



# The Paradigm of Selective Adaptation Revisited

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# The Issues (1)

- Globalization increases the interdependencies between countries
- As a consequence there is a need for increased coordination and the development of a common international institutional infrastructure
- The development of a common international institutional infrastructure can emerge through:
  - International negotiations leading to common models of behavior including international standards, international laws and dispute resolution mechanisms
  - A mimetic process of diffusion where countries seeking to develop domestic legal/institutional infrastructure adopt best practices of other countries
  - Missionary and coercive processes of diffusion where some powerful countries attempt to persuade others to adopt certain types of practices, standards and norms perceived by them to be universal (normative imperialism)
  - Evolutionary processes of mutual adjustment where countries need to adapt domestic systems so that they can function in a changing international environment





## On Compliance (1)

- Process fidelity versus outcome fidelity of compliance
- Process fidelity may be counter productive. This can be attributed to
  - Flaws resulting from lack of knowledge of the “production function” underlying the law. This is the case when the prescriptions of the law do not lead to the desired objective of the law (i.e. a faulty design of the law) or the particular production function is not universal and cannot work in some environments
  - There are some “irrelevant” features in the design of laws that impose high costs or trigger resistance to other (more) relevant prescriptions
  - The process prescribed is too complex thus increases the chance of error and uncertainty





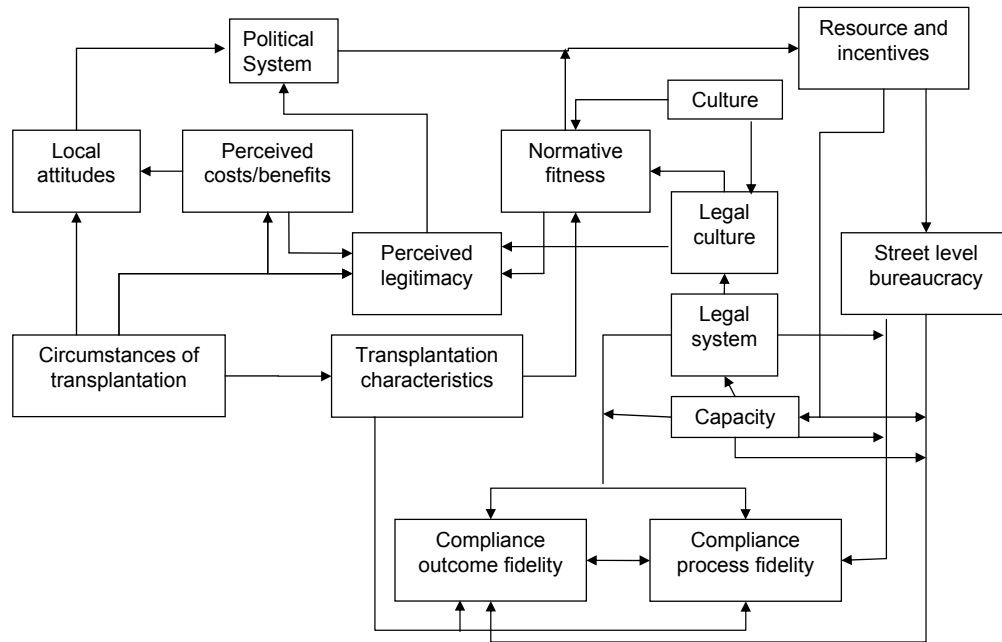
## On Compliance (2)

- Outcome fidelity is difficult when objectives of the law (e.g. international agreements) are either too vague or overly precise. Vagueness is characteristic in bargained agreements as it permits accommodation. Overly precise specification of outcomes may be counter productive as no accommodation to local context is permitted. The precise definition may not correspond to the true intention that led to the drafting of the law or the development of standards. Since measurable outcomes and standards are often proxies to higher level objectives precise universal definitions may not reflect the true objectives or a specific domestic context
- Need to consider unintended consequences of inflexible pursuit of fidelity or adherence either to process or outcome prescriptions.





# Compliance process of transplanted processes





## The model illustrated: IPR protection in China

- Circumstances: China acceding to the WTO having to accept TRIPs and develop property protection laws that meet TRIPs standards (China did not negotiate TRIPs and some Chinese may not perceive the agreement to be in the interest of china)
- Norms: TRIPs standards are based on a universalistic market model (few context related exceptions, private ownership, protection of exclusive use of knowledge, a key requirement for protection is degree of newness )
- Normative clash: (lack of fit)
  - Chinese culture: collectivistic, particularistic. This implies context and relationships matter
  - Chinese culture (Confucianism), past oriented, knowledge should be widely disseminated, copying a virtue





## The model illustrated (2)

- Political system: lack of strong motivation to enforce as China is a net importer of knowledge based goods (increasing pressures from trade partners – in particular the US – and pressures from multinationals (FDI) provide pressure to comply). Very recent incentives to protect more vigorously local high-tech start-ups
- Characteristic of transplanted patent laws – high complexity in some areas
- Legitimacy: given low perceived benefits, perception of coercion associated with the process of transplantation and normative clash, legitimacy is low. If government is perceived to take it seriously legitimacy will increase
- Resources and incentives: episodic campaigns to satisfy external pressures. Incentives strengths also vary (high during campaigns)





## The model illustrated (3)

- Capacity: lack of a sufficiently large skilled pool of legal experts
- Legal culture: avoid formal channels. Relationships dominant. Discrimination acceptable
- Process compliance: Low
- Outcome compliance: Low
- Observations: improvements in process compliance may be too costly. Flexible process compliance requirements may increase acceptability. Increased capacity is vital. Exceptions should be made in areas of public health. Intellectual property protection will continue to be an area with low legitimacy unless the Chinese government undertakes to educate the population about the benefits of IPR protection and creates the appropriate incentives to shift public attitudes.







## Circumstances of Transplantation

- The perceived circumstances of the introduction of an external model of law or standards affect local attitudes with respect to the new law. They also affect its perceived legitimacy.
- Beliefs that the acceptance of transplantation was a result of coercion or result of a weak bargaining position, reduces the perceived legitimacy of the transplanted law.
- A belief that the transplantation was voluntary and decided by a competent legitimate government either as a consequence of a negotiated agreement or as a result of deliberate imitation of “best practices” elsewhere increases the perceived legitimacy and contributes to a positive attitude toward the transplanted law
- The way the transplanted law is introduced affects its characteristics. Voluntary or negotiated characteristics are liable to be attuned more sensitively to the needs or a culture of the country adopting the law.
- Example for discussion – China’s accession to the WTO, TRIPS obligations and China IP Protection laws





## Cultural Dimensions that Affect the Formation of “Legal Culture”

- Individualism collectivism [Hofstede]
- Power distance [Hofstede]
- Uncertainty avoidance [Hofstede]
- Masculinity/Femininity [Hofstede]
- Universalism/Particularism [Trompenaars]
- Relationships between cultural dimensions and norms of governance
  - Rule of law
  - Corruption
  - Accountability
- Governance relates to how power should be exercised in public and private spheres?  
[Licht, Godtschmidt and Schwartz]





# Law and Culture

- Collectivists place more importance on resolving disputes amicably than individualists (Leung 1988)
- Room set up and non verbal communications are important ingredients in dispute resolution processes in collectivistic societies (thus results of normal dispute resolution processes may reflect factors which should be irrelevant to the process).
- High power distance in a society lead to acceptance of the authority of people higher in the hierarchy, as well as acceptance of the legitimacy of their positions or endorsements.
- Individualists consider confrontation and acknowledging disputes as a means for preserving harmony in the long term. Collectivists emphasize avoidance of confrontation as means of preserving harmony.
- Collectivists tend to use equity (degree of contribution) in resource allocation decision with out-groups while concern for needs dominate when dealing with in-group members. The individualist tends to use equity with everyone. Ideas about fairness may thus vary (Biedel)
- Privacy rights have more significance in individualistic societies.





# Legal Culture

- Attitudes toward channels of dispute resolution (formal versus informal)
- Attitudes toward the law (rule of law)
- Control of the disputed resolution process (e.g. Control by disputants versus control by a third party)
- Universalism versus particularism

## Empirical Findings (highlights)

- People from collectivistic cultures are not willing to abandon their important interpersonal relationships to abide by law
- People from collectivist cultures show greater preferences for abiding by traditional and religious norms, whereas individualists have distinct preferences for formal procedures in regulating- in group conflicts
- Positive correlation was found between authoritarianism and conservatism and positive attitudes toward law and order.
- Individualism and egalitarianism in national cultures correlate positively with better governance.





## Perceived Legitimacy of the Transplant

Perceived legitimacy of the transplant is higher when:

- People believe the transplant is beneficial
- The process of introduction was fair
- The process was legitimate given the prevailing legal culture and that the prescribed processes and institutions are compatible with the prevailing legal culture.
- That the norms reflected in the transplant are compatible with prevailing domestic norms
- Those who introduced the transplant have authority (legitimate power)





# Characteristics of Transplanted Laws That Affect Compliance

- Complexity
- Ambiguity of intention:
  - Conflicting goals
  - Lack of specifics about means
- Ambiguity seems both inevitable and desirable in the political process of passing the law (Berman 1978)
- Ambiguity in ends and means increases the dependence of the implementation on the characteristics and capacity of administering organizations
- A slippage between legal prescriptions and guidelines and local response may arise for several reasons: lack of incentives, the political conditions of the local environment.
- Laws can be based on good or bad ideas (i.e. The relationship of prescriptions to expected outcomes in the particular local context).





## Political Systems :Law enforcement as an intra-organizational implementation bargaining game (1)

- Organizations are arenas of conflict in which individuals and subunits with specific interests compete for relative advantage in the exercise of power and allocation of scarce resources. (Elmore 1978)  
The judicial system and the various organizations responsible for enforcement are no exception – governments consist of multiple units with parochial objectives (Alison 1971)
- Decision making in organizations is the result of bargaining of units with different objectives.  
“Bargaining does not require that parties agree on a common set of goals, nor does it even require that all parties concur in the outcome of the bargaining process. It only requires that they agree to adjust their behaviour mutually in the interest of preserving the bargaining relationship as a means of allocation resources.” [Elmore 1978].  
Only when a strong signal (and alignment of incentives to reinforce it) is sent from those with power to demand faithful adherence to the transplanted law or standards, one may expect that the bargaining solution will at least regard implementation directives as constraints.





## Political Systems (2)

- “Partisan mutual adjustment” [Lindblom]
- Discussion: the role of top government echelons in China versus their role in Canada in ensuring fidelity of enforcement of laws and standards.
- Elmore: Formal position in the hierarchy is a source of power “but only one of many. It does not necessarily carry with it the ability to manipulate the behaviour of subordinates.”







# Implementation Problems

- Implementation typically dominates outcome (Berman, 1978)
- Complexity of joint actions and bureaucratic strategies to clarify and direct action.
  - Goal discrepancies
  - Influence and authority differentials
  - Resources deficiencies
  - Communication difficulties (Bardach 72, 77)
- Hierarchies increase probability of failure
- Street-level bureaucrats face overload of demands and expectations in implementing new laws and policies (Weatherly and Lipsky)
- Street-level bureaucrats develop coping devices for simplifying and often distorting the aims of the law (Weatherly and Lipsky) [counter strategy bounding and controlling discretion through tight enforcement procedures]
- Discretion, however, can be an adaptive device [Elmore]
- Bargaining as a precondition for local effect





## Implementation Biases

- “Implementing agent fail to notice, intentionally ignore or selectively attend to policies that are inconsistent with their own (and/or their agency’s) interests and agenda.” [Spillone et al 2002)
- “Implementing agents and agencies... often lack the capacity – the knowledge, skills, personnel and other resources – to work in ways that are consistent with the policy.” [Spillone et al 2002]
- “Bounded rationality and the use of heuristics [and therefore the exposure to a variety of biases associated with the use of heuristics]





## Methodological implications for testing the selective adaptation paradigm

What do we have to show:

1. That adaptation occurred (i.e. there is significant lack of compliance in some dimensions of a transplanted law)
2. A clash of norms leads to a reduction in perceived legitimacy
3. There exist a predictable processes of reinterpretation of the law. The biases can be derived from cultural differences (including legal culture)
4. Overall, compliance (mainly outcome fidelity) can be increased by permitting violation of some less critical features of the transplant (complementarily)

Testing needs to control for all the other elements of the model (e.g. capacity, political support, the diversity of organizations and submits involved in the implementation process)





# Policy Implications

- Selective adaptation is a positive not normative model. It describes how things are and why they work in a certain way, not how they should be.
- It makes some “trade offs clear”.
- The insight that can be derived from the paradigm of “selective adaptation” is that if “outcome fidelity” is more desired than “process” fidelity then one may violate some process norms to increase normative fitness and promote legitimacy of the transplant (e.g. allowing discrimination or more generally adopting a particularistic-relativistic point of view in enforcing the law)
- “Outcome Fidelity” requires flexibility in drafting the law so it fits local conditions (resources, constraints and relationships)
- Capacity within the legal system must be sufficient to prevent overload in “street level” implementation units.

