavailable to the agencies supporting the draft CL.

Further, conditions attached to loans advanced to the government during the 1990s by the Asian Development Bank (ADB), the IMF, Japan (through the Miyazawa initiative), and the World Bank sought to deregulate market access for private businesses. However, it is unlikely that the loans were instrumental in changing government attitudes. As a locally-based foreign consultant involved in drafting the EL observed:

Most national observers felt that while there had been substantive dialogue between government and donors on key policy issues that had helped in improving and developing the socio-economic develop-

¹⁵⁵ The main international agencies supporting the EL were the ADB, UNDP, the German International Aid Organization (GTZ), and AusAID.

ment agenda in Viet Nam, formal policy-based lending had not played a pivotal role in securing reforms.¹⁵⁶

It is more likely that the international agencies supporting the EL played the decisive role in convincing drafters to use neo-liberal solutions to resolve Vietnam's economic problems. They inculcated neo-liberalism through sustained relationships that brought foreign advisors,¹⁵⁷ consultants, and lawyers into a close working relationship with state officials.¹⁵⁸ Further cementing these relationships, some members of the drafting committee also worked as consultants for the international agencies. In addition to the numerous official workshops convened by CIEM and VCCI to discuss EL drafts, small informal meetings and telephone conversations took place between advisors and drafters on a daily basis.

Rather than the drafters converting to the neo-liberal agenda *en masse*, small but influential cliques sympathetic to this thinking developed within CIEM and other drafting agencies such as the VCCI and Ministry of Trade. Over time, this group formed a loosely constituted neo-liberal-oriented interpretive community. The term "community" in this case does not signify a spatial location or a specific place where particular interpretive positions were followed, but rather refers to a network of abstract social relationships that have the potential

156. RAYMOND MALLON, APPROACHES TO SUPPORT THE DEVELOPMENT OF AN ENABLING ENVIRONMENT FOR SMALL ENTERPRISES: COUNTRY REPORT: VIET NAM 25-27 (2002), available at http://www.businessenvironment.org/dyn/be/docs/25/Report_Vietnam.pdf.

157. David Goddard, a New Zealand corporate lawyer, and Reinier Kraakman, a Harvard University academic and architect of the Russian corporate reforms, were perhaps the most influential foreign advisors to CIEM. See Chapman Tripp, Sheffield & Young, Enterprise Law Reform—Some Issues and Some Suggestions (1998) (unpublished paper, on file with author); Reinier Kraakman, Comments on the Draft General Report: Law of Enterprises of Different Forms in Vietnam UNDP Program VIE/94/003 (1997) (unpublished paper, on file with author). Some discussion took place about the relative merits of German and American corporate models, but in the main the Anglo-American approach prevailed.

158. Lawyers and economists from Vietnamese investment consultant firms such as Investconsult, Galaxy, Leadco, Vietbid, and Concetti worked closely with foreign investors and international agencies in providing research and strategic advice to promote legal reform.

to generate cooperation and shared responses to regulatory problems.

Vietnamese members of this community were mostly foreign-educated, proficient in English, and well-acquainted with globalized neo-liberal regulatory principles.¹⁵⁹ Through frequent international study tours, training courses, and conferences, they developed links with a network of international legal reformers. This interaction expanded their worldviews from parochial and local to cosmopolitan, while access to foreign consultancies, travel, and education provided an incentive to use neo-liberal ideas to resolve domestic problems.

In working closely with foreign advisors and locally-based foreign consultants, some drafters were constantly exposed to particular narratives about the correct approach to regulatory problems. The uniform language, style, and argumentation promoted by international agencies were not just a matter of form, as they also embodied concepts and worldviews. Members communicated in mutually comprehensible legal and economic modes of thought that assisted in the rapid transfer of complex corporate law doctrines. Common social interests and professional ideas encouraged an enclave-like and self-referential approach to policy alternatives. This in turn generated a propensity for members to exclude or minimize critical legal, economic, and political perspectives. For example, CIEM drafters and international agencies vigorously resisted suggestions from some local academic commentators that the EL should apply simplified corporate governance rules to small-scale private companies.¹⁶⁰

CIEM officials adopted a set of preferences and epistemological assumptions that set them apart from most domestic entrepreneurs.¹⁶¹ The principles of neo-liberal deliberation not only privileged certain regulatory ideas, but also arguments expressed in ordered, structured, and dispassionate lan-

159. For example, Nguyen Dinh Cung from CIEM, one of the principal architects of the Enterprise Law, received a masters degree in economics from the University of Birmingham; others involved in the drafting projects held Ph.D.s in development economics from the Australian National University.

160. Interviews with Nguyen Nhu Phat, Dir., Ctr. of Comparative Law, Inst. of State & Law, in Hanoi (June 1998).

161. These comments are based on observations I made at meetings between CIEM drafters and entrepreneurs held in Hanoi during June 1998.

guage. By favoring particular modes of discourse, drafters defined away the sentimental, figurative, and highly contextual arguments (discussed below) that domestic entrepreneurs raised to oppose certain corporate governance reforms.

The boundaries delineating the interpretive community were difficult to identify. Not only were its members reluctant to openly identify with foreign legal agendas, they also belonged to Party, state, business, and family-based interpretive communities with competing principles and practices. In order to function within multiple interpretive environments, members were obliged to deploy neo-liberal ideas strategically. Rather than passively following the advice given by foreign advisors, CIEM drafters applied neo-liberal prescriptions tactically so as not to offend the hierarchies and policies in their host institutions. For example, CIEM drafters rejected foreign legal advice to give companies the legal rights of natural persons because so doing would have questioned Party objections to market-individualism. They also used heterogeneous narratives that adjusted neo-liberal prescriptions to suit the audience. Yet, over time, the perceived success of the EL increased the drafters' prestige and influence, allowing neo-liberal ideas to infiltrate further into the organizational hierarchy.¹⁶²

CIEM drafters lacked the political power to prevent state economic management views from entering lawmaking discussions. They speculated that forces supporting this thinking, such as the Party Economic Commission and Ministry of Public Security, would have undermined reforms if their opinions were ignored. Unable to exclude contrary views, they encouraged consultation that exposed other drafters to neo-liberal deregulatory ideas. CIEM drafters welcomed the contributions of experts from many legal systems, not only to dispel the impression that they were captured by any particular international agency but also to give themselves ample opportunities to find regulatory solutions that satisfied competing interests. Without ever directly challenging state economic management, which remains a core Party doctrine, they used

162. For example, Nguyen Dinh Cung, one of the principal architects of the Enterprise Law, was promoted to Director of the Enterprise Department in CIEM and secretary to the Enterprise Enforcement Mission Group (Nhom Nhiem Vu Cuong Che Doanh Nghiep), which the Prime Minister convened to prevent reregulation under the EL.

empirical evidence to show that deregulation would stimulate economic development and industrialization, an overarching Party policy. CIEM drafters and their allies used a well rehearsed neo-liberal deregulatory script, backed by local research, to defeat political, moral, and sentimental objections to market deregulation.

2. *Non-State Regulatory Discourse*

Most domestic entrepreneurs viewed the draft enterprise law from a different perspective than CIEM and VCCI officials.¹⁶³ Although entrepreneurs generally supported market-entry deregulation, most opposed other facets of the neo-liberal regulatory agenda such as complex corporate governance rules, more statutory reporting, and robust minority shareholder rights. They worried that complex rights-based rules would disrupt the organizational structures and processes underpinning family-based management hierarchies. They were also concerned that minority shareholder rights would discourage employers from offering their employees shares and that more rigorous disclosure requirements would reveal sensitive business information to competitors.

VCCI invited some entrepreneurs to make a case against business licensing, but discouraged them from expressing concerns about the internal management rules to the drafting committee. A few entrepreneurs later revealed that VCCI staff tightly managed these exchanges with the drafting committee.¹⁶⁴ The meeting agendas gave entrepreneurs few opportunities to discuss internal management rules in the prolonged and unmediated exchanges that discourse analysis suggests are necessary to convey nuanced understandings. VCCI officials also vetted written comments prepared by entrepreneurs. As a consequence, entrepreneurs' views about imported corporate

163. Interviews with private entrepreneur associations (the Hanoi Associations of Industry and Commerce Vietnam, the German Entrepreneurs' Club, VCCI (Small and Medium Enterprise Promotion Center), the Hanoi Small and Medium Enterprises Council (Hiep Hoi Cac Doanh Nghiep Vua Va Nho Ha Noi), and the Union of Associations of Industry and Commerce (Hiep Hoi Cong Thuong Thanh Pho Ho Chi Minh), in Hanoi and Ho Chi Minh City (1999-2004) [hereinafter Associations Interviews].

164. Interviews with Vu Duy Thai, Vice Chairman and Sec'y, Hanoi Ass'n of Indus. and Commerce, in Hanoi (Mar. 1999, Jan. 2000, Mar. 2003).

principles were selectively represented to the drafting committee.

Interviews with Vietnamese business associations strongly suggest that domestic entrepreneurs considered the complicated internal management provisions in the draft law alien and unsuited to the familial and relational norms and practices that regulated most companies.¹⁶⁵ Empirical studies about Vietnamese business structures also support this argument. As McMillan and Woodruff demonstrated, Vietnamese entrepreneurs rely on community norms, trade associations, and market intermediaries to secure business organizations and commercial transactions.¹⁶⁶ More recently, the author studied sixty enterprises operating in five industries in Northern Vietnam. The findings from this study confirm that relational structures have endured socialist and, more recently, market forces and continue to order private business organizations.¹⁶⁷ Similar discrepancies between imported internal management rules and domestic business organization have been observed elsewhere in East Asia.¹⁶⁸

The entrepreneurs I interviewed used proverbs like “family first, others second” (*gia dinh la trien het*) to invoke a social ordering in which close family connections formed the bonds generating dependable and trustworthy management structures. When external skills were required, managers turned first to family and then friends from the same home village, or to those with longstanding personal ties developed in the workplace, universities, or military units. In each case, attempts were made to find sentimental attachments that repli-

165. *Id.*; see also Associations Interviews, *supra* note 163.

166. See John McMillan & Christopher Woodruff, *Interfirm Relationships and Informal Credit in Vietnam*, 114 Q. J. ECON. 1285 (1999).

167. I conducted interviews with the managers and staff of sixty small and medium-sized companies (10-200 employees) in the construction, wood processing, copper wire trading, electric batteries sales, and computer sales and service industries. Interviews were arranged and assisted by staff from NH Quang and Associates, a Hanoi-based law firm, between March 2004 and April 2006. Firms were asked to describe in detail their internal management practices, understanding of the Enterprise Law (and other commercial laws), and the modes of transacting within business networks and with strangers.

168. See Roman Tomasic & Jian Fu, *Company Law in China*, in COMPANY LAW IN EAST ASIA, *supra* note 135, at 135, 137-38, 143-44; Peng, *supra* note 140, at 264-69.

cated the loyalty (*trung thanh*), “sentiment towards others” (*tin h cam*), and trust (*tin*) binding family members.

Management practices varied among the sectors surveyed. For example, wood-processing firms most closely resembled family hierarchies, while companies in the computer sales and service sector more closely resembled the Western professional corporate ideal. Respondents explained this difference in terms of labor specialization. There are few skilled workers in the information technology sector, and company owners are compelled to recruit non-family members to fill management positions. But, even in this sector, respondents said that they were training family members to replace non-family managers. They expressed little faith in abstract legal distinctions between management and ownership to protect their assets from non-family managers.

Owners strove to develop a family-like atmosphere within their companies by celebrating birthdays and other significant occasions such as weddings and funerals. With few exceptions, staff members interviewed believed that sentiment, as much as profit, bound their firms together. They repeated similar narratives about their places of employment that stressed a common history working together against unconscionable market competition, such as ruthless, irrational, and fraudulent competitors. Storylines emphasized the need for self-sacrifice (for example, wage restraint in tough economic times) and collaboration with the owners. They attributed their firm’s success to “good heart” (*tam*), compassion (*thong cam*), and sentiment among the owners and staff.

In these self-regulating communities, codified rules stipulating precise rights and duties were considered unnecessary because the staff knew and trusted each other to follow common ethical values. They preferred personal and tacit interaction, and they worried that professional codified rules might generate distrust and undermine the group’s sentimental foundations.

Although most owners interviewed had read about the Enterprise Law and were familiar with its internal management principles, few had detailed knowledge about the contents of their own company charters and even fewer sought legal advice to understand their legal obligations. Not only small companies were indifferent to internal management

rules. Owners of companies with over 200 employees, who might have benefited most from codified rules, preferred the tacit understandings brokered by personal relationships. Only large textile companies with thousands of employees had established the legal bureaucracies needed to administer the internal management rules mandated by the Enterprise Law and company charters. But even within these companies, respondents intimated that the rules were promulgated at the insistence of foreign buyers to satisfy the labor, production, and management standards expected by Western purchasers.

Although my study found little current demand for codified internal management rules, the possibility of such demand arising cannot be ruled out. In order to grow, some company owners will eventually need to devolve significant management powers to non-family members and, as a consequence, secure legal protection for their assets and intellectual property rights. For the present, however, most domestic entrepreneurs seem content to use moral and sentimental discourse to organize their companies. The rights-based categories underlying much of the Enterprise Law 1999 make little conceptual sense to owners and staff who construct their business organizations from familial, ethical, and sentimental building blocks.

C. *Unified Enterprise Law 2005*

In 2004, the Party once again instructed CIEM to draft a new company law.¹⁶⁹ By this time, solid political support for international economic integration, coupled with pressure to comply with WTO conditions, had muted, though not totally silenced, opposition to neo-liberal deregulation. Public discourse had also changed since the EL was drafted. The press generally promoted the government line that market-entry deregulation had dramatically increased private investment and economic growth.¹⁷⁰ On another front, press campaigns

169. These observations are based on interviews with CIEM officials that supported the drafting committee, in Hanoi (Apr. 2006).

170. This assertion is based on the author's selective readings of the Vietnamese press from 1998-2008. For a representative account, see Tu Giang, *A Law that Changed the Nation*, VIETNAM INVESTMENT REV., June 26, 2006, available at <http://www.vir.com.vn/Client/VIR/index.asp?url=content.asp&doc=10690>.

against bureaucratic corruption increased public support for deregulation as a means of reducing rent-seeking.¹⁷¹

As with the EL reforms, a neo-liberal-oriented interpretive community including key officials in CIEM and other like-minded state bodies formed around the international agencies supporting the Unified Enterprise Law (UEL). This time, however, CIEM officials encountered less opposition to neo-liberal deregulatory ideas from other drafting agencies. The UEL advanced the deregulatory process begun by the CL and the EL by introducing measures to prevent ministries, and especially local governments, from introducing new business licenses to re-regulate market-entry.¹⁷² It also removed distinctions between domestic and foreign companies—a reform that CIEM drafters were prevented from including in the EL.

D. *Local Implementation of the Enterprise Laws*

Although neo-liberal deregulation has gained the upper hand at the central level, it has not swept aside discretionary practices in local-level decisionmaking. Discourse analysis reveals a much more complex interaction between global and local ideas. As CIEM drafters discovered when the EL became operational, implementing deregulation was not simply a function of moving from a globalized to a domestic regulatory script. Ample opportunities existed for government regulators to renegotiate globalization on their home turf.

Since the neo-liberal deregulatory ideas underpinning the reforms seldom traveled beyond central-level interpretive communities, local officials steeped in a tradition of state economic management creatively sought opportunities to re-regulate corporations. Even the terminology officials used to describe the regulatory processes was infused with contextual subjectivity. A popular term for regulation literally means “believe in oneself” (*niem tin noi tam*). However, the unfettered

171. See Quy Hoa, *Dung Lam Kho Doanh Nghiep: Nhin Lai Mot Nam Thi Hanh Luat* [*Do Not Make it Difficult for Business: Reviewing a Year's Enforcement of the Enterprise Law*], Hoi KHOA HOC KINH TE VIET NAM, Apr. 2, 2001, at 9.

172. Lan Phuong Nguyen, *Local News*, REUTERS, Nov. 1, 2000; see also Central Institute of Economic Management, Comparative Provincial Performance in Private Business Development, VIE01/025, at 22-23 (Nov. 2003) (unpublished paper, on file with author); Interviews with Nguyen Hung Quang, Managing Partner, NH Quang & Associates, in Hanoi (Mar.–Apr. 2005, Apr.–May 2005).

discretion implied by this idiom was mediated by local norms which insisted that decisions be made with “good heart,” compassion, or sentiment toward others. In short, neo-liberal notions of legal rights and deregulation were reconceptualized by local-level officials struggling to remain relevant in a largely self-regulating private economy.

My study shows that businesses adopted various responses to the implementation of the UEL. For example, businesses in the construction industry formed close and frequently corrupt working relationships with state officials. More typically, however, businesses formed regulatory networks that established common organizational and trading norms that now coexist with, and sometimes supplant, the UEL.

Take, for example, the networks established by traders in the copper wire and car battery industries in Northern Vietnam. Because network members lived significant parts of their lives together, they influenced each other to act for collective interests. Although they sometimes pursued their own economic objectives, in general they worked towards common goals. In order to explain why they came together, members repeated particular storylines that stressed the need to form a network to protect the group against outsiders, including local-level state officials. The storylines reflected an eclectic set of norms primarily based on traditional mutual assistance and sentimental practices, but in some cases also borrowed from management practices embedded in International Standards Organization protocols and international contracts. Norms originating from the UEL and company charters rarely surfaced in these narratives.

Over time, particular storylines about appropriate forms of business organization and transactional behavior acquired the authority to order the traders’ cognitive understandings. The storylines created a set of epistemological assumptions that guided interactions among the traders and with outsiders such as state officials and other businesses. Eventually, the trading network began to function like an interpretative community.

The study showed that although business networks rarely engaged with global laws and principles, they were compelled to deal with local officials on a regular basis. Network members used several strategies to moderate their interaction with

local officials. The most important tactic was to cultivate “relationship friendships” (*quan he*) with state officials. Long-term stable relationships were much preferred to short-term bribes (*dut lot*). Businesses encouraged feelings of reciprocity and “mutual obligations” by infusing relationships with sentiment (*tin h cam*). Personal networks based on family and friends were used to provide “good introductions” (*gioi thieu tot*) and cement relationships with state officials. Officials were then invited to karaoke parlors and plied with goodwill payments (*khoan thien chi*) and gifts on special occasions such as weddings, birthdays, and Lunar New Year (*Tet*). The main objective of these exchanges was to supplement or replace inflexible legal obligations with highly mutable sentimental reciprocal obligations.

Another common strategy was to co-opt local officials into business networks. This practice took many forms but generally involved paying a percentage of profits to officials and bringing relatives of state officials into business networks. The latter tactic exposed officials to the storylines that bound the networks together. Officials were expected to bend rules to support family, friends, and local businesses. A morality of good neighborliness or “sentiment among neighbors” (*tin h cam lang gieng*) encouraged officials to balance community interests against legal interests. In this local interpretive community, officials and businesses assessed correct official behavior in terms of being “right and compassionate” (*co ly co tin h*)—with sentimental obligations thus augmenting and sometimes displacing legal obligations.

Officials syncretically selected moral, sentimental, and legal sources to find contextually relevant solutions to specific local problems. Exogenous normative sources such as central laws were not considered absolute, universal, or immutable, but rather as alternate sources of guidance. Local businesses expected officials to personalize decisions to overcome rigidities in central laws, provide privileged information, enforce debts, and selectively enforce administrative and criminal sanctions. In the process, officials protected private property and profits that were accumulated in politically and socially responsible ways—a practice that informed localized network standards. In short, businesses used relationships with officials to back business networks with state power.

To summarize, drafters at the central level became over time more receptive to the neo-liberal deregulatory agenda. The preference convergence required to change regulatory beliefs occurred when drafters discussed the EL with international agencies and lawyers and domestic consultants in a mutually comprehensible language. The concentration of international initiatives within Vietnam played a critical role in forming an interpretive community that shaped and sustained these regulatory conversations. Vietnamese members of the interpretive community played a strategic role in transposing neo-liberal ideas into domestic idioms and systems.

Discourse analysis also reveals differences between state-centered and truly local regulatory discourse. Local-level officials understood corporate reforms from a highly contextual perspective. Statutory rights predicated on binary legal/non-legal cleavages did not smoothly transpose into a local self-regulatory discourse based on moral principles and sentiment. Since recipients in Vietnam belong to many interpretive communities, new regulatory principles such as neo-liberalism must negotiate and accommodate many different types of pre-existing regulation. Above all else, this analysis shows that legal transfers behave like catalysts, stimulating new regulatory approaches and novel adaptations of existing systems.

Although this case study only considered one type of legal transfer into Vietnam, it is sufficiently representative to allow us to infer some general propositions:

- Recipients negotiate and contest legal transfers.
- Effective communication of legal transfers requires unmediated exchanges conducted in a mutually comprehensible mode of thought that is receptive to new ideas.
- Interpretive communities play a key role in the effective communication and conceptual reconfiguration of legal transfers.
- Members of interpretive communities use legal transfers strategically.
- Power relationships order the authority of different regulatory conversations.

VII. MODELING LEGAL TRANSFERS

Evidence considered in this study suggests that it is impossible to model legal transfers deterministically. The phenomena are unknowable from a quantitative empirical perspective, because the causal links explaining human responses to legal transfers are cognizable (if at all) only for the most simple transactions. There are simply too many variables to support quantitative variable analysis.¹⁷³ Yet it has been possible to gain valuable insights by using content-rich “thick” description to examine indirect processes such as regulatory conversations. These processes influence thinking, which in turn shapes approaches to legal transfers. This is causation in heavy disguise.

My attempt to understand this problem has been greatly assisted by the notion, borrowed from systems theory, that laws and legal principles are transferred through regulatory conversations as well as by the methodological tools synthesized from discourse analysis. In directing attention toward regulatory conversations about legal transfers, this theoretical approach avoids the limitations associated with state-centered analysis. It requires a researcher to ask who conducts these conversations, what are they about, and how they advance the regulatory objectives of key players. It suggests that the transfer of laws and ideas have similar effects, because discourse analysis collapses distinctions between legal prescription and legal description. Further, it allows for the assessment of the types of conversations that are most likely to generate preference convergence and the adoption of imported legal ideas. For example, legal meanings transfer easily among members of interpretive communities that share similar epistemological and tacit understandings. Discourse analysis also acknowledges the role played by human agency. The story of legal transfers is inextricably bound up not only in meaning, but also in legal development strategies.

173. Note the criticism of quantitative variable analysis of legal phenomena in both socio-legal and systems theory. See, e.g., Markovits, *supra* note 18, at 97-98; Klaus Ziegert, *The Thick Description of Law*, in AN INTRODUCTION TO LAW AND SOCIAL THEORY 55, 57 (Reza Banakar & Max Travers eds., 2002). For an example of quantitative variable analysis of legal transplants, see Berkowitz, *supra* note 8.

Above all else this study has revealed the complexity of legal transfers. There are simply too many processes and perspectives for one unified theory. The interpretive models proposed in this study are intended to complement and refocus, rather than supplant, other theoretical approaches through which transfers can be observed. In this way the models can guide researchers towards the processes and exchanges that shape and adapt legal transfers into developing East Asia. An exploration of the compatibility or lack of compatibility of these theories with the proposed models is beyond the scope of this study, though such an analysis is one that is needed to advance research in this area.

In developing interpretive models, it has been necessary to abstract from the rich details of case studies. Each model covers a narrow subset of the facts and situations governing legal transfers. They have been constructed not only to explain, but also to propose some hypotheses about the integration of legal transfers into recipient regulatory systems. I propose and employ six interpretive models in this study: dialogical negotiations, effective communication, interpretive communities, strategic agendas, power relationships, and fragmented meanings.

A. *Contests and Negotiations*

Mediation and negotiation are the main processes that bring legal transfers into regulatory conversations. But this proposition says little about the types of contests and negotiations that are most likely to communicate imported legal knowledge to recipients. There must be a more nuanced way to ascertain what kinds of dialogical exchanges generate preference convergence.

A consistent theme in this study is that legal transfers encounter resistance at the central and, especially, the local levels of society. Rather than signaling transplant failure, dialogue and discord are necessary for legal transfers to enter and influence local regulatory conversations and practices. For example, the disputes between CIEM officials and conservative members of the EL drafting committee shaped the meaning of corporate law principles that were eventually codified into the EL and enforced by central-level regulators. At the local level, negotiations between state officials and businesses have selec-

tively ignored, transposed, and transmogrified global laws and principles. In other circumstances, these exchanges have creatively used imported ideas to imagine new legal solutions to domestic problems that could not be resolved by local precepts and practices. For example, family-based businesses have not developed effective mechanisms to raise equity capital from the public.

B. *Discursive and Non-Discursive Communication*

Not all communication effectively transfers legal knowledge. Communication conducted in mutually comprehensible modes (or epistemologies) is more likely to generate preference convergence. What ultimately determines effective communication is the receptiveness of dominant modes of thought to new ideas and particular regulatory solutions.

The case study showed that groups discussing the same law from different modes of thought communicate with difficulty. For example, legal ideas transferred rapidly between foreign legal advisors and Vietnamese lawmakers because they shared a similar legal grammar, educational background, and epistemological assumptions about the appropriate role for corporate law. But global ideas transferred much more slowly to local officials who were steeped in socialist regulatory doctrines and closely bound by sentimental obligations to local business networks. The case study also demonstrated that neoliberal modes of thought not only privileged certain regulatory ideas, but also arguments expressed in ordered, structured, and dispassionate language. This mode of thinking led CIEM drafters of the EL to discount views by businesses that were expressed in sentimental and figurative language.

Research also demonstrates the importance of sub-verbal communication and tacit understandings in conveying understandings across highly asymmetric state-society relationships.¹⁷⁴ More work is required to assess how non-discursive factors such as ritual and symbolism, as well as empathetic and sensory communication, influence the interpretation of legal transfers.

174. See GILLESPIE, *supra* note 3, at 190-92, 245-59.

C. *Interpretive Communities*

Members of interpretive communities tend to understand legal transfers from similar perspectives. Interpretive communities are constitutive, because they infuse members with shared epistemological and tacit assumptions about the nature of regulatory problems and the appropriate responses. Factors that differentiate communities include the epistemological framework through which they validate legal transfers and the storylines and tacit assumptions that build common identities among members.

Rather than individual champions leading reform, the study shows that the regulatory conversations conducted within and among interpretive communities exerted the greatest influence over legal transfers. The most visible community clustered around the foreign donors that supported the EL. Members diagnosed regulatory problems from neo-liberal perspectives and drew solutions to legal problems from neo-liberal ideas. Complex legal doctrines transferred rapidly among members. Constantly repeated principles, doctrines, and strategies for reform also played a central role in constituting and directing the way members selected, adapted, and implemented imported corporate law provisions and principles. Within this community, borrowed ideas increasingly became the frame of reference for drafting and implementing laws.

Given that members of this community were simultaneously embedded in multiple interpretive communities, arguments and knowledge preferred in one community had the potential to discredit understandings about legal transfers privileged in another community. For example, CIEM officials who played an important role in the neo-liberal-oriented community were also members of the Party, the Ministry of Planning and Investment, and families. They used rather heterogeneous language and ideas to accommodate conflicts between these interpretive communities. The case study tentatively suggests that group loyalties and identities influence which interpretive tradition is ultimately used to understand and reconfigure legal transfers.

D. *Strategic Discourse*

Members of interpretive communities use discourse strategically to secure regulatory objectives. In some circum-

stances, imported ideas are used to advance blueprints for reform; at other times, imports camouflage institutional or personal interests. In each case, shared epistemologies and tacit understandings shape the way members of interpretive communities define their strategic interests and devise tactics to use legal transfers to realize those interests.

CIEM legal drafters, for example, strategically used the deregulatory language of neo-liberalism to encourage domestic businesses to support the EL. But they discounted local narratives that questioned the complex corporate governance provisions imported into the draft Enterprise Law. Conservative ministries, on the other hand, invoked politically sensitive arguments about maintaining state management over the economy in order to camouflage their interest in preserving regulatory powers over companies.

E. *Power Relationships and Regulatory Conversations*

Regulatory conversations about legal transfers take place in the context of structured inequalities of power. Those with access to financial and political power have more say over whether legal transfers will come to resemble global or local norms and preferences. Those lacking power tend to compensate by developing self-regulatory networks at the periphery of state power. In essence, legal transfers come to reflect the interests of those with access to political and financial power.

This study has shown that the sites of power acting on legal transfers are dispersed. State power plays a vital role in ordering the significance that state and non-state players attach to regulatory conversations about imported laws. For example, CIEM officials used state power to promulgate their ideas and modify or suppress opposing views.

Social relationships also exert power over regulatory conversations, even when the trappings of state power and coercion are absent. Business networks can consolidate their regulatory patterns by procuring support from acquiescent state officials. They use personal (frequently corrupt) networks with regulators to harness state power to secure their business objectives. Small-scale entrepreneurs outside these networks lack the resources to access state power and, as a consequence, struggle to enforce their regulatory preferences.

Far from a monolithic entity, state power is multidirectional and responds to social forces seeking to influence legal transfers. Market power gives some businesses the capacity to dictate transactional rules that strongly mediate the way imported laws function in the marketplace.

F. *The Fragmentation of Legal Meaning*

Multiple interpretive communities and polycentric power structures fragment the meanings given to legal transfers. The proposition goes like this: Recipients interpret legal transfers according to the epistemological assumptions that guide the dominant interpretive community to which they belong. Societies with sharp epistemological cleavages between different interpretive communities are likely to experience heterogeneous and fragmented understandings of legal transfers. Fragmentation is exacerbated by state power structures that lack the willingness and/or capacity to unify and standardize coherent legal meanings.

In this case study, I have shown that corporate law provisions and principles transferred rapidly into neo-liberal-oriented interpretive communities but were resisted by conservative ministries influenced by socialist economic ideas. Through negotiations and debates, the neo-liberal ideas underlying the EL gradually influenced elite thinking. Meanwhile, at the local level, officials and businesses established a wide range of interpretive communities that variously ignored, rejected, or transmogrified global laws and principles. These heterogeneous understandings of legal transfers were reinforced by the polycentric distribution of power, which favors some interpretive positions over others.

VIII. CONCLUSION: APPLYING THE INTERPRETIVE MODELS

Some perplexing questions about the interpretive models remain. Do interpretive techniques undervalue objective factors such as culture, levels of development, and institutional path dependencies? Does the focus on discourse evade the challenging task of evaluating the normative agenda underlying legal reforms? Is the focus on what people think a proxy for what really matters, such as economic and political power?

Some of these objections can be addressed by locating regulatory conversations in the context of a “thick” empirical

mapping of the political, economic, and cultural structures in recipient countries. Background information gives regulatory conversations a historical and strategic context that is sometimes difficult to glean directly from dialogical exchanges. For example, information about the ideological competition between socialist legality and the law-based state in Vietnam gave the dialogical contests surrounding the Enterprise Law a wider meaning.

The objection that political and economic interests are more important than ideas in shaping legal transfers takes a philosophical turn, since it reflects the causal principles of Marx, Durkheim, and Weber. This claim is difficult to prove or disprove empirically from the case study. As previously noted, however, systems theory and discourse analysis reject the causal relationship between social phenomena and ideas found in many socio-legal theories. They turn this theory on its head, arguing that communicative events influence the material world and that political and economic interests only indirectly affect the abstract ideas informing legal transfers. Ideas primarily exist in the networks, alliances, and oppositions among and within interpretive communities, and ideas define both the strategic interests and the tactics used by social actors contesting legal transfers. This notion is encapsulated by John Lukacs, who observes that “material conditions, almost always, matter less than mental conditions and inclinations—indeed, the very material order (or disorder) of the world is not at all the fundament but the consequence of what many people think.”¹⁷⁵ In other words, the communication of ideas is what shapes the material world.

The interpretive models jettison the essentialist notion that legal transfers have substantive meanings such as property rights, rule of law, universality, or procedural justice. Legal transfers are what people say they are.¹⁷⁶ Everything is left open to empirical investigation. Researchers can range be-

175. JOHN LUKACS, *DEMOCRACY AND POPULISM: FEAR AND HATRED*, at viii (2005). In many respects, this debate mirrors a wider philosophical argument about absolute and relative notions of truth. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); John McDowell, *Towards Rehabilitating Objectivity*, in RORTY AND HIS CRITICS 109, 109-122 (Robert B. Brandom ed., 2000).

176. Tamanaha describes a similar non-essentialist conception of law. “Law is whatever people identify and treat their social practices as ‘law’ (or

yond the interaction between legal transfers and state-based institutions and examine non-state or decentered regulation that appears to have little or no connection to state rules and institutions.

The models rest on two propositions. The first is that regulation acquires social force through preference convergence and consensus. This notion correlates with the role that interpretive communities play in manufacturing shared understandings about appropriate forms of regulation. When enough key actors share a common frame of reference about how to control social behavior, regulatory conversations acquire authoritative and socially legitimate meanings. This requirement for consensus or critical mass prevents the models from sliding to the conclusion that all forms of communication about legal transfers are regulatory.

The second proposition is that the utility of legal transfers is determined by their capacity to enable recipients to find new solutions to regulatory problems. Thus a key criterion for evaluating the effectiveness of legal transfers is whether they are actively discussed and change the behavior of a wide range of social actors. The content and quality of outcomes generated by regulatory discourse, such as rule of law and social justice, are only secondary considerations with contextual meaning to those embedded in specific interpretive communities. The models imagine legal transfers as comprising pluralistic understandings in which the most forceful and compelling narrative determines the regulatory outcome. Legal transfers that are ignored have failed.

The models differ radically from normative approaches to comparative law that evaluates legal transfers according to broad standards such as neo-liberal legalism, justice, and human rights. It does not matter from a regulatory perspective whether the most forceful narrative supports “bad law” that curtails civil rights. In practice, however, regulatory discourse generates normative standards and is assessed according to those very standards. Even within one-party states such as China and Vietnam, where civil society remains constrained,

Recht, or droit, and so on).” Brian Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. L. Soc’y 296, 313 (2000).

regulatory discourse in and outside that party clearly shapes normative agendas.¹⁷⁷

177. See generally BENEDICT J. TRIA KERKVLIT, *THE POWER OF EVERYDAY POLITICS: HOW VIETNAMESE PEASANTS TRANSFORMED NATIONAL POLICY* (2005).

