Law and Development: Applicable Law in Transitional Contexts –is there a role for model criminal legislation?

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1. Introduction

A thorny issue for the UN transitional administrators in Kosovo and East Timor was determining the applicable law of each territory, particularly in the area of criminal law. This challenge led to a UN review of peacekeeping operations which recommended that the UN develop model criminal codes for use in UN civil administration peacekeeping missions. The call to develop model criminal codes builds on a plethora of model codes and legislative guides that have been developed by the multilateral banks, UN agencies and through other multilateral and bilateral processes to assist countries to implement international treaties, conventions and otherwise meet international standards.

This essay will consider the challenges the UN met in determining and applying the applicable criminal laws in East Timor, the model codes which were ultimately developed by UN agencies and and the benefits and challenges of using the model codes from a theoretical and practical perspective.

2. East Timor's Independence

After four centuries of Portugese colonial rule and a quarter century of occupation by Indonesia, the East Timorese had the opportunity to decide their own future through a "popular consultation." More than three quarters of the East Timorese people cast their historic vote on 30 August 1999 in favour of independence from, rather than autonomy within, Indonesia. What followed was a trail of violent destruction by the retreating Indonesian military and militia members supportive of integration with Indonesia.[1] The destruction caused widespread displacement of the population and extensive destruction of public infrastructure. The East Timorese economy collapsed with nearly all economic activity

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[1] Megan Fairlie, 'Affirming Brahimi: East Timor Makes the Case for a Model Criminal Code' (2003) 18 *American University International Law Review* 1059, 1065.

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ceasing contributing to severe food shortages. The institutions of Government ceased to operate as the vast majority of senior Government officials fled to Indonesia.[2]

As a result of this violence and destruction, the UN's original plan for a gradual transfer of power to the East Timorese[3] following the referendum necessarily gave way to an immediate international response which was led by Australia to restore peace and security in East Timor.[4] Approximately six weeks later, the UN Security Council established the United Nations Transitional Administration in East Timor (UNTAET).[5]

UNTAET was an international civilian mission with mandate over the territory of East Timor with the power to exercise all legislative and executive authority, and responsibility for the administration of justice.[6] UNTAET was established just three months after the UN established a civilian mission in Kosovo. Until these two missions, the UN had been reluctant to complement military engagement with a whole scale civilian post-conflict presence.[7]

It has been argued that, in effect, the UN was granted sovereignty over the territory of East Timor and that this was first time that sovereignty passed to the UN independent of a competing authority.[8] Accordingly, in East Timor the UN found itself hurriedly responding to extreme and somewhat unexpected violence and destruction and found itself with a mandate far more comprehensive than it had had in recent history. The UN had to govern East Timor, restore peace, overcome a humanitarian crisis, build the institutions of state sufficient for a transition to democracy, administer justice and prepare for elections.[9]

During the first stage of the mission in East Timor, the UN necessarily focused on emergency humanitarian assistance, resettlement of refugees, physical rebuilding and political negotiations. However, during this phase, criminal activity does not abate.[10] If anything, trauma, breakdown of social order and poverty make crime more likely and criminal elements

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[2] Daniel Fitzpatrick 'Developing a Legal System in East Timor: Some Issues of UN Mandate and Capacity.

[3] Jarat Chopra, 'The UNs Kingdom of East Timor' (2000) 42 *Survival* 27, 28.

[4] SC Res 1264, 4045th mtg, UN Doc S/RES/1264 (15 September 1999).

[5] SC Res 1272, 4057th mtg, UN Doc S/RES/1272 (25 October 1999).

[6] SC Res 1272, art 1.

[7] Carsten Stahn 'Justice under transitional administration: Contours and critiques of a paradigm' (2004-5) 27 *Houston Journal of International Law* 311, 318; see also *Comprehensive review of the whole question of peacekeeping operations in all their aspects,* 55th sess, Agenda Item 87 (provisional), UN Doc A/55/305–S/2000/809, 76 ('*Brahimi Report*').

[8] Chopra above n 3, 30.

[9] Hansjorg Strohmeyer, 'Collapse and reconstruction of a judicial system: The United Nations Missions in Kosovo and East Timor' (2001) 95 *American Journal of International Law* 46, 47.

[10] Joel Beauvais, 'Benevolent Despotism: A Critique of UN State Building in East Timor' (2001) 33 *International Law and Politics* 1101, 1149.

can take advantage of such fragile situations. The destruction of criminal justice institutions can also lead to the failure to collect, protect and store evidence necessary for effective prosecutions.[11] The failure to address violations promptly and effectively can create further instability. Social disorder could have easily overwhelmed the fledgling transitional administration in East Timor.[12] Accordingly, nation building needs to be based in a framework of law and order.

The first step was to create a legal framework within which the UN's powers could be exercised. In fact, the restoration of the rule of law[13] in East Timor was perceived to be 'a central factor in the long term development of peace, democracy, economic development and respect for human rights.'[14]

3. Choice of Law -Regulation 1999/1

The importance of the rule of law was reflected in the first regulation issued by the Transitional Administrator which set out the applicable law to be applied in East Timor during the tenure of the UNTAET.

Section 3.1 of the Regulation[15] set out that, until replaced, the applicable law would be that which applied in East Timor prior to 25 October 1999. That is, Indonesian law as it applied in East Timor prior to the establishment of UNTAET would continue to apply. However, Indonesian law would apply only insofar as it did not conflict with:

- international human rights standards,[16]
- the mandate of UNTAET, or
- a subsequent regulation or directive issued by the Transitional Administrator.

The regulation abolished capital punishment and also listed specific laws that would not apply in East Timor.[17]

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[11] Strohmeyer above n 9, 47.
[12] Beauvais, above n 10, 1157.
[13] *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies,* Report of the Secretary General, UN Doc S/2004/616 (3rd of August 2004)(*Secretary General's Report (2004)*), [6] defined the rule of law as 'a principle of governance in which all persons, institutions and entities public and private including the State itself are accountable to laws that are publicly promulgated equally enforced and independently adjudicated and which are consistent with international human rights norms and standards.'
[14] Beauvais above n 10, 1149.
[15] *Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor,* UN Doc UNTAET/REG/1999/1 (27 November 1999).
[16] *Regulation No.1999/1,* sec 2.

Accordingly, the Transitional Administrator confirmed Indonesian law applicable subject to internationally recognised human rights standards and subject to amendment by the Transitional Administrator. Thus, the Transitional Administrator created a hybrid system.

The approach of the UN in East Timor in determining applicable law was consistent with the role of the UN as a de facto occupying power under the Fourth Geneva Convention and was legally correct.[18] However, it has been criticised on the basis that it proved to be practically unworkable.[19] Principally, it was a decision made in order to fill a legal vacuum to provide an immediate basis for the application and enforcement of law to restore social order and address violence.[20] The circumstances and chaos into which the UN arrived presented no opportunity to draft new criminal laws or develop a codified hybrid of laws.[21]

Given that this was an unprecedented situation for the UN, there was no practical or theoretical framework to assist. The issue of legal pluralism in a country like East Timor was not, at least initially, taken into account. There was no assessment of how communities were dealing with disputes themselves in accordance with cultural, religious or societal practice.[22] The primary theoretical consideration in determining the laws to apply in East Timor, to extent there was a theoretical consideration, was to ensure that human rights standards were applied and upheld by UNTAET.

4. Problems in Implementing Regulation 1999/1

Ultimately, Regulation 1999/1 failed to provide an immediately applicable black letter law to which judges, prosecutors, lawyers and police officers could look with any degree of certainty to consistently guide decisions.[23]

4.1 Inherent Complexity

The hybrid system created by Regulation 1991/1 was complicated. It did not specify which laws applied nor identified areas of inconsistency. Instead it left inexperienced lawyers to

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[17] *Regulation No. 1999/1*, sec 3.2, 3.3.
[18] Vivienne O'Connor 'Traversing the Rocky Road of Law Reform in Conflict and Post Conflict States; Model Codes for Post Conflict Criminal Justice as a tool of Assistance' (2005) 16 Criminal Law Forum 231, 239; see also *Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War,* opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 64.
[19] O'Connor, above n 18, 234.
[20] Beauvais, above n 10, 1151.
[21] Other options included going back to Portuguese Law. Given the length of time since it application in East Timor this was deemed not to be practicable.
[22] Fitzpatrick above n 2, 10.
[23] O'Connor above n 18, 239.

engage in the complex task of interpreting the Indonesian penal code or the criminal procedure code through the lens of international human rights standards. Lawyers were to apply those provisions that met international standards while disregarding those that did not, and substituting for the latter the appropriate standard under international law.[24] For experienced lawyers trained in the jurisprudence of international human rights law this would be a complicated and challenging task; for the inexperienced lawyers, prosecutors and judges in East Timor it proved nigh-on-impossible.

Whilst under the hybrid system, applicable Indonesian legal provisions could be struck out or effectively ignored where they were inconsistent with international standards there were still gaps in the law that saw international standards undermined. This was not remedied. Whilst Regulation 1999/1 foresaw further reviews of Indonesian law for compliance with human rights, no further review was actually conducted by UNTAET.[25]

4.2 Human Rights Deficiencies

The identified gaps in Indonesian law, as it applied in East Timor under UNTAET, which had implications for human rights include:

- Failure to fully criminalise, and protect the victims of, gender based violence.
- Rape in Marriage was not criminalised. This was especially problematic given the incidences of forced marriage in East Timor.
- Narrow Definition of Rape which did not effectively criminalise a wide range of acts of sexual violence.
- Narrow Definition of Torture not in compliance with UN Convention.
- Criminalisation of Defamation.[26]

As a result of the challenges for UNTAET in applying Indonesian law in accordance with human rights standards, UNTAET drafted and adopted 75 separate regulations in four years in the area of criminal law.[27] Despite initially adopting the Indonesian Code of Criminal Procedure (with the necessary changes to comply with human rights law) the transitional

[24] Strohmeyer above n 9, 59.
[25] Fairlie, above n 1, 1079.
[26] Ibid, 1080-1090.
[27] O'Connor, above n 18, 240.

administration eventually conceded that this was impossible to apply and subsequently drafted a new Civil Procedure Code.[28]

4.3 Practical Challenges in Implementation

In addition to these substantive problems in determining and applying the law, academics have highlighted the practical problems of implementing Indonesian law in East Timor. When the UN arrived, only ten trained lawyers remained in the country. None had ever been a judge or prosecutor. Accordingly, extensive training was required counteracting the argument that Indonesian law was an immediately practicable option.

As a consequence of the destruction wrought on East Timor there were no copies of relevant legal texts available. The UN relied on Indonesia law firms, legal aid organisations and universities for assistance.[29]

As a consequence of the scale of the destruction, UNTAET relied heavily on international experts and staff. UN staff struggled to apply Indonesian law. No UNTAET lawyers spoke Bahasa or were familiar with Indonesian law. Accordingly, the laws needed to be translated before international legal experts could assist new lawyers and judges and provide meaningful mentoring and advice to East Timorese nascent lawyers, prosecutors, judges and police officers.[30]

Even when the law was actually being enforced, UNTAET encountered operational difficulties. Due to limited correctional facilities, the UN had to limit arrests. UNTAET actually had to let serious criminals go in order to detain militia members implicated in grave violations of humanitarian and human rights law.[31]

5. Brahimi Report

In response to the challenges faced by the UN peacekeeping missions in East Timor and Kosovo the Secretary General convened an expert panel to review the UN’s peacekeeping operations. The review’s report, commonly known as the Brahimi Report, concluded, for the

[28] Ibid.
[29] It took the Dili Courthouse over a year to obtain a complete set of criminal law texts.
[30] Strohmeyer above n 9, 56.
[31] Beauvais above n 10, 1155.

reasons set out section 4 above, that the issue of applicable law in UN transitional civil administrations was a "pressing issue."[32]

This report concluded that the missions task would have been "much easier"[33] if there had been available an interim and politically neutral UN legal code which could have been applied by the transitional administration. The code would apply temporarily pending a full reform of the criminal justice system developed by the subsequent (democratic) government in accordance with local customs. Such a code would include both law and procedure. The code would be limited to serious crimes against the person and would need limited local adaptation.[34] Such a code would provide certainty to the UN Civilian Police on the procedural aspects of criminal law, particularly the powers of detention, arrest and warrants.[35]

6. Model Codes

Whilst the Secretary General did not adopt the recommendation,[36] in response to Brahimi Report; the US Institute of Peace and the Irish Centre for Human Rights in cooperation with the Office of the High Commissioner for Human Rights and United Nations Office on Drugs and Crime embarked on a project to develop such codes. They developed four annotated model codes – a criminal (or penal) code, criminal procedure code, a model detention act and a model police act (Model Codes).

The criminal code is comprehensive and includes 114 separate offences covering the field of serious personal and property crimes.[37] The code only leaves out misdemeanours and petty offences. The authors state that the Model Codes are a compendium of draft laws and procedure that seek to address each element of the criminal justice system in a cohesive and integrated manner. The codes have been vetted by 250 experts from across the globe.[38]

The Brahimi Report recommended a more cursory body of law that would provide the basics of both law and procedure for the creation an emergency legal system –certainly not of the breadth or complexity of the Model Codes. The Brahimi Report only mentions murder, rape,

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[32] Brahimi Report, above n 6. [79].
[33] Ibid, [81].
[34] Ibid, [82].
[35] Strohmeyer above n 9, 62.
[36] *Report of the Secretary-General on the implementation of the report of the Panel on United Nations peace operations,* 55th sess, Agenda Item 86, UN Doc A/55/502 (20 October 2000).
[37] Vivienne O'Connor and Colette Rausch (eds) *Model Codes for Postconflict Criminal Justice* (United States Institute of Peace Press, 2007) 20.
[38] O'Connor above n 18, 248.

arson kidnapping and aggravated assault explicitly.[39] The authors of the Model Codes report that the codes initially developed as the Brahimi Report had intended, and were continuously expanded over the drafting period in response to experts pointing out gaps. The authors also expanded the Codes to assist practitioners translate international standards (covering substantive law, procedural law and international standards for detention) into a practical framework of application.

7. Theoretical Challenges for Model Codes

The recommendation of the Brahimi Report and its manifestation in the Model Codes could be considered a classic legal transplant. Transplanting a criminal law or procedural code in any state let alone a fragile post-conflict state could be incredibly fraught. Criminal law fundamentally intersects with culture and society – behaviour so unacceptable that it is criminalised (and the relative severities of criminal behaviour) cannot easily (and acceptably) be transplanted. Laws on sentencing and punishment are heavily contextual.

7.1 Legal Autonomy

Historically there has been a range of theoretical perspectives on whether or not it is possible to transfer or transplant a law from one country to another. This range of perspectives is known as the legal autonomy spectrum.[40] At one end of the spectrum is Watson who has argued that legal transplantation is a more or less technical exercise – that law may be borrowed regardless of social economic, geographical or political circumstances.[41] Law is a technical discourse between lawyers, and transferability is dependent on legal culture and not societal culture more broadly. Watson highlights the successful transplantation of Roman Law throughout the countries of Western Europe as evidence of the inherent transportability of law. This view is challenged, however, by the litany of legal development projects which have attempted to transplant laws in developing countries with results at best problematic and at worst abysmal failures notwithstanding similarities in the legal systems.[42]

At the other end of the spectrum are academics who consider the transplantation of law impossible as law is inherently contextual. Law essentially mirrors and reinforces the system

[39] Brahimi Report above n 6, [82].
[40] John Gillespie, 'Towards a Discursive Analysis of Legal Transfers Into Developing East Asia' (2008) 40 *International Law and Politics* 657, 665.
[41] Ibid, 668.
[42] Gordon Barron, 'The World Bank and Rule of Law Reforms' (Working Paper Series No 05-70, World Bank, December 2005), 23-25.

of cultural norms or beliefs within a society. That is, law is essentially a reflection of culture and where there are cultural differences no successful transplant is possible, '[c]ulture provides the framework that gives meaning and sense to laws.'[43] Thus this approach reinforces that law is not just text, law cannot be separated from the interpretative activities accompanying it, nor "intralegal systemic and extra-legal societal interpretations."[44] It is therefore essential to consider the interpretative presuppositions underlying the understanding of a legal code. Taken to its extreme, however, this approach becomes entirely relativistic.

7.2 Systems Theory

A mediation between the absolute autonomy of law and its holistic socially embedded counterpart is the Systems Theory. Teubner highlights that within the relationship between law and society a process of selective connectivity with social sub-systems occurs.[45] In the case of legal transplants, the introduced innovation irritates the connected social discourses provoking a readjustment and a reformulation of the newly introduced rule and consequently on the side of the legal domain the way of incorporating the rule itself. The result is that the rule to be transplanted is substantially reformulated by the target subsystem and with it its specific functioning assumes a completely different form and modality.[46]

Applying a Systems Theory approach, in the case of East Timor, if a Model Criminal Code had been applied it would have "irritated" the social discourse within East Timor which underpins the understanding of morality and legal order. The Model Code would have been reformulated by the social discourse in a manner which best fit East Timor society. The theory lacks explanation or guidance on how such an irritation would play out in practice – in part that is because it is essentially context specific. The process of irritation would in practice undermine the presumed universal applicability of the Model Code which the Brahimi Report assumed would be able to be applied and enforced by UN civilian experts throughout the world with very minimal adaptation.

[43] Gillespie above n 40, 670.
[44] Claudio Corradetti, Can Human Rights be exported? On the very idea of human rights transplantability' in Antonina Bakardjieva Engelbrekt and Joakim Nergelius (eds), *New Directions in Comparative Law* (Edward Elgar Publishing, 2009) 40, 49
[45] Gunther Teubner, 'Legal Irritants: Good Faith in BritishLaw or How Unifying Law Ends up In New Divergences (1998) 61 *Modern Law Review 11, 15.*
[46] Corradetti above n 44, 54.

7.3 Transplanting International Standards

The theory of transplant has typically been applied in the context of legal borrowing from one country to another and not in the context of application of international law standards. Zekoll asserts that the thesis of legal transplants is strictly limited to legal borrowings from one county to another and cannot explain reforms of domestic law to implement international legal obligations or to meet international standards.[47] The UN has argued that the UN normative framework[48] has created norms which have been developed and adopted by countries across the globe. These norms and standards bring a legitimacy that cannot be attached to exported national models which may reflect the individual interests or experiences of donors. The UN normative framework is the normative basis of the Model Codes.[49]

Zekoll's analysis assumes a free and active state which is able to interpret its obligations and reflect them in culturally appropriate legislation. It assumes that each state has had an equal opportunity to contribute to and shape international norms. In the case of new nations, such as East Timor, this is clearly not the case. Arguably, developing countries (particularly those that are aid dependent), often have insufficient autonomy, resources and capacity to take such an active approach in shaping international norms. Similarly, international standards are adopted by developing countries in circumstance where they have had little influence over the development of the standard and where in implementation there is little adaptation for individual circumstances. Arguably, as the Model Codes reflect a different normative framework to that applicable in most developing countries their adoptions would act very similarly to a legal transplant.

8. Secretary General's Report

Concerns about transplantability of a model criminal code together with the difficulties inherent in applying such a code across the globe are reflected in criticisms of the Brahimi Report's recommendation.[50] The Secretary General's Report argues that the UN's role

[47] Joachim Zekoll, 'Kant and Comparative Law – Some Reflections on a Reform Effort' (1996) 70 Tulane Law Review 2719, 2731.

[48] The normative framework is the UN Charter, international human rights law, international humanitarian law, international criminal law and international refugee law. See *Secretary General's Report (2004),* above n 14, [9].

[49] O'Conner above n 18, 251.

[50] Richard Sannerholm, ''Cut-and-Paste'? Rule of law promotion and legal transplants in war to peace transitions' in Antonina Bakardjieva Engelbrekt and Joakim Nergelius (eds), *New Directions in Comparative Law* (Edward Elgar Publishing, 2009) 56, 61

should be to support reform and not to substitute laws and justice systems more broadly.[51] The Report highlights the countless pre-designed or imported projects, which, whilst well-reasoned and elegantly packaged, have failed the test of legal reform.[52]

The Brahimi Report and the Secretary General's Report both highlight the universality (and inherent importance) of UN values which underpins the imperative for the UN to act in post conflict environments to restore law and order. The reports differ significantly, however, on the recommendations as to how the UN should seek to restore peace. In part this change of emphasis reflects that post Brahimi and the UN responses in Kosovo and East Timor more specifically, the UN has moved away from executive missions to advisory missions.[53] Whilst the Brahimi Report had assumed that the UN would again be required to act as civil administrators as it had done in Kosovo and East Timor, instead there has been a shift towards a more supportive and secondary role for the UN.

Given the refocused role for the UN in post conflict situations, there is a question as to the specific purpose and value add of Model Codes. If there are unlikely to be UN executive missions where the UN needs to determine the applicable law and hit the ground running in applying and enforcing the law, how and where would the Model Codes be applied? The Secretary General's Report highlights that "[t]oo often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity."[54] Accordingly, the UN should be looking to nationally led strategies of assessment and consultation carried out with active and meaningful participation. National bodies should be leading the reform process and not the UN.

This would seem to rule out foreign expert heavy missions to implement Model Codes in post conflict environments. Nevertheless, the Secretary General's Report argues that the Model Codes will be valuable in assisting post-conflict countries to address gaps in their criminal legislation and assist reforms aimed at compliance with international obligations.[55] The report fails to address how this process of gap analysis, review and national participatory reform can be readily implemented in immediate post-conflict environments such as East Timor. The

[51] *Secretary General's Report (2004),* above n 13, [17].
[52] Ibid.
[53] E.g Democratic Republic of Congo, Haiti, Burundi and Liberia
[54] *Secretary General's Report (2004),* above n 13, [15].
[55] Ibid, [30].

reality in East Timor was, as set out above, that a workable legal framework was an immediate necessity to restore order and respond to the humanitarian crisis.

9. Practical Challenges to Proper Use of Model Codes

If the value of the Model Codes is as an additional law reform tool that can be utilised by developing countries, it is an excellent resource. Arguably, however, there are existing tools that already assist national leaders and international experts with undertaking national assessments to determine gaps in legislation and develop reform strategies.[56] A Model Code, with its accompanying commentaries and guides, goes further than a simple diagnostic or assessment tool and presents a suite of international best practice criminal codes which have the potential to be implemented in full with little adaption. The realties of development practice mean that there is potential for the codes to be used without the necessary adaptation recommended by the authors nor as one part of a coherent plan for law and justice reform. Three key challenges include:

- Results driven approach of donors,
- Failure to develop the process of law making, and
- Realistic local adaptation.

9.1 Results Driven Approach

One of the challenges of implementing model laws is their use in a donor environment that over emphasises legislative solutions to problems in development. The law and justice challenges in East Timor, for example, were much broader than the laws that applied and in effect the whole law and justice system had to be built from scratch.

Often rule of law assistance focuses on short term achievement of goals such as drafting new laws while failing to support long term capacity to manage, monitor and evaluate drafted laws.[57] The Model Codes, for example, could be taken off the shelf and adopted with very limited technical expertise and potentially without local adaptation or an implementation plan.

[56] For example, UNODC's 'The Criminal Justice Assessment Toolkit' is a comprehensive practical guide to assist those in charge of criminal justice reforms to conduct comprehensive assessments of criminal justice systems; to identify areas of technical assistance; to assist in the design of interventions that integrate UN standards on crime prevention and criminal justice; and to assist in training.

[57] Richard Sannerholm, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template' (2007) 12 Journal of Conflict and Security Law 65, 78.

The pressure on donors to show results annually exacerbates this challenge. Legislative changes are often reported as results regardless of the actual receptiveness of the developing country to the legislative reform or the current status of implementation or adherence to the law. This distorts development programing (and consequently the allocation of limited resources) and shifts focus from core capacity building work which is slow, laborious and long term, towards high profile legislative reforms which are not necessarily priorities for the government and people of the developing country.

9.2 Failure to Develop the Process of Law Making

A second challenge of this focus on substantive law is the lack of a concomitant focus on the process of law reform. This has resulted in less focus on building the core skills of legal policy development (including community consultation) and legislative drafting skills in developing countries. Strengthening the processes of local lawmaking is arguably more important than substantively reforming the law. Laws that don't reflect a mediation of societal values but are instead imposed by donors are likely to fail.[58]

Changing a procedure and form is arguably harder than changing the substance of law.[59] Changing procedure intrudes directly on how government agencies work – for example by including a process of community consultation as part of any legislative reform program. By assisting to improve the process of law reform, a development agency hopes to improve the quality of all laws that are passed and not just specific pieces of law that are of particular interest.

Failure to focus on procedure can also create unintended consequences including a failure to ensure that subsidiary legislation, regulations and administrative rules and policy are developed. Inconsistency in the hierarchy of laws can arise particularly as donors often prefer new laws over legislation that amends existing laws – the Model Codes may be used as stand-alone acts rather than used as resource for amending existing laws.

Donors often fail to support the task of ensuring there is no legal conflict with existing legislation or ensuring a workable process for resolving conflicts of laws. Problems with Gazettal can create inappropriate operationalization frameworks and timelines for legislation. Whilst these problems can seem small in the context of overwhelming development

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[58] Jane Stromseth 'Post-conflict rule of law building: The need for a multi-layered, synergistic approach' (2008) 49 *William and Mary Law Review,* 1443, 1461.
[59] Sannerholm above n 50, 66.

challenges they undermine the effectiveness of new laws and create large numbers of legal uncertainties which are left to already overburdened court systems to resolve.[60]

9.3 Realistic local adaptation

The Model Codes represent a template for implementing international obligations and upholding international standards in criminal law and administration. International donors also use these types of instruments to give legitimacy to their assistance programs in the area of law reforms. Use of international norms and standards is perceived to hold a greater legitimacy than national legal models.[61] Accordingly, the UN was conscious to ensure that its transitional administrations in Kosovo and East Timor were seen to implement and uphold international human rights law both in terms of the laws that applied and the manner in which the territories were administered.

Whilst on one level the majority of countries agree (as reflected by signatories to the key treaties) to uphold the key principles of international human rights and international criminal law, in so doing there needs to be scope to accommodate local culture in the legislative process.

Beyond the theoretical challenges of adopting international norms in domestic legislation, for developing countries dependent on aid and assistance from donors, there are also the practical problems of implementing local adaptation. The very existence of the international standard Model Codes as opposed to good models from another country which may be adapted militates against local adaptation. The Model Codes can be perceived as the best (or at least a tested) method of reflecting international obligations into domestic legal systems. The codes act as an assessment benchmark. Every derivation from international standard has the potential to create a perception that the code has been weakened or the obligation has not been fully implemented, rather than acknowledged as a natural part of the process of national adaptation. When using any model legislation in a development context it is important to ensure that the UN norms and standards are married to local cultural and context in a manner that supports and respects local ownership.[62]

[60] Ibid.
[61] Ibid.
[62] Stromseth, above n 58, 1463.

10. Conclusion

The UN's mandate expanded in Kosovo and East Timor to full international civilian missions with the power to exercise all legislative and executive authority. It did so without any theoretical approach to the determination of applicable law or any practical roadmap for upholding the applicable law in accordance with the UN normative framework. This led to recommendations for the establishment of a Model Criminal Code which the UN could apply consistently in future missions. Whilst such codes were ultimately developed, in the meantime, the UN had shifted away from executive to advisory missions – supporting rather than leading civil administration and reconstruction in the immediate post-conflict environment. Accordingly, the purpose of the Model Codes shifted much more to a traditional law reform tool. In this new paradigm, this essay has considered the theoretical and practical challenges in the use of Model Codes in the current development context. Ultimately, model legislation is most effective when it is used as one tool to ensure that UN norms and standards are reflected in domestic legislation in a manner that supports local ownership and effectively considers and incorporates local cultural and context.

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