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LEGAL DEVELOPMENT AND THE PROBLEM OF SYSTEMIC TRANSITION

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Legal transitions take place on numerous scales. At times the scale is comparatively small, as is the case when individual legal rules are changed. When such micro-transitions occur, questions arise about the appropriate transition policy, if any, to be adopted, such that negatively affected individuals will (or will not) be recompensed for or immunized from the consequences of the transition.[2] Debates about the retroactivity (or not) of changes in legal rules exemplify the issue,[3] as do questions about compensation (or not) for lost expectations,[4] about the gradual phasing-in of new rules,[5] about the effective date of legal change,[6] and about the extent to which

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[2]See Alan Auerbach and James Hines, Investment Incentives and Frequent Tax Reforms, 78 Amer. Econ. Rev. 211 (1988); Michael Graetz, Legal Transitions: The Case of Retroactivity in Income Tax Revision, 126 U. Pa. L. Rev. 47 (1977); Michael Graetz, Implementing a Progressive Consumption Tax, 92 Harv. L. Rev. 1575 (1979); Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509 (1986); J. Mark Ramseyer and Minoru Nakazato, Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow, 75 Va. L. Rev. 1155 (1989).

[3]See, e.g., Daniel Shaviro, When Rules Change: An Economic Analysis of Transition Relief and Retroactivity (2000); Michael Graetz, Retroactivity Revisted, 98 Harv. L. Rev. 1820 (1985); Kenneth Kress, Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions, 72 Calif. L. Rev. 369 (1984); Saul Levmore, Changes, Anticipations, and Reparations, 99 Colum. L. Rev. 1657 (1999); Kyle D. Logue, If Taxpayers Can't Be Fooled, Maybe Congress Can: A Public Choice Perspective on the Tax Transition Debate (Book Review), 67 U. Chi. L. Rev. 1507 (2000); Stephen R. Munzer, A Theory of retroactive Legislation, 61 Tex. L. Rev. 425 (1982); Stephen R. Munzer, Retroactive Law, 6 J. Leg. Stud. 373 (1977).

[4]Compensation for lost expectations is one way of characterizing the question that often goes under the name of "takings." See generally Richard Epstein, Takings (1985); William A. Fischel, Regulatory Takings (1995); Abraham Bell and Gideon Parchamovsky, Takings Reassessed, 77 Va. L. Rev. 277 (2001); Abraham Bell and Gideon Parchamovsky, Givings, 111 Yale L.J. 547 (2001); Saul Levmore, Takings, Torts, and Special Interests, 77 Va. L. Rev. 1333 (1991); Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964); J. Gregory Sidak and Daniel F. Spulber, Givings, Takings, and the Fallacy of Forward-Looking Costs, 72 N.Y.U. L. Rev. 1068 (1997).

[5]See Daniel S. Goldberg, Government Precommitment to Tax Incentive Subsidies: The

agents who acted on the basis of now-obsolete or now-rejected rules are entitled to the continuing benefits of actions which were lawful when taken but have become unlawful at some subsequent point in time.[7]

Impact of United States v. Winstar Corp. on Retroactive Tax Legislation, 14 Am. J. Tax Pol'y 1 (1997); Nancy Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, 73 N.Y.U. L. Rev. 97 (1998); Walter D. Schwidetzky, The New Activity Regulations Under Section 469: Into the Abyss, 9 Va. Tax Rev. 525 (1990).

[6]See G. Ray Warner, Non-uniform Effective Dates and the Transition to Revised Article 9, 2001 Am. Bankruptcy Inst. J. 126 (2001).

[7]See Levmore, supra note 3. The characterization in the text should also remind us that the issue of transition policy lies at the heart of the largest issues at the intersection of law and morality, for a common objection to trials for war crimes or other human rights abuses, with Nuremberg as the prime example, is that people should not be punished for acts they undertook prior to a change in moral sensibilities. That there is a good response to this argument – moral sensibilities have not changed, and punishment for acts that were temporarily treated as lawful in some outlier legal system is not the same as ex post facto punishment – does not detract from the fact that the issue presents important issues of transition policy, one of which is always whether there has in fact been a transition, and another of which is whether affected actors should have been on notice when they acted as to the likely future existence of the subsequent policy.

Similar issues arise when we are dealing not with individual rules, and not even with clusters of legal rules (title to real property, torts, taxation, pension law, or the Securities Act of 1933,[8] for example), but with entire legal regimes. If questions surrounding changes in individual legal rules are the micro-questions of transition policy, then the questions surrounding changes in legal systems themselves are the macro-questions. When in the period from the late 1980s to the middle of the 1990s much of Eastern Europe and most of the republics of the former Soviet Union transformed their legal systems from socialist systems to, broadly speaking, post-socialist ones, what transition policies, if any, attached to that transformation, and were they the correct ones? When South Africa jettisoned apartheid and adopted a new constitution in 1996, following on an interim constitution enacted in 1994, were there transition costs, and, if so, what were they, how were they accommodated, and was this a desirable accommodation? When colonies become independent nations, as so many did in the 1960s and 1970s, what transition complexities surrounded the transition from a colonial legal system to an independent national legal system, and are there lessons to be learned from the patterns followed in moving from colonial to post-colonial legal regimes?

These questions are only a small sample of the ones that arise when entire legal systems are subject to transition. My goal here is to identify the transition issues that are presented in this systemic context, to compare those systemic transition issues with the ones that arise in smaller scale legal transition, and to attempt to determine whether the existing research and thought

[8] 15 U.S.C. §77a et seq.

about small scale legal transition has anything to teach us about systemic transition, or, conversely, whether the insights we may gain from examining systemic transition may cast new light on older approaches to transition policy with respect to individual legal rules or legal families.

I. Is There a Transition Problem?

The problem of legal transition is an important one, but there is a possibility that it may be so important and so pervasive that it makes little sense to consider it a discrete problem at all. Take, for example, Louis Kaplow's definition in this Symposium of a transition issue as arising "whenever an act has future consequences and the legal regime applicable to those future consequences is not known with certainty at the outset."[9] Under this capacious conception of a transition issue, a transition issue arises whenever I purchase an asset which on resale might (or might not be) taxed in some way, whenever I acquire property whose ownership might (or might not be) unlawful at some point in its now-predicted useful life, whenever I commit to an enterprise that might (or might not) in the future be more (or less) regulated than it is now, and in general whenever I engage in an extended or consequential activity whose duration or whose consequences extend across a possible period of legal change. Under this definition, it is not implausible to suggest that the problem of legal transition is the problem not only of all of law, but also of all of life, for few actions are devoid of future consequences, and few forms of behavior can be known with certainty to be immune from possible future legal change. In one

[9]Louis Kaplow, Transition Policy: A Conceptual Framework, __ J. Contemp. Legal Issues ___, ___ (2003)..

sense it is of course true that my decision to buy green bananas rather than ripe yellow ones presents a transition problem, but there is always a risk that in defining the problem so broadly we lose a crisp sense of what the problem of transition is and where it has its most significant bite.

That the issue of legal transitions may be larger than commonly supposed is not necessarily a problem. It is, however, a signal that the terrain of thinking about the topic may not be nearly as barren as was imagined when people first attached the label "legal transitions" to a cluster of issues that have been at the center of thinking about law for generations. Whenever a current legal act constrains future legal change, there is implicit in the decision to constrain an otherwise optimal change an awareness of the problem of legal transition. Because the constraints of constitutionalism,[10] the constraints of precedent,[11] the constraints of rule-based decision-making,[12] and the constraints of an obligation to provide reasons for a decision,[13] for

[10]Especially if constitutionalism is understood as being largely about second order constraints on first order policy preferences.

[11]Precedent is a constraint in just this way because the "bite" of precedent occurs when, and only when, it provides a reason for making a decision other than the one that the decision-maker would otherwise have selected. See Larry Alexander, Constrained by Precedent, 63 So. Cal. L. Rev. 1 (1989); Stephen Perry, Judicial Obligation, Precedent and the Common Law, 7 Ox. J. Leg. Stud. 215 (1987); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571 (1987). For a conception of the force of precedent explicitly denying this feature of precedential constraint, see Jill Fisch, The Obligation of Precedent: A Challenge to Conventional Theories of Stare Decisis, __ J. Contemp. Leg. Issues __ (2003).

[12]See Larry Alexander and Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law (2001); Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991).

[13]Because reasons are broader than the results that they are reasons for, a decision-maker

example, are all best seen as intertemporal constraints on legal change,[14] and are all constraints in which some future decision-maker is obliged to make accommodations for transition costs,[15] it is not implausible to believe that almost all of the characteristic modalities of law are ones that are premised, at least in part, on stability for stability's sake, and thus on the view that in some or

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obliged to give a reason is committed in the service of the values of stability and notice to deciding a group of cases at one time, and thus potentially making suboptimal decisions for at least some members of that group. See N.R. Campbell, The Duty to Give Reasons in Administrative Law, 1994 Pub. L. 184; Michael Dorf, Courts, Reasons, and Rules, in Linda Meyer, ed., Rules and Reasoning: Essays in Honour of Fred Schauer 129 (1999); Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633 (1995); James L.H. Sprague, Remedies for the Failure to Provide Reasons, 13 Can. J. Admin. L. & Prac. 209 (2000).

[14]A point first identified in Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification (1961).

[15]A decision-maker incurs a cost whenever she makes a decision other than he one she would have made unconstrained, and thus a decision-maker incurs a cost whenever she obeys (as opposed to merely engaging in conduct that coincides with the dictates of a rule but which is not guided by a rule) a rule, follows a precedent, or provides a reason whose effect is necessarily to narrow her degrees of freedom in future instances.

many contexts the costs of transition exceed the benefits of optimization. When Justice Louis Brandeis remarked, famously, that "in most matters it is more important that the applicable rule of law be settled than that it be settled right,"[16] he marked himself as one of the most visible theorists of legal transitions, for his message was simply that some legal transitions that might otherwise be optimal should be foreclosed or at the very least impeded in the service of the values of reliance, stability, and the other virtues of repose.

Justice Brandeis's statement about the frequent virtues of avoiding even optimizing legal change, however, not only punctuates the ubiquity of transition issues, but also points to a possible explanation of why the two significant contemporary transition literatures – one dealing with taxation, tort liability, and occasionally the takings of property; the other dealing with rules, precedents, reasons, and the other devices of legal stability – have failed to engage with each other. In urging adherence to precedent, Brandeis supposed, correctly, that he was speaking to an audience (his fellow Justices) who in that particular case and as part of their larger role possessed the power to decide whether a transition would or would not take place. For Brandeis, the fact of transition was not something to be assumed, and was not something whose consequences were to be analyzed ex post, but rather was precisely the matter in issue.

[16]Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). See also Sheldon v. Goodrich, 8 Ves. 481, 497, 32 Eng. Rep. 441, 447 (1803) ("Better that he law should be certain than that every judge should speculate on improvements").

By contrast, however, most of the existing transition literature focuses on discrete legal areas, and in much of that focus takes the fact of transition – whether the tax law will be changed, or whether the property will be taken, for example – as exogenous to the question of how the consequences of that transition ought to be managed. In his contribution to this Symposium, for example, Professor Kaplow stipulates that the "underlying substantive policy" will be "assumed to be unaffected by transition policy."[17] Legislatures change the laws, or municipalities and counties expropriate property, much of the existing transition literature appears similarly to assume, and then it is up to the rest of us to deal with that inexorable fact. The possibility of transition issues being factors for the legislature or the county council to consider when it first considers the change (and thus considers whether to make a change at all) is rarely discussed in the transition literature. Consequently, it is possible that the jurisprudential transition literature, which considers the desirability of change to be its major focus, and the taxation/torts/takings transition literature, which takes the change as a given, are both guilty of ignoring each other precisely because they have focused on different stages of the larger transition process, or on different actors in that process.

When we turn to the question of systemic transition, however, it makes little sense to treat the agents of the legal change as exogenous, and little sense to start with the assumption that substantive policies are unaffected by concerns about transition effects and transition costs. Thus, the nature and desirability of systemic change itself has been a frequently discussed issue

[17]Kaplow, supra note 9, at ___.

in legal development and legal transformation,[18] and more often than not the degree of systemic change has been more modest than might have been expected precisely because of the influence, either explicitly or implicitly, of transition concerns. Whether those transition concerns were well-placed is an important issue, but first it will be useful to see just what they were, as well as to note that the area of legal development is one in which it may be especially important not to assume at the beginning that substantive or institutional policies are adopted without conscious consideration of transition policies.

II. The Problems of Systemic Transition

[18] See, e.g., Richard Bilder and Brian Z. Tamanaha, The Lessons of Law-and-Development Studies, 89 Am. J. Int'l L. 470 (1995); Amy Chua, Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development, 108 Yale L.J. 1 (1998); Richard S. Kay, The Secession Reference and the Limits of Law, 10 Otago L. Rev. 327 (2003); Richard S. Kay, Legal Rhetoric and Revolutionary Change, 7 Carib. L. Rev. 161 (1997); Eric W. Orts, The Rule of Law in China, 34 Vand. J. Transnational L. 43 (2001).

The problems of systemic change – political and economic as well as legal – have been difficult ones, especially in the last several decades, precisely because of the revolutionary character of the changes. Although modern revolutions have, more often than not, been peaceful ones, they were still revolutions. Fewer shots were fired in the transition from apartheid South Africa to Nelson Mandela's South Africa than in the transition from George III's colonies to George Washington's United States, but if the measure of a revolution is the size of the change and not the method by which it came about, then the former was every bit as much a revolution as the latter. And much the same applies to the transitions from colonies to nations in Africa, in the Caribbean, and in many other parts of the world, to the transitions from Warsaw Pact communism to social democratic Europeanism in much of Eastern Europe, to the transitions from centrally controlled Soviet republic to independent nation in Estonia, Belarus, Kazakhastan, and the rest of what used to exist as the USSR, to the constitutional and quasi-constitutional transformations of legal and political culture in countries such as the United Kingdom,[19] Australia,[20] New Zealand,[21] and Canada,[22] and to the major reformulations of legal and

[19]See Hilaire Barnett, Constitutional and Administrative Law 227-304 (4th ed. 2002); Rodney Brazier, Constitutional Reform (2d ed. 1998); Peter Catterall, Wolfram Kaiser, and Ulrike Walton-Jordan, eds., Reforming the Constitition: Debates in Twentieth Centiry Britain (2000).

[20]See Tony Blackshield, George Williams, and Brian Fitzgerald, Australian Constitutional Law and Theory (1996); David Kinley, Human Rights in Australian Law (1998).

[21]See Geoffrey Palmer and Matthew Palmer, Bridled Power: New Zealand Government Under MMP (3d ed. 1997).

[22]See David Beatty, Constitutional Law in Theory and Practice (1995); Anthony Peacock, ed., Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory (1996); David Schneiderman and Kate Sutherland, eds., Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics (1997).

constitutional understandings in countries whose membership in the European Union has dramatically transformed the character of their domestic legal systems.[23]

One of the things that makes many of these transitions revolutionary even when songs rather than guns were used is the degree of rejection of the previous regime, a rejection that encompasses not only the rejection of specific institutions, but also the psychology of imagining that one is now in a new culture whose traditions and history are largely being made anew. Rhodesia becoming Zimbabwe, for example, is not like the typical change of power in the United States that occurs on the occasional January 20, when we replace a sitting President with a new one. Rather, the transition from Rhodesia to Zimbabwe embodies a desire in revolutionary mode to start afresh, and to replace a regime that is thought (at least by the successful revolutionaries) backwards, corrupt, distant, wicked, and undemocratic. Obviously cultures cannot totally remake themselves, and continuities of geography, of habit, of language, and of many other dimensions of culture ensure that even the most seemingly revolutionary of revolutions has more continuity with a country's pre-revolutionary past than the most ardent of revolutionaries would want to admit. Some of Rhodesia is imprinted on Zimbabwe, just as some aspects of geography, language, culture, and history make contemporary South Africa the same country, in a literal and in a formal sense, that it was in 1975. Nevertheless, the transitions that are so large, so pervasive, and so abrupt that we can call them "revolutions" rather than transitions are

[23]See Mattias Kumm, Who is the Final Arbiter of Constitutionality in Europe, 36 Common Market L. Rev. 351 (1999).

characterized by a substantial displacement in a relatively short period of time of numerous pre-revolutionary political and economic structures, values, and institutions.

Yet although the desire to start afresh is a characteristic mode of (winning) revolutionaries, starting legally afresh has rarely occurred. Or, to put it more precisely, even in those societies in which there have been revolutionary political and economic and social changes, the legal changes have often been quite a bit less revolutionary. Given that it is common to remove previous political leaders (or remove their heads), to subject them to temporary or permanent political disability (the technical term is "lustration"[24]), to eliminate the public symbols of their glory (the statues of Lenin and Saddam Hussein have been toppled, and not just amended by the addition of an ending date to their rule), and often to outlaw the political parties they created, it would be natural to assume that many of the same inclinations toward sweeping out the old regime are likely to persist with reference to the legal systems created by and associated with subsequently discredited or at least replaced governments.

[24]See Roman Boed, An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice, 37 Colum. J. Transnational L. 357 (1999); Mark S. Ellis, Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc. 59 L. & Contemp. Prob. 181 (1996).

Yet although such inclinations towards the wholesale replacement of legal institutions and legal systems plainly exist, it is almost as plain that the manifestations of those inclinations have not transpired. Obviously it would be difficult to design the experiment or measure to test the question completely, and thus the conclusions must be somewhat impressionistic and anecdotal. Nevertheless, it appears to be the case that the extent of legal institutional change in substantially transitioning societies has been less than the degree of political and economic and social institutional change. South Africa has retained almost all of its Roman-Dutch legal apparatus even in the face of cataclysmic constitutional and political alteration.[25] Robert Mugabe's eagerness to strip white Zimbabweans of their ill-gotten land but to retain at least the form and the structures of the English legal system is but an extreme example of the fact that most post-colonial legal systems in Africa, in the Caribbean, and in Asia are identifiable heirs of their colonial ancestors.[26] More than traces of American influence still pervade the German and Japanese legal systems, almost sixty years after American legal structures were imposed but almost fifty years after they were officially removed.[27] Substantial elements of socialist legal structures persist in Eastern Europe and the republics of the former Soviet Union even as

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[25]See David Dyzenhaus, Judicial Independence, Transitional Justice and the Rule of Law, 10 Otago L. Rev. 345 (2003). The persistence of Roman-Dutch law with little alteration can be seen in, for example, Reinhard Zimmerman and Daniel Visser, Southern Cross: Civil Law and Common Law in South Africa (1996).

[26]See Andrew Harding, Law, Government and the Constitution in Malaysia (1996); Grace Patrick Tumwine-Mukubwa, Ruled From the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa, in J. Oloka-Onyango, Constitutionalism in Africa: Creating Opportunities, Facing Challenges 287 (2001).

[27]See Christopher A. Ford, The Indigenization of Constitutionalism in the Japanese Experience, 28 Case West. Res. J. Int'l L. 3 (1996).

economic assumptions and political institutions have been totally revamped.[28] Frequent revolutions in Latin America have been superimposed on a surprisingly persistent set of legal ideas and institutions.[29] And of course the United States at the founding continued the substance, the procedure, and the institutions of the English common law even as it was engaged in a dramatic replacement of the English approach to political institutions and the role (or not) of a written constitution.[30]

Perhaps there are counterexamples to this incomplete list of post-revolutionary legal systems that adhere more closely to their pre-revolutionary forbears than might have been predicted, or than might be the case for parallel political, economic, and cultural structures and institutions. Yet it is unlikely that there are nearly as many counterexamples as there are confirming examples, and if we indulge the mental exercise of trying to gauge the degree of systemic political, economic, cultural, and legal change, and if we continue the exercise by trying the compare the degree of change among these (and other) segments of a society, it seems not at all implausible to hypothesize that the degree of legal substantive and systemic change has often been significantly less than the degree of parallel political, economic, and cultural change. And

[28]See Stanislaw Frankowski and Paul B. Stephan III, Legal Reform in Post-Communist Europe: The View from Within (1995); Kataryna Wolczuk, The Moulding of Ukraine: The Constitutional Politics of State Formation (2001).

[29]See Maria Dakolias, The Judicial Sector in Latin America and the Caribbean: Elements of Reform (World Bank Technical Paper 319, 1996).

[30]Similarly, consider the way in which states that were created out of other states, such as Maine and West Virginia, explicitly chose to treat the law of the former state as their default authority.

if we take what is admittedly only a hypothesis and then try to explain (rather than test) it, we can turn to attempting to speculate, in a preliminary way, about why genuine new legal beginnings, at least as compared to genuinely new economic, cultural, and political beginnings, have so rarely taken place, or have taken place at so much slower a pace.

A. The Problem of Staffing

It is characteristic of most legal systems that they are staffed largely with people having formal legal training in institutions devoted exclusively to that training. And it is characteristic of this legal training that one cannot, the views of far too many law students notwithstanding, pick it up overnight. Whether there is or is not an explicit mode of thought that we can call "legal reasoning,"[31] or whether instead formal legal training consists simply in learning a different language and learning about specific legal institutions and specific legal doctrines, there is something about attending a law school (or majoring in law, in those countries – most of them – in which law is an undergraduate specialty and not a graduate program), qualifying to practice law, and then practicing law itself that produces a degree of differentiation between those we call lawyers and judges and those whose professional descriptions and professional identities are different.

The fact that lawyers are in some ways different from other people, and the fact that these differences cannot be assimilated instantly, is a relatively trivial observation. Behind these

[31] See Larry Alexander, The Banality of Legal Reasoning, 73 Notre Dame L. Rev. 517 (1998).

banalities, however, is a transition issue of considerable importance – what is to be done when the only lawyers and judges currently available are the ones from the old regime? If there are tasks that a society expects its lawyers and judges to take on, and if becoming a lawyer or a judge is not something that takes place as quickly as a revolution takes place, then the inevitable consequence is that a post-revolutionary society will find itself with a stock of lawyers, judges, and other legal officials who are decidedly pre-revolutionary, and will find itself unable, at least in the short term, to do very much to change that unfortunate situation.

This is a problem that arose in a quite important way in post-Revolutionary France. For reasons that should hardly come as a surprise, almost all of the judges in pre-Revolutionary France were members of the aristocracy. Once the Revolution had succeeded, the revolutionary powers would have preferred simply to replace the aristocratic judges with judges of less aristocratic heritage and sympathies. This, however, was simply not possible because there were no non-aristocratic judges to be had. On solution was to have no judges at all, at least for a transitional period. And another solution was to keep in place the judges from before the Revolution. Because the former transitional strategy was deemed more costly than the latter, bad judges (from the perspective of the post-Revolution powers-that-be) being thought less of a problem than no judges, the next transitional question was the control of those bad judges. And the solution, not surprisingly, was what we would now consider to be "formalism." In numerous official and semi-official ways, the aristocratic judges in a non-aristocratic regime were kept under a tight rein, limited to narrow interpretations, limited in their jurisdiction, and constrained to engage in literalistic interpretations of the Code that would be considered narrow even by civil

law standards.[32]

[32]See O.F. Robinson, T.D. Fergus, and W.M. Gordon, European Legal History 271 (1994). See also John Philip Dawson, The Oracles of the Law (1968). [I am grateful to Tony Honoré and John Bell for illuminating me on this point].

A similar problem was presented in 1994 South Africa. Although non-whites were represented among the ranks of the lawyers in apartheid South Africa to a considerable greater extent than non-aristocrats were represented in the ranks of pre-revolutionary French judges, there were at the moment of South Africa's great transformation few non-whites as members of the judiciary.[33] Faced with the choice of largely white and largely apartheid regime National Party judges interpreting the post-apartheid constitution, South Africa opted for a different course, and circumvented the existing patterns of (and rules about) judicial promotion by creating a new constitutional court whose members need not have previously served, unlike the judges of the Supreme Court, as lower court (called the High Court) judges. Rather than empowering the wrong group of judges and then constraining them, the South African approach was to create an entirely new court.[34]

In both of these cases, the early 19th century French and the late 20th century South African, the transition issue arose at the level of institutional design. In both cases, institutional designers (more of a construct than an identifiable formal group) could plausibly be understood as having believed that the optimal solution was to start over again with new lawyers, new prosecutors, new judges, and new legal officials in all of the domains of the legal system. But because starting over again would have been difficult or impossible because of understandings

[33]The degree of such representation in apartheid South Africa varied with racial group, with Indians being granted privileges not granted to Coloureds, and Coloureds in turn having considerable more representation than Blacks.

[34]See generally Hugh Corder, Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985-2000, 118 S. Afr. L.J. 773 (2001).

about the roles of lawyers and judges, understandings about the necessity of having legally trained people performing certain functions, and consequent understandings about the personnel the institutional designers had at their disposal, the institutional designers made what likely appeared to them to be suboptimal decisions precisely in order to accommodate to transition costs.

The lesson to be drawn from these experiences is the simple one that formal legal transition may be substantially easier than personnel transition – that it is usually easier to change the written rules than it is to change the identities or the attitudes of those who must interporet and apply those rules. When this is the case, as it so often is at the systemic level, then the difficulty of retraining, or the time lag involved in having different people staffing the newly transformed institution, may often produce what would otherwise appear to be a suboptimal institution precisely because the institutions we would design for the wrong people are not the ones we would (or should) design for the right people. And when having the wrong people is an inevitability during a time of, and because of, the nature of transition, then the creation of institutions designed to constrain the wrong people will be optimal in the larger sense, even of those institutions would be suboptimal were the right people to staff them. This is of course a larger point about rules, but it may have a special application and a special bite just because of the time lag involved in changing the training of legal officials, a phenomenon that may go some way towards explaining the comparative stickiness of legal institutions during time of transition as compared to political, economic, and even cultural institutions.

B. The Particular Path-Dependence of the Law

In addition to the special stickiness of the pool of available legal personnel, legal systems may also be especially[35] prone to path-dependence.[36] You do not need a license to be a politician, or even a bureaucrat, but you do need one to be a lawyer, at least in most countries, and thus also to be a prosecutor and a judge. The law, unlike politics and administration, requires its practitioners to be trained in an official way, and those with that training, even after a dramatic transition, are unlikely to be willing to cede the comparative advantage that that training brings. So given that the legal systems will be controlled after transition by people trained in the previous system (and, often, in the country of the former colonial or occupying power), the residual influence of that previous system will be greater than it would be for areas of governance in which formal training is not nearly as important. The problem of staffing discussed in the previous sub-section thus has a special bite here. Not only will carryover legal officials be

[35]It bears repeating that the "especially" is important here. The task is to explain why legal systems have been less inclined towards transformation than political or economic or cultural systems and why legal systems have been less transformed even when they have transformed. If it is the case that this disparity exists, then the search for explanation must lie within factors that disproportionately affect the legal system and not just factors that apply to the legal system along with everything else.

[36]See Clayton P. Gillette, The Path Dependence of the Law, in Steven Burton, ed., The Legacy of Oliver Wendell Holmes: "The Path of the Law" and Its Influence (1998); Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law Legal System, 86 Iowa L. Rev. 601 (2001).

especially needed, but those carryover officials will be for obvious reasons of self-interest be inclined to perpetuate the knowledge that they have and others do not. And because this is an old regime knowledge and not a new regime knowledge, carryover officials will be among the principal agents in resisting the kind of dramatic legal transformation that would leave them without much of their comparative advantage.

In some areas of inquiry, specialist knowledge is important but not nearly as geographically or culturally specific as law. A society in transition needs economists as much as (and probably more than) it needs lawyers, and economics, like law, typically requires lengthy, serious, and formal training. But training in economics is substantially cross-cultural, and a society in transition can often obtain the economic expertise necessary for economic transition with non-indigenously trained economists. Not so with law, however, and the special indigeneity of law may make the use of foreign lawyers and foreign legal officials (as well as foreign laws[37]) especially problematic, and thus may make law's path dependence especially likely.

C. The Stabilizing Effect of Foreign Influence

[37] See Paul H. Rubin, Growing a Legal System in the Post-Communist Economies, 27 Cornell Int'l L.J. 1 (1994).

It should come as no surprise that developing countries are heavily focused on attracting foreign direct investment and on attracting the good offices and kind feelings of the World Bank, the International Monetary Fund, the World Trade Organization, the United Nations, and other similar multi-national and donor organizations. And precisely because of their extra-national constituencies, these and like-minded organizations are committed to looking at legal systems disproportionately through the lenses of stability and reliance. Although a legal system serves many goals other than the goals of stability and reliance, many of these goals are ones in which the constituents are largely domestic. The constituency for justice, for fairness, and even for setting a legal system on the path towards optimization is largely a domestic one, and a country's citizens will be the chief beneficiaries of a substantively just set of legal institutions and legal outcomes. Foreign investors and donors, conversely, may be disproportionately interested in stability and reliance goals, and disproportionately uninterested in other goals, including, for example, the goals of ensuring procedural justice for petty criminals. So even if there are good arguments intra-nationally for requiring the victims of legal transition to bear transition costs as a way to give them the incentives to anticipate legal change, as much of the existing legal transition literature argues,[38] such an approach is likely to be singularly ineffective when the costs would be imposed upon extra-national actors who operate in a world in which they have many choices for their investments and for their approval.[39] For the extra-national constituency, unlike the intra-national constituency, the goals of legal stability may dominate all others, consequently producing a set of intra-national incentives to be especially wary of excess legal

[38]See especially Louis Kaplow, supra note 2.

[39]See Markku Suksi, ed., Law under Exogenous Influences (1994).

change.

An interesting feature of the effect of multi-national organizations and extra-national investors is that they will have a preference for the familiar. For reasons that are both obvious and too complex to analyze fully here, most of the legal systems of influential foreign investors – English common law, American statutory and regulatory law, French and German civil codes, among others – are also the legal systems that former colonies and formerly occupied countries might wish, ideally, to jettison. Yet to the extent that investors will prefer to invest in countries with legal systems similar to their own, investor preference will incline towards the legal systems of the major legal families in wealthy nations. Moreover, a fair amount of existing research indicates that both the absence of corruption[40] and presence of economic growth[41] are positively correlated with common law legal models and/or with largely Western visions of the rule of law. And whether or not this is actually true, what is important is that it is believed to be true in many investor nations and in many multi-national organizations. The consequence, therefore, is that the effect of this phenomenon will be away from legal change in many of the former colonies and formerly occupied countries that now have the very legal models that influential external forces find valuable. The result, therefore, will be a pull towards keeping these models in those countries that now have them, and a pull towards adopting them in countries that do not. A

[40]See Daniel Treisman, The Causes of Corruption: A Cross-National Study, 76 J. Pub. Econ. 399 (2000).

[41]See Robert J. Barro, Economic Growth in a Cross Section of Countries, 106 Q. J. Econ. 407 (1991); Gerald W. Scully, The Institutional Framework of Economic Development, 96 J. Pol. Econ. 652 (1988).

hypothesis emerging from this would be that there would be greater adherence to pre-transition legal systems in transforming nations with common law backgrounds than in transforming nations with other backgrounds – that Uganda, for example, would have one more reason to adhere to the English common law than Bulgaria would have to adhere to Soviet-influenced socialist law. It may turn out that this is not true, but it is just the kind of hypothesis that recognizing the external influences on legal development would lead us to investigate.

D. The Problems with Transplants

In the short term, even if not in the intermediate and long term, the typical alternative to keeping major elements of existing laws and legal institutions, warts and all, is a transplant. Although many countries are reluctant to employ a transplanted constitution, indigenous constitution-making often being understood as an essential component of proclaiming national identity,[42] the situation is different with "ordinary" law, such that many countries initially think there may be advantages in taking another country's legal models essentially off the rack. Yet as the beginnings of a new literature are starting to show,[43] transplants come at heavy costs to both legal and economic effectiveness. So if both transplants and creating new systems are costly,[44]

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[42]See Frederick Schauer, The Politics and Incentives of Legal Transplantation, in Joseph Nye and John Donahue, eds., Governance in a Globalizing World 253 (2000).

[43]See Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, "Economic Development, Legality,. And the Transplant Effect," Harvard University Center for International Development Working Paper (November 1999). See also Stephen Cornell and Joseph C. Kalt, Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache, 33 Economic Inquiry 402 (1995).

[44]See Frederick Schauer, The Politics and Inentives of Legal Transplantation, inJoseph Nye and John Donahue, ed., Governance in a Globalizing World 253 (2000).

the advantages of keeping what is perceived to be an inferior system grow commensurately, and the existing system may be preserved simply because the cost of changing a legal system may be greater than the cost of changing a political or economic system.

E. The Subtle Role of Precedent

Finally, a legal system is a system operating in a milieu in which precedent matters. And although we normally think of precedent in terms of specific legal rules and specific judicial decisions, it is also possible to imagine an entire legal system as a precedent writ large. Just as the idea of precedent instructs us, at least presumptively, to retain even those rules and rulings we now believe to be suboptimal,[45] so too would a precedential view of a legal system instruct us to retain even a suboptimal system, again for the values of stability and disempowerment (to change the status quo, possibly fir the better and possibly for worse) that the idea of precedent brings. Once we understand precedent as involving a meta-norm requiring its subjects to give presumptive credence to rules or decisions they think unwise,[46] it should come as no surprise that when legal rules come together to comprise an entire system that the same ideas of precedent should still prevail. There may be important differences, but as a psychological or sociological matter it should not be surprising that a system controlled by those who believe in precedent will present itself as more resistant to change than would be the case for other systems in which a norm of precedent is taken to be somewhere between unwise and perverse.

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[45]See supra note 12.

[46]But see Jill E. Fisch, The Obligation of Precedent: A Challenge to Conventional Theories of Stare Decisis, __ J. Contemp. Legal Issues ___ (2003).

There is a complex question of cause and effect here. One possibility is that the dominance of precedential and other forms of backward-looking thinking in legal system will produce in those who internalize the values of the legal system less of a proclivity towards change than will be the case with those who have internalized the values of more forward-looking enterprises. And the other possibility is that those who populate the professional parts of the legal system are a self-selected group of people disproportionately inclined to value stability and consistency more than they value, for example, creativity, risk and change. Insofar as either or both of these phenomena are in place, and insofar as the inhabitants of the legal system are significant factors in the degree of change in that system, we would expect to see further reinforcement of the possibility that law is less prone to change precisely because those who "do" law are less prone to value change, and also less prone to encourage it.

III. The Special Stickiness of the Law

The foregoing list of factors is potentially non-exhaustive, and there may well be others that should be added. But the important task is less in identifying the factors and more in getting clear and what those factors may demonstrate. Each of these factors points to a way in which law may be less amenable to change, more hidebound, and slower to change even when it wants to change than are the other structures and institutions of a transitioning society. Insofar as these factors exist, they will do much toward explaining why societies that seem quite willing to throw much of the pre-revolutionary political and economic apparatus overboard have nevertheless held on to their legal apparatus to a surprising degree.

At the first cut we might explain this phenomenon by the conclusion that legal reform is more expensive than other types of systemic reform.[47] But if we attempt to go beyond this conclusion for explanation, and to try to determine why legal reform is more costly in various ways than other types of reform, we find ourselves considering the cost of various types of institutions, the extent to which law may be more institution-dependent than other social phenomena, and also the costs of the various factors, some of which have tangible costs and some of which do not, sketched in the previous section.

The issue of cost is important, but so too is the issue of how those costs are to be allocated. Much of the existing literature on legal transitions outside of the development context, and outside of the context of systemic transition, has importantly identified the ways in which we can perform a sophisticated analysis of how to apportion the costs of legal transition. One way of apportioning those costs, however, and a way typically assumed away in much of the transition literature, is by imposing the costs on the present and on the future by refusing to implement what would otherwise be a desirable legal transition. Assuming that the transition is in fact desirable, then to the extent we refrain from enacting or otherwise implementing that transition we are imposing costs on ourselves, and imposing costs on future generations. As Justice

[47] See Richard A. Posner, Creating a Legal Framework for Economic Development, 13 World Bank Research Observer 1 (1998); Richard A. Posner, The Cost of Rights: Implications for Central and Eastern Europe – and for the United States, 32 Tulsa L.J. 1 (1996).

Brandeis recognized, such an approach may more often than we think be a desirable strategy, and may lay at the heart of the idea of law more than much of the transition literature acknowledges. But it may turn out, perhaps surprisingly, that the virtues of legal stability are even greater at the systemic level than at the level of individual legal rules or families of legal rules. And it may turn out that the sociology of legal stability, even if often less virtuous and less an accurate reflector of actual value, will further exacerbate tendencies towards disproportionate systemic legal stability, disproportionate with respect to other systems and institutions and disproportionate to non-systemic legal change as well. If this is the case, and the examples may lend some credence to the possibility that it will be the case, we may have gone a long way towards explaining why systemic legal transitions take place less often and less dramatically than we may otherwise have predicted.