

Circulations of Law:
Colonial Precedents, Contemporary Questions

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Introduction: Law Travels

Enthusiasts of a new global order often overlook earlier globalisations, just as proponents of ‘rule of law’ often overlook earlier rules of law. The globalisation of imperial orders was marked by the extension of imperial law-making, just as it was accompanied by the expansion of trade routes and communications amongst elites throughout the empire. The Romans and the Persians; the Ottomans, French and British; and now, perhaps, a new manner of global imperium – in all of these, the expansion of legal orders was inseparable from the movement of people, goods and services along routes which circumscribed the known world and aspired beyond its borders.

This paper draws from a larger research project on the project of law in the British colonial period to ask questions of contemporary visions of rule of law. Law is a travelling phenomenon, its logic centred upon the balance between the local and the general: the justice of the third party judge, the rules that apply to all within a community, the laws made to make inter-group exchanges possible, the impulse to analogise, compare, and generalise across time and space. A widely-used understanding of the concept of ‘legal system’ divides the world into common, civil and mixed law regimes – systems whose precedents are imperial, whose contemporary borders match those of old empires, and whose current legal arguments still refer to the traditions of the post-imperial centre.²

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² The University of Ottawa Law School has a useful website for illustrating the distribution of legal systems according to civil/common/mixed categories: <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde-large>. Another important category, Muslim law, is beyond the scope of this paper, but is explored in detail in the wider project.

However, law did not travel alone: it had carriers and agents, who themselves had travelling companions – government officials and diplomats, traders and businessmen, missionaries, pilgrims, scholars, privateers. Its departure was often a matter of heated debate; its arrival at each port of call required translation, negotiation and domestication, as well as all-out war. The words ‘legal transmission’ sanitise the drama of law’s travels and remove its human agents as well as their bargaining, disputation, violent confrontation and uneasy accommodations. They also minimise the important ways in which the processes of travel and domestication change law itself: its content, its meaning, its scope and its ultimate effects.

This is why this paper, whose ultimate destination is the contemporary puzzle of ‘rule of law’, takes as its point of departure the colonial travels of law: it traces the path of law from the United Kingdom to India, Egypt and Malaya in the late nineteenth century, following colonial agents as they attempted to define criminality, private property, and social order. Upon arrival, though, these officials negotiated the content, scope and meaning of law with local elites, whose interventions had enormous importance for the eventual domestication of law. Colonial concerns for stability, private property, order and justice (in that order) required accommodations with some local elites who saw opportunities for the furtherance of their own varied interests. It is this multiple nature of negotiation that ‘rule of law’ advocates now must confront: not just in courting local elites in each case, but also in the varied and potentially conflicting concepts of ‘rule of law’ within their own institutions and states.

This paper consists of two movements: the first consists of the circulation of what is now known as ‘common law’ through the British Empire: from its manufacture in London, its journey first to India and then to Malaya and Egypt, accompanied by British agents and met by local elites, and finally to its domestication and translation in the immediate post-independence period. The second movement, of ‘rule of law’, began where the first ended: a new circulation of legal reforms and institutions, brought by international organisations and accompanied by new actors, articulating and negotiating a modified vision of rule of law whose definitions remain vague and whose ultimate effects are unknown. While India was crucial to the first circulation,

Singapore is critical for the second: we conclude with speculations as to the significance of these ports of call for the future of rule of law.

Colonial Law

The spread of common law systems throughout the British Empire was effected by British colonial officials who carried British law and administrative policy to the colonies as well as to states which were never officially colonised. These systems of law were translated for domestic consumption by colonial and local elites, and it was local elites who saw the maintenance of these systems into the era of national independence. Negotiations between local and colonial elites over the content, scope and meaning of the law were iterated, creative and multiple: they took place in court rooms and treaties, battlefields and public ceremonials, state councils and school textbooks.

My research in the negotiations of law during British rule in India, Malaya and Egypt shows a number of stages in legal struggle. Colonial treaties signed between the British and local elites, and the first sets of legal arrangements establishing the colonial relationship, tended to lead to war (India 1857, Malaya 1874, Egypt 1881). Local violence and brutal British retaliations cleared the most troublesome elites from negotiations, and a new compact was made, this time with more emphasis on the rule of British law and justice (India 1858, Malaya 1876, Egypt 1882). The role of law was prominent and explicit at every step, but each stage of colonial governance required a different kind of law: first, treaties and division of jurisdiction among local and colonial elites, then the enforcement of British justice in trials and administration, and finally the re-definition of local practices within the rubric of British concepts such as the private sphere, family law and religion. The details of these dynamics are beyond the scope of this paper, but the patterns are clear: the process of transporting British law to colonial sites was not only contentious but creative of new struggles over authority, legality and power. Law in the colonial period was not merely an instrument of colonial rule: it was an arena of conflict, and these conflicts re-defined local elite hierarchies, state authority and the relationship between subjects and the state.³

³ Hussin 2008, 'The Politics of Islamic Law: Local Elites and Colonial Authority in India, Malaya and Egypt,' Ph.D Thesis, University of Washington.

To say that the common law transplants varied from the law of the United Kingdom is an understatement: even in what are regarded 'pure' common law systems, such as Australia, important interpretive and selective choices were made which transformed the law once it arrived at its destination. In India, Malaya and Egypt, the law of the United Kingdom was brought by colonial officials, who then found that negotiation with local elites would be inextricable from the process of translating, domesticating, implementing and administering the law. In each of these cases, the British saw their mandate extending only to matters of economy and order, and so explicitly left the domains of religion, culture and 'private law' under the control of local elites. This division of jurisdiction between elites was also a division of political, economic and social resources, and attempted to enforce a newly-defined distinction between public and private, religious and secular, state and society.

In India, this meant that for the first time, Muslims were to be governed by 'Muslim law' and Hindus by 'Hindu law,' according to British understandings of these laws, based upon ancient and classical texts and not local practice. In Malaya, the identification of local elites with a sphere of autonomy defined as 'religion and custom' led to the increasing inseparability of Malay ethnic and Muslim religious identity.⁴ In Egypt, some local Muslim elites used the equation of 'Islamic law' with family law to place the Egyptian Muslim family at the centre of reforms. Even though the project of colonial law emphasised its non-interference in matters outside economy and administration of the state, the intervention of British law and colonial agents led to radical transformations in the societies they encountered.

The implementation of colonial policies – even those aimed strictly at economic extraction/development – often required the re-arrangement of local elite hierarchies and institutions with deep roots in local society. The reform of land law to allow for clearer rules for private property and taxation, for example, was a ubiquitous feature of colonial law reform. In Malaya, the effort to reform land law involved the creation

⁴ To the extent that the Federal Constitution of Malaysia defines a Malay as "a person who professes the religion of Islam, habitually speaks the Malay language...(and) conforms to Malay custom." (Art. 160, cl. 2.) In Malaysia today, therefore, it is legally impossible to be Malay and not be Muslim. This racial and religious category of Malay confers particular rights and privileges involving land ownership, practicing business, and having a privileged national language (Malay) and religion (Islam).

of a new class of local elites, for whom a new educational and institutional system had to be put in place. W.E. Maxwell, Colonial Commissioner of Lands in Malaya, argued that “the two...are inseparably connected, and while, on the one hand, no land revenue system can possibly work without the intelligent employment of local native officials, so, on the other hand, the employment of native headmen as a rural police will be of little avail unless they have a local influence founded upon their position as land-owners and land revenue collectors.”⁵ Maxwell suggested the implementation not of English land law, which he saw as medieval and inadequate to the task of colonial administration, but of the Torrens system in use in Australia, in conjunction with local structures of authority. The ‘native headmen’ he proposed to elevate soon found themselves the local intermediaries not only for colonial policy, but for the post-colonial state which would follow.

What we refer to today as ‘mixed systems,’ therefore, are far more than British law co-existing with laws governing religion, family and custom. The sphere of autonomy for custom and religion was defined in the colonial encounter, and religion itself re-defined by British and local elites. Perhaps even more importantly, ‘mixed systems’ signal new power arrangements: in Malaya, at the level of local administration of colonial law, the village headmen became important intermediaries for the colonial state, and their new roles buttressed their power over the rural areas. At the apex of local power were the Malay Sultans, whose cooperation with British policies secured their positions as heads of state and arbiters of Malay custom and Islam. The realisation and maintenance of new law depended upon local interests and adoption, and the transmission of law from Britain into its subject territories involved the radical re-negotiation of local elite hierarchies, institutions and legal categories.

‘Rule of law’ in the colonial period was neither fully realised nor without contradiction, but the overall pattern of change was towards the extension of state authority over new domains, and the strengthening of state sovereignty vis-à-vis local power-holders. The pattern of colonial-era rule of law calls into question whether it is possible to change the structure of a legal system and not its political dynamics;

⁵ Maxwell, W. E. Memorandum on the Introduction of a Land Code in the Native States in the Malay Peninsula. Singapore: Government Printers, 1894.

whether it is possible to ‘reform’ only Islamic law and not affect the scope of state law; whether a mixed system can really be understood as simply the sum of its parts.

Travelling Companions

British officials, missionaries, travellers, and merchants went from Britain to India, and then to Malaya and Egypt, carrying with them understandings of monarchy, government, civilisation, law and authority as well as political, economic and strategic interests. Muslim traders, pilgrims, students and diplomats crossed the Indian Ocean between Singapore, Calcutta, Cairo and Mecca, participating in and creating a global circulation of agents, ideas, relationships and goods. Alongside these networks of people were other flows: newspapers, letters, textbooks, policy papers, intelligence briefs, invoices and contracts. These circulations and interconnections meant that the classic comparative politics method of parallel case studies – India, Malaya, Egypt – was in these circumstances not only inadequate but also fundamentally flawed. These sites were connected by networks of people, institutions and ideas which made them not independent cases to be compared, but nodes in a worldwide circulation of law.

How did law travel, with whom, and what baggage accompanied it? For what destinations was it intended? How was it translated, repackaged, and domesticated? The journey of Lord Cromer (Evelyn Baring, 1841-1917), who brought lessons learnt from India into his career as Imperial Proconsul in Egypt between 1883 and 1907, is one of the best examples of the travels of imperial law, and will ring familiar to current scholars of globalisation policy.⁶ Evelyn Baring went to India as Private Secretary to Lord Northbrook (Viceroy of India from 1872-1876), whose policies in India were to become the mainstay of Baring’s approach to Egypt: economic liberalisation, which involved a combination of low taxation, free trade and *laissez-faire* policies, would be the primary task of British officials. However, this economic aim was allied to a concern with ‘reform’ (defined as the improvement of administration and justice, the

⁶ Roger Owen. *Lord Cromer: Victorian Imperialist, Edwardian Proconsul*. Oxford University Press 2005. That Evelyn Baring was born into one of the most prominent London banking families of his time indicates his involvement in yet another network: international finance.

elimination of corruption, the alleviation of poverty, and “a belief in the power of example as a means of bringing about social change and political progress”) as well as an interest in maintaining local institutions and elites wherever possible.⁷

Cromer was not alone: several key actors in the British strategy for Egypt were experienced India hands. Kitchener (1850-1916), who was Proconsul in Egypt shortly after Cromer (1911-1914), was before then commander in chief in India (1902), having also served as Commander in Chief of the Egyptian army (1892), in Sudan (1898) and in the Boer War (1900). Reginald Wingate, who took the post of High Commissioner in Egypt shortly after Kitchener's departure (1916-1919), began in the India Service and was posted to Egypt in 1883, where he became commander of Military Intelligence in 1889. The interconnectedness of India, Malaya and Egypt was not merely among members of the British colonial service, but can be seen in the movements of Muslim judges, writers, scholars and religious elites between India, Mecca, Egypt and Malaya as well. These sites were, in fact, connected not just by land and sea, but by a sense – within both British and Muslim networks – of the need to transport knowledge from one place to another in order to confront the problems of the day.

The British colonial vision of rule of law, which travelled with men like Cromer from London to India to Egypt and Malaya, attempted to achieve non-interference in local affairs by emphasising economic policies: the stabilisation of private property and land title, the maintenance of social order, the enforcement of contract. At the same time, these policies, and the officials who implemented them, also carried moral baggage, couched in the language of reform and tutelage: local elites were to be taught by example about rule of law and administration, and social and political hierarchies would be remade only if justice was at stake. Depending upon the domestic political climate in the United Kingdom and the policy objectives of local administrations, however, ‘justice’ was a flexible concept. Attempts to codify existing law tended to impose British understandings of legal practice which were new (such was the case in attempts to fix Islamic and Hindu law through the Hastings Plan of 1772 in India);

⁷ Mowat, R. C. "From Liberalism to Imperialism: The Case of Egypt 1875-1887." *The Historical Journal* 16, no. 1 (1973): 109-24, 113.

modifications made to 'domesticate' law depended upon British imaginations of native society as well as of British law.

Local elites played crucial roles in the reception, translation and domestication of legal change. British interests in securing private property and state administration required the cooperation of local elites, whose negotiations with colonial officials gave them access to new resources of power, often defined as 'traditional', 'private' or 'religious.' In Malaya, India and Egypt, local elites who resisted British intervention were generally replaced by elites who saw in the colonial encounter new opportunities. In Malaya, the Malay Sultans used their newly-granted autonomy over religion and culture to legitimise their power but also to bind Muslim religious and Malay ethnic identity together. In India, local Muslim elites saw in the British eagerness to define Islamic law through texts, codes and state courts, a new role for the state in the religious and social life of Indian Muslims. Having taken on these newly-defined roles as arbiters of Islam and Muslim identity, however, local elites also used colonial and Muslim networks to organise new responses to British rule, connecting Egypt, Malaya and India in new anti-colonial and pan-Islamic discourses. Once domesticated, the discourse of rule of law and its legal institutions allowed local elites to strengthen their own power, silencing their opponents and maintaining their autonomy from British rule.⁸

Ports of Call: India

Paying attention to how law travelled also helps highlight another matter which tends to have been overlooked in the literature on legal 'transmission': where the law stopped on the way from London to distant sites of empire. The importance of India as a port of call for colonial officials and colonial policy has been discussed; we now turn to the critical role played by India in the travels of the common law. The Indian Penal Code was brought to Singapore, Sri Lanka, Malaysia, Brunei and Burma, and remains

⁸ At times, with mixed and surprising consequences: Sultan Abu Bakar of Johore (1833-1895), for example, the ruler of the southern-most state on the Malay Peninsula and Singapore's neighbour to the north, used British influence to appoint himself Sultan; afterward, though, he put in place the first Constitution in Malaya (1895), which not only secured the succession for his heirs but also made Islam the state religion and delegated authority to a judiciary and legislature.

the core of criminal law in these states. Yet the movement of law from England to India to other sites of empire had important effects on the law itself, and continues to be significant for the criminal law of post-British colonies.

The development of the Indian Penal Code is perhaps the definitive example of the manner in which law travelled from England to India, and the transformation it underwent on the way. The 1862 Indian Penal Code was put into place in India as a result of debates in England over the criminal justice system, debates which did not result in a criminal code in England, but which stimulated the desire to put British justice into effect in India. The Code attempted to create in India a rule of law which could only be an ideal in England.⁹ The English law reform movement was led by Utilitarians like Bentham and Mill, and the Indian Penal Code shows their influence both in its form and its content, but also the influence of a growing unease over criminality in England, and the perceived inability of the justice system to stem the tide of crime. The myth of origins runs deep and continues to affect Indian law: even though the Indian Penal Code did not draw exclusively from English law, and even though its drafter, Thomas Babington Macaulay (1800-1859), inserted new elements based on supposed 'Indian' realities such as criminal castes, thuggee (ritual murder) and dacoity (banditry),¹⁰ English law is still a referent for Indian judges.

The Indian Penal Code formed the basis of criminal law in Singapore, Malaya, Egypt and other states, where it is still in effect, and where judges still refer to Indian case law. The aims of the Code were understood by colonial reformers to be 'modern' and to be particularly suited to native, non-European populations: the Commission appointed to draft a penal code in Egypt in 1919 looked to the Indian Penal Code "to bring them into harmony with modern ideas," since it was a criminal law that "has for many years been successfully applied to races...that in character and habits closely resemble those inhabiting Egypt, and it has already been adopted in a modified form

⁹ David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century', *Modern Asian Studies* Vol. 32 (3) 1998, 513-557.

¹⁰ Radhika Singha, 'Providential' Circumstances: The Thuggee Campaign of the 1830s and Legal Innovation,' *Modern Asian Studies* Vol. 27, No. 1(1993), 83-146.

by the Sudan.”¹¹ The codification, regularisation and enforcement of criminal law was itself an innovation wherever the Indian Penal Code was instituted, but as we will discuss later, particular substantive provisions of the Code (such as those arbitrating sexual morality, gender and family life) placed new domains of life into the jurisdiction of the state.

As with the Penal Code, the Indian Constitution has been a model for constitutions throughout the Commonwealth, in the absence of a written British constitution. The constitutional documents drawn up in Whitehall in the post-World War II era were aimed at a number of goals: among them were the development of parliamentary-style democracies on the British ideal, the securing of rights for minority Anglo settlers in regimes now under local elite control, and the sense of a legacy passed on to the Commonwealth at the end of Empire. In addition, the Indian Constitution took on elements from the United States, such as the guarantee of fundamental liberties. Constitutional conventions and intermediate instruments provided the basis for modifications to fit each context. In Malaysia, for example, the legacy of nineteenth-century reforms of law re-organised local elite hierarchies and resources (like land) and formed the basis for constitutional modifications which privileged Malay ethnic identity in the newly independent Malaysia.

Other elements of the Indian Constitution were imported wholesale, but to different effect: among the most important of these differences were the ways in which constitutional issues were elaborated by the courts. In India, constitutional issues were brought to the courts and hotly contested in the initial years of its promulgation, whereas in Malaysia there was much less contest in the courts over constitutional provisions.¹² One unexpected result of this is that even today, debates over constitutional issues in Malaysia refer to earlier Indian cases. Paying attention to the selective transmission of rule of law, the politics of reception of that law as it travelled and was transformed at various ports of call, and the local dynamics of interpretation

¹¹ G. Glover Alexander, ‘The Egyptian Draft Penal Code, 1919’, *Journal of Comparative Legislation and International Law*, 3rd Ser., Vol. 1, No. 3 (1919), 244-247, 244.

¹² L. A. Sheridan, ‘Constitutional Problems of Malaysia,’ *The International and Comparative Law Quarterly*, Vol. 13, No. 4. (Oct., 1964), 1349-1367.

and elaboration, helps underline that rule of law is not just about the delivery of policy instruments. Rule of law is also about the management and re-organisation of conflict, the re-distribution of power and resources in the local context, and about the authority and legitimacy of state and social actors. The next section will discuss the multiplicity of current rule of law efforts, their new travelling companions and the ways in which they are being exported and domesticated.

New Circulations of Law: International ‘Rule of Law’?

A survey of some of the major funders of ‘rule of law’ projects indicates that they share some of the assumptions of the British colonialists: that when laws travel, they can be altered to fit local circumstances. In addition, while rule of law is transferable from one context to another, barriers to the achievement of rule of law are invariably assumed to be local. A survey of U.S.-based rule of law programs shows a common set of assumptions: policy imperatives can be achieved by the careful application of law, law can serve both those who deliver and those who receive it, and law can and should be ‘bundled’ with other social, political and institutional elements.¹³ The Carnegie Endowment couples democracy and rule of law,¹⁴ USAID places rule of law within its Democracy and Governance goals alongside ‘Respect for Human Rights’,¹⁵ the U.S. Institute of Peace argues that rule of law “requires an evolutionary search for those institutions and processes that will best bring about authentic stability through justice.”¹⁶ The World Bank classifies 571 projects under the theme ‘Rule of Law,’ further categorising these projects as: ‘access to law and justice’, ‘judicial and

¹³ The United States Department of State lists a number of organisations ‘Promoting the Rule of Law’ (http://usinfo.state.gov/dhr/democracy/rule_of_law/rulelaw_legal.html): the Carnegie Endowment for International Peace, the American Bar Association, the United States Agency for International Development (USAID) and the United States Institute of Peace.

¹⁴ <http://www.carnegieendowment.org/programs/global/index.cfm?fa=proj&id=101&proj=zdr1>

¹⁵ http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/

¹⁶ <http://www.usip.org/ruleoflaw/about.html>

other dispute resolution mechanisms', 'law reform', 'legal institutions for a market economy', 'legal services', 'personal and property rights, and 'other rule of law.¹⁷

Even if we accept that rule of law can be delivered through policy programs, what kind of rule of law would it be? Constitutionalism, or anti-corruption? Order, or freedom? The support of regimes of private property, or the securing of social and economic rights? These are potentially conflicting aims, whose simultaneous pursuit is difficult even at the best of times, let alone in states where the rule of law is merely one of a number of competing priorities. Rule of law proponents and officers pursue multiple definitions of rule of law, and multiple strategies, some of which conflict not just in aims but in fundamental assumptions. Democratisation can and has made the upholding of contracts and private property quite difficult in the short term, the extension of fundamental liberties can create social and political instability, legal reforms for the few who would benefit from a market economy can make the task of providing social and economic rights for the many who risk losing rights to land and work, an uphill battle.

Further, the meanings of rule of law have changed: at the World Bank, for example, the aims of rule of law projects are multiple and have changed to reflect developments in the organisation's understanding of its mandate. The "structural adjustment" phase of the 1980s was followed by the "governance" phase of the 1990s, which in turn has been followed by the "comprehensive development" phase of 1999 onwards.¹⁸ Since the Bank's mandate has been economic rather than political – which would interfere with the jurisdiction of the state – the re-definition of Bank goals in rule of law has required a shift in the definition of rule of law itself. While the 'institutional' conception of rule of law sees law as merely increasing the effectiveness of policy – law as a targetting instrument – the 'substantive' view of law includes ideals and values, such as poverty reduction and democratisation. The 'instrumental' view of rule of law sees law as helping to achieve whatever goals a society would set for itself

¹⁷<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,menuPK:64140075~pagePK:64133621~piPK:64140076~theSitePK:40941,00.html>

¹⁸ Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development,' in *The New Law and Economic Development: A Critical Appraisal*, ed.s David M. Trubek and Alvaro Santos, Cambridge University Press 2006, 253-300.

(which might include the privileging of other things to rule of law), whereas the ‘intrinsic’ vision of rule of law sees law itself as the highest ideal of any society. Alvaro Santos argues that these form a continuum within World Bank rule of law programs, of which there are hundreds, and that the breadth they encapsulate provides a ‘shield’ against critique, negative evaluation, and domestic government resistance.¹⁹

While some rule of law programs are imposed upon states as part of aid packages or adjustment programs, the majority of rule of law efforts are voluntary and well-subscribed. Rule of law is a multi-billion dollar “growth industry.”²⁰ But if critics of rule of law programs are right: if they are expensive, ill-defined, poorly regulated projects which do not even meet internal evaluative criteria, why is rule of law such a popular concept? Here, again, the relationship between local elites and the agents of rule of law plays an important role: at the level of personal relationships, the officials of international agencies and those of the countries they serve participate in joint networks (travel, education and career advancement) and share interests in private property, free markets, social and political liberalisation. Intellectually, they share assumptions about development, governance and the goals of reform. At the level of governments, the wide-ranging claims of rule of law projects provide them with a broad appeal within state and society (judges, legal professionals, scholars, non-governmental organisations and local advocacy groups).²¹

Looking back at the British colonial experience of legal travel, a few questions arise for further research: who are the Cromers, Kitcheners and Wingates of this new era of rule of law, and what baggage (economic, political, social and ideological) travels with them? Who are their local counterparts, what domestications of rule of law have they created, and upon what assumptions about local life and society have these been based? Even though agencies like the World Bank began with policies of non-interference, as did the British in some colonial states, what interventions has the project of rule of law required? How have local elites negotiated these projects, the opportunities and the challenges they present? The colonial project of legal reform

¹⁹ Santos 2006, 276.

²⁰ Jane Stromseth, David Wippman, Rosa Brooks. *Can Might Make Rights? Building the Rule of Law After Military Interventions*. Cambridge UP 2006.

²¹ Santos 2006, 296-298.

resulted in new local hierarchies, new definitions of state, society and subject, and unintended consequences in the realms of ethnicity, religion, public and private: how far does this history allow us to see into the future of current rule of law projects? This last question takes us to new ports of call in the circulation of rule of law – just as India played an important role for the extension of British rule of law, we look to Singapore for the trajectories of contemporary rule of law.

New Ports of Call: Singapore

In contemporary rule of law, new circulations and new ports of call have emerged. The role of the United States, international organisations and non-governmental players has increased dramatically, and new models for rule of law have become prominent. Singapore is significant as a port of call for rule of law because of its economic success, its social stability and its growing influence on countries in Asia as well as elsewhere who wish to replicate this success. As in the case of India in the colonial and immediate post-colonial period, where law stops in its travels is significant for what law becomes: we will discuss the importance of Singapore as a new port of call for rule of law concepts, both for its promise and its peril.

A World Bank report on judicial reform in Singapore has praised its efforts at ‘modernisation’, and characterised its strategies as: ‘Using Leadership,’ ‘Refining Models of Justice and Expanding Alternatives,’ ‘Increasing Access,’ ‘Improving Court Administration Capacity,’ ‘Improving Human Resource Management,’ ‘Emphasizing Performance and Results,’ ‘Leveraging Technology,’ and ‘Building Bridges.’ While the report itself is quite clear that it takes a ‘managerial’ view of the question of reform, it is also clear that Singapore is a model for other countries to follow: “No one would suggest that Singapore’s strategy is a magic formula...but it would be wise to examine the strategies used and lessons learned from Singapore’s experience as a potential guide toward successful and sustainable judicial reform.”²²

As a model for rule of law and legal reform, it is important to understand how Singapore’s rule of law is distinct from that of its precedents in India and the United

²² Waleed Haider Malik, *Judiciary-Led Reforms in Singapore: Framework, Strategies, and Lessons*. World Bank Publications 2007, x.

Kingdom. The World Bank report took a managerial approach to the question of reform, but the model is not nearly so specific: Singapore is a model for rule of law as a whole, the approval of the World Bank of this model is a strong selling point. In this case, how might we understand the implications of the Singapore model? While Singapore's legal system owes much to India, there are marked differences in the handling of law and legal instruments. These will continue to be difficult to disaggregate as long as 'rule of law' remains undifferentiated in our analyses, with important consequences not just for scholarship and evaluation, but also for the continued circulation of law as it travels from Singapore to other developing legal systems, like Cambodia and China (and even back to India).

The area of constitutional law is one of these differences: whereas Britain did not have a written Constitution, constitutions are a common feature of post-British colonies, India and Singapore not least among them. However, while India's Constitution has been made more robust through the balance of power between Parliament and the Supreme Court (*Kesavananda Bharati v. State of Kerala*, (1973))²³, Singapore's Constitution has so far been more a document for the furtherance of government policy: since 1979, amendments to the Constitution have required a two-thirds majority in Parliament, which has been dominated by the ruling People's Action Party for the last four decades. "The Constitution of Singapore, unlike the American Constitution is not based on the Lockean philosophy of limited government which stresses control and checks on government. Instead, it is a document which provides a springboard for governmental action."²⁴

Another area is criminal law: the common law stopped in Calcutta on its way to Cairo and Singapore, dispersing Indian Penal Code provisions in post-colonial Singapore and Malaysia. The British attempt to domesticate the Penal Code for India involved inserting elements of 'Indian' criminality as defined by the British – dacoity, thuggery, etc. – into a reformed code which could not be implemented in the United Kingdom. An autonomous sphere of law was constructed for Islam and Hinduism,

²³ William Dale, 'The Making and Remaking of Commonwealth Constitutions', *The International and Comparative Law Quarterly*, Vol. 42, No. 1. (Jan., 1993), 67-83.

²⁴ Kevin Tan, 'The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day', *Singapore Academy of Law Journal*, Vol. 1, p. 1, 1989, 28.

defined (again by the British) by a reliance on ancient/classical texts and limited in its scope to matters of family law and religious observance. These localisations not only secured the support and legitimacy of some local elites, but also reinforced Victorian-era British ideals of family, patriarchy and a private domestic sphere.

These localisations and domestications continue to have important consequences. In Singapore, for example, attempts to remove Section 377A (which prohibits “gross indecency” between men) from the Penal Code were met with objections from the ruling government on the grounds that the law expressed local cultural sensitivities which would be offended by the de-criminalisation of sex between men. Local advocates and scholars have argued that the ‘local sensitivities’ of 377A to which the Government refer are Victorian strictures, rather than the cultural views of either the Chinese majority or minority ethnic communities. This argument seems borne out by the preponderance of evangelical Christian objections to the abolition of 377A and the human-rights based arguments of pro-abolitionists, in the face of largely silent Chinese (Confucianist/Taoist), Indian (Hindu/Christian) or even Malay (Muslim) groups. Defending the decision to maintain 377A on the law books, Prime Minister Lee Hsien Loong argued that Singapore was “a conservative society,” and that he wished to keep it so.²⁵ British colonial law written for the Indian Penal Code, therefore, has been used in Singapore to re-constitute a social vision: that of a ‘conservative’ society.

In the area of judicial independence, in 1989 Singapore ceased referring to the Privy Council in Britain as its highest appellate jurisdiction in almost all matters. On the one hand, this seems a laudatory move towards the development of a sovereign judiciary; on the other, it has been seen as an attempt to increase Singaporean governmental control over the judicial system, a move which benefitted the ruling party at the expense of its most vocal opponents.²⁶ In 1994, Parliament abolished the entire appellate jurisdiction of the Privy Council. Rule of law in Singapore, therefore, even though the laws themselves have origins in the United Kingdom and Britain, is a profoundly local instrument, where economic rights and social stability are privileged

²⁵ ‘Singapore retains its gay sex ban,’ BBC Online 23 October 2007: <http://news.bbc.co.uk/2/hi/asia-pacific/7059300.stm>

²⁶ Judicial Committee of the Privy Council (1989) A.C. 1, J.B. Jeyaratnam.

over political rights and liberties, and where laws which protect the security of the state (eg. the Internal Security Act (1985), the Official Secrets Act (1985), the Sedition Act (1985) and the Maintenance of Religious Harmony Act (1985)) are used at the discretion of a legislature controlled by the ruling party.²⁷

As a local instrument, the model of Singaporean rule of law has its share of proponents and detractors, but if we see Singapore as an important new clearinghouse for developing legal systems in Asia – in China and Cambodia, etc – this raises troubling questions about rule of law. When British colonialists travelled from India to Singapore, they brought the Indian Penal Code, whose implications continue to matter for Singaporeans today; what do World Bank officials bring with them when they leave Singapore (which has itself always been wary of taking advice on domestic or economic policy) for Cambodia, for China, for India? The ambiguity of the concept of rule of law, within international organisations and between governments, does more than shield these projects from criticism; it may in fact gloss the importation of rules and ideals of governance which conflict even with the stated aims of these organisations themselves.

Here is where the vagueness of rule of law concepts becomes more than a frustration for scholars, but a problem for the realisation of rule of law itself: what does rule of law as exemplified by Singaporean legal reform imply for the states which wish to emulate it? As this article has shown, the terms ‘common law’ or mixed legal system are insufficient to the task of specifying rule of law. Tracing the path of legal travel, its personnel and their interests, worldview and assumptions, goes some way to clarifying the complexities of rule of law circulations. Being aware of transformations in law as it stops at particular ports of call adds another layer of understanding. Even so, the case of Singaporean rule of law illustrates the fundamental problem of this capacious concept: what exactly does the term rule of law contain? And when one kind of rule of law – for instance, market-friendly legal reforms or judicial efficiency – takes precedence in state policies over another – such as political freedoms or constitutional robustness – how should scholars evaluate the project as a whole?

²⁷ Singapore Attorney General’s Chambers, Singapore Statutes Online: <http://statutes.agc.gov.sg/>

Conclusion

That law is a travelling phenomenon is an inescapable reality, as is that rule of law will continue to be an attractive project both for those who construct and propagate it, and for the local elites who receive, translate and domesticate it. However, this article has attempted to show that the manner in which law travels, the routes it takes, and the people, ideas, institutions and interests with whom it travels, are crucial for what law might become. The travels of rule of law necessarily mean the transmutation of law, often with consequences unforeseen by those who constructed it, consequences which become the law of the land. The history of travelling law indicates that law is much more than an instrument of policy and encourages us to look beyond the multiple claims of rule of law, to the contradictions they represent, the new relationships they foster, and the conflicts they will engender.