Lessons From the Transplantation of Kenya’s 2015 Companies Act From the U.K.’s Companies Act of 2006

By:

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April 11, 2020

In 2015, Kenya adopted a new Companies Act as part of a larger package of business law reforms. That new law was lauded for updating the very archaic 1948 law that it replaced. Kenya’s 2015 Companies Law is a replica of the United Kingdom Companies Act of 2006. Thus, like its 1948 predecessor, Kenya’s 2015 Companies Act is an English transplant.

My argument presented at the inaugural CLRNN conference at the University of Reading in September 2019 is part of my forthcoming book on Kenyan Company law. To understand my argument, it is first important to set the background against which the 2015 Companies Act was enacted.

Although the immediate reason for Kenya's adoption of the 2015 Companies Act was closely tailored to bettering its rankings in the World Bank's annual Ease of Doing Business Reports, there had been a more than two decades long process of reforming the 1948 law that it superseded. Understanding why the 2015 Statute was adopted and why prior efforts to reform company law in Kenya failed, is the primary goal of this blog post.

Two Contending Kenyan Elites Representing Different Legal Reform Strategies

How can the enactment of the 2015 Kenyan Companies Act be accounted in light of how quickly Parliament approved the statute and given the failure of a prior more than a two-decade prior attempt?

The enactment of the 2015 Companies Act not only moved very quickly through Parliament, but also completely sidelined a more than two-decade reform process that had sought to engineer a new Companies Law statute that was closely hewed to Kenya's circumstances and the experiences that had been accumulated under the 1948 Statute.

The enactment of the 2015 Companies Law therefore represents how an elite group of corporate leaders embedded in international business networks who had access to the highest levels of the government propelled a new initiative to reform the country's business laws in order to move Kenya up the rankings in the World Bank's annual Ease of Doing Business Reports. According to this elite group of business leaders, going up the rankings the way Rwanda had already done, was key to opening up the country to more foreign direct investment in a way that was aligned with President Uhuru's unprecedented commitment to liberalizing the Kenyan economy.

By contrast, there had been a more than two decades old company law reform process that had failed. That process began in 1993 when the then Attorney General appointed a Task Force to reform Companies, Investments, Partnerships and Insolvency Laws headed by then Registrar General Joseph King'auri. Prof. Arthur Eshiwani, one of Kenya's leading company law academics at the time, was appointed as its Joint Secretary. Referred to as the Eshiwani

Task Force, it worked closely with the Kenya Law Reform Commission over many years to reform and most significantly to indigenize Company Law in Kenya. That was a priority when now Judge of Appeal Kathurima M'Inoti chaired the Kenya Law Reform Commission and subsequently under leading private law practitioner, Mbage Ng'ang'a. One of the strategies of the Eshiwani Task Force together with the Kenya Law Review Commission was to avoid any new company law statute not reflecting Kenya's unique circumstances. They proceeded on the premise that the wholesale transplantation of foreign business laws would be inappropriate. Unfortunately, the 2015 Companies Act did not spring from this long-drawn out reform process that sought a home-grown company law statute. Instead, the 2015 Companies Act was hurriedly 'drafted' single-handedly by a non-Kenyan consultant. When the Kenya Law Reform Commission received the draft of what is now the 2015 Kenya Companies Act, it recommended close to 1,000 amendments. Those amendments would have gone some way in aligning the new law to Kenya's circumstances borrowing from the more than two-decades long reform process. However, Parliament was in such a rush to enact the 2015 Companies Act that many of these amendments were pushed aside.

So What Can We Make of the Transplantation of the 2006 U.K.'s Companies Act in Kenya?

The enactment of Kenya's Companies Act of 2015 that largely replicates the 2006 U.K.'s Companies Act represents a failure of imagination on the part of elite business interests in Kenya. These elite interests believe that attracting foreign capital is a central ingredient if not the most important element in Kenya's economic development. To the delight of these elites, the first World Bank Ease of Doing Business Report that took into account the enactment of the 2015 Companies Act, Kenya was cited as the third most improved country among the most improved countries in 2016. In my view, these elite interests or the transnational capitalist class as Bhupinder S. Chimni would refer to them, therefore promote a kind of dependent development because their primary interlocutors are foreign not local business interests. For these elites who are embedded in transnational business networks, transplanting foreign business laws is a precondition for development – or at least that is what their argument is.

By contrast, the elites whose efforts to reform company law started in 1993 but ultimately failed are primarily embedded in local business networks. Without high-level political access to have their vision of corporate law reform prevail, the agenda of supporting the indigenization of the economy and of autonomous national development with the aid of foreign capital only as a backup or as a second best option has taken a distant second place. The stakes involved in considering company law reform therefore hearken back to what academics of Kenya and foreign capital called the Kenya Debate pitting those who argued capitalist transformation was impossible or improbable as long as local elites remained subordinate to metropolitan capitalist interests, on the one hand, and those that believed that under certain conditions, capitalist development and transformation was possible through foreign direct investment especially when in alliances such as joint ventures between domestic and metropolitan elites. I raise this point about the Kenya Debate to signal that discussions of legal transplantation must begin to be embedded within the rich context of competing law reform factions where transplantation takes place. I turn to that point next.

Theoretical Implications for Theories of Legal Transplantation

The literature on transplantation of commercial laws from colonial metropolitan centers to former colonial countries can be summarized under three broad approaches. Under the first approach, known as the legal family/origins approach most transplanted colonial laws follow the general structure, form, and content of the colonial family origin from which they originate. Under this approach, the common law family offers the strongest form of protection to shareholders while the French-civil law family offers the weakest.[1] Thus, a country that was colonized by the British would follow the path dependency of common law or if colonized by the France or Germany it would follow civil law. Alan Watson, who is most associated with this approach argued that there was no necessary and close connection between the law and the society in which it operated.[2] He argued that even though laws could not exist without societies, it was remarkable how easy it had been to transplant legal rules from one system or society to another and their capacity to endure a long stay in the receiving societies.[3]

By contrast, the transplants effects approach is critical of the legal family/origins approach, and focuses less on the origins and more on the local conditions and effects of the legal transplants.[4] One strand of the transplants effects approach argues that while laws may have been transplanted from the former colonial powers, they invariably evolve or stagnate based on local circumstances. On this view, “good” commercial law should focus on how well these laws fit the local needs and circumstances in the receiving country rather than on their *a priori* origins. For example, Berkowitz, Pistor, and Richard argue that laws that are imposed through colonialism function less effectively.[5] This is because legal intermediaries would have a harder time to easily adapt these laws for local purposes. The transplanted law is only acceptable if it serves the societal needs of the receiving society. Law and development scholars from David Trubek and Marc Gallanter in 1974[6] and comparative law scholars like Ralf Michaels in the more recent past have also been very skeptical of transplanted laws serving the kinds of purposes proclaimed in contemporary development circles such as the World Bank’s *Ease of Doing Business Reports*.

Under the imperialism approach transplanted commercial laws especially from countries receiving these laws from their colonial or other western metropolitan centers are viewed as aimed at securing the immediate and future commercial interests of the colonial/metropolitan empire and not the interests of the peoples of the receiving countries. For example, Rob McQueen argues that most commentators have uncritically accepted the view that the introduction of English company legislation in their colonies was a good thing without questioning the imperial hegemonic concerns involved in such transplantation.[7] The assumption was that the imperial model was unquestionably accepted as being the most modern/sophisticated legal system available, and if there were problems, it was the fault of administrators who didn’t follow the latest trends of company law, not with the legal framework itself.[8]

In my view, these three dominant approaches to transplantation of laws have failed to grapple in detail with how contending forces within the countries where transplantation eventually takes place strategize about adoption of new commercial laws. These contending approaches also do not tell us about how in the post-colonial period, different elite reformers in the post-colony have varying degrees of political power or access to it that in part accounts for how and if at all transplantation or adaptation takes place. In addition, none of these theoretical approaches adequately accounts for how successfully transplanting a foreign statute may also simultaneously result in quashing an innovative domestic reform agenda that could have produced a law more tailored to suit the local circumstances. In short, our theoretical approaches need to fully account for how countries that receive borrowed laws are themselves not merely passive recipients but also active shapers of legal regimes. These new theoretical approaches should not ignore or eclipse projects of domestic reform that seek to adapt commercial law reforms to serve domestic economies and their autonomy from the travails of international capital. By only focusing on how transplantation from the metropole happens, current theoretical frameworks foreground the often fast-moving and unaccountable transnational elite commercial law reformist projects and make invisible contestations of legal reform in different directions. Indeed as Dr. Bolanle Adebola argued recently on this blog in a discussion on the complexities of insolvency law, " [m]any of the laws that were diffused into the Nigerian sphere failed to match the realities of the Nigerian situation…we [therefore] needed to look closely at the realities of our circumstances and apply methodologies and methods that resolve the challenges of our contexts…[so] that we can contribute to global knowledge through this path." Nothing could be further from the truth. For this reason, the Commercial Law Research Network Nigeria, (CLRNN) and initiatives like it, have their work cut out for them. They have to help inaugurate and develop theoretical and methodological approaches to understanding the reform and transplantation of commercial laws that do not merely mimic existing approaches that fail to fully account for the politics of legal reform today.

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[1] Rafael La Porta, Florencio Lopez-de-Silances, Andrei Shleifer & Robert Vishny, "Legal Determinants of External Finance" (1997) 42 Journal of Finance, 1131; Rafael La Porta, Florencio Lopez-de-Silances, Andrei Shleifer & Robert Vishny, "Law and Finance" (1998) 106:6 Journal of Political Economy, 1113-1155; Rafael La Porta, Florencio Lopez-de-Silances, Andrei Shleifer & Robert Vishny, "Investor Protection and Corporate Governance" (2000) 58 Journal of Financial Economics, 3-27

[2] Allan Watson, *Legal transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974), 21-22.

[3] Alan Watson, “Comparative Law and Legal Change,” 37 Cambridge Law Journal, 313 (1978).

[4] Mariana Pargendler, “Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil” (2012) 60 American Journal of Comparative Law, 805; Petra Mahy, “The Evolution of Company Law in Indonesia: An exploration of Legal Innovation and Stagnation” (2013) 61 American journal of Comparative Law, 377.

[5] Daniel Berkowitz, Katharina Pistor, & Jean-Francois Richard, “Economic Development, Legality, and the Transplant Effect” (2003) 47:1 European Economic Review, 165-195.

[6] David M. Trubek, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States” Wisconsin Law Review 1081 (1974).

[7] Rob McQueen, “Company Law as Imperialism” 5 Australian Journal of Corporate Law 187-213 (1995).

[8] Id.