

# INSTITUTIONAL TRANSPLANTATION AND THE RULE OF LAW: HOW THIS INTERDISCIPLINARY METHOD CAN ENHANCE THE LEGITIMACY OF INTERNATIONAL ORGANISATIONS\*

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## Abstract

Although the influence of various Western countries, especially that of the United States, is still substantial, the stars of China, India, Russia, Brazil and other large developing states are rising. Within international organisations this trend has become visible through a growing reluctance of non-Western states to accept and go along with the political, legal and economic diktats of European and American-flavoured recipes and policies. This trend also has an impact on the compliance of international organisations with rule-of-law conceptions, which are not universal but depart from the cultural and national assumptions embraced mostly in Western countries. Even though the legality of international organisations may not be disputed as such in non-Western countries, the administrative and cultural acceptance of these organisations often remains questionable. This undermines the conception and the functioning of the rule of law at the international level.

One of the ways in which acceptance of the rule of law can be enhanced at the international level is by utilising a method known as ‘institutional transplantation’. This method aims to facilitate new legal and policy initiatives through an adoption process in which the chances of achieving political and cultural congruence and desirability are maximised. After presenting the six principles underlying this approach, this article examines the case of the World Bank’s Inspection Panel, in order to show how these principles can be applied in practice.

## 1 Introduction

The most articulate spokesperson for the cause of terminating Western arrogance in international politics is probably Singaporean ex-minister and current professor of public policy Kishore Mahbubani. In his well-known publications *Can Asians Think?*<sup>1</sup> and *The new Asian Hemisphere: The Irresistible Shift of Global Power to*

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<sup>1</sup> K. Mahbubani, *Can Asians Think?* (New York, Marshall Cavendish Editions 2005, 3rd ed.).

*the East*,<sup>2</sup> he has drawn attention to the fact that the dominance of North America and Europe, at least in its undisputed form, in terms of economic hegemony, demographic expansion and, increasingly, military might, has been evaporating in the past few decades. This gradual erosion is likely to result in revised geopolitical relations and a change in the way that various players have in rules for international decision-making and economic policies. According to Mahbubani, Western governments and industries are deluding themselves and will pay a high price if they deny this shift and look away from its consequences, hang on to their substantial overrepresentation in international organisations and continue to claim moral superiority in legal, political and economic thought. Although Mahbubani may be among the first Asians to openly reaffirm Asian power and take pride in the region's regained self-confidence, he is far from being the first to make such statements. In fact, a famous but often controversial American ex-adviser to President Jimmy Carter and Harvard political scientist, Samuel Huntington, already pointed to similar issues in the early 1990s. Huntington's best known monographs were entitled *The Clash of Civilizations*<sup>3</sup> and *Who Are We? America's Great Debate*.<sup>4</sup> American and European liberals have criticised them for emphasising rather than bridging cultural cleavages and making life harder for multiculturalists by accusing them of a lack of loyalty to Western and/or Christian civilisation. However, Huntington has documented his claims of declining Western influence and more balanced power relations in the world with abundant statistics and powerful examples. Behind his Christian parochialism and aversion to cosmopolitanism, a powerful interpretation of economic, military, demographic, cultural and linguistic data can be found.

The analysis of scholars such as Huntington and Mahbubani is based on reasoning relating to the waxing and waning of world powers and/or civilisations. Although their reading and interpretation of the data they have studied differ markedly, a bottom-line that they will all to some extent subscribe<sup>5</sup> to is the willingness of dominant yet declining powers to learn and absorb knowledge and wisdom from less influential but growing countries. However obvious this seems, it has always appeared a challenge for them, because world hegemony almost naturally goes together with haughtiness and lack of interest in what other peoples and tribes have to offer. This haughtiness is not only potentially dangerous for the geopolitical credibility and acceptance of Western societies, but countless normative arguments can also be raised against ignoring recessive voices when constructing the global legal, political and economic order.

These shifting geopolitical relations form the background of this article. Our purpose is to analyse the meaning of the theory on institutional transplantation for the establishment of international organisations in accordance with the rule of law, i.e. the establishment of legitimate international organisations. For this purpose, we have selected the case of the World Bank's Inspection Panel, whose recent establishment constitutes an institutional innovation in terms of the establishment of international organisations.

The Inspection Panel was created to investigate complaints of private parties who claim to have suffered negative effects from World Bank projects, which in practice are carried out mainly in developing countries. The establishment of this Panel is hailed by some as the beginning of a more socially responsive approach on the part

<sup>2</sup> K. Mahbubani, *The New Asian Hemisphere: The Irresistible Shift of Global Power to the East* (New York, Public Affairs 2008).

<sup>3</sup> S. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York, Simon & Schuster 1996).

<sup>4</sup> S. Huntington, *Who Are We? The Challenges to America's National Identity* (New York, Simon & Schuster 2004).

<sup>5</sup> For example, R. E. Bissell, 'Recent Practice of the Inspection Panel of the World Bank' (1997) 91(4) *American Journal of International Law* 741-744.

of global economic institutions. However, others have attacked it as a sham because of its dependent position and restricted legal powers.<sup>6</sup> Therefore, the Inspection Panel is a suitable object of analysis and reasoned speculation on the possible development of legitimate global legal governance.

To substantiate our argument, we will first present the basic tenets of institutional transplantation and explain its implications for the ‘rule of law’ at the international level and its application in international law and international organisations (sections 2 and 3). We subsequently take the main lessons on institutional transplantation as they are known in the literature on state-to-state transplantation and transpose them to heuristics for institutional transplantation at the international level (section 4). In section 5, we explain the workings of the World Bank Inspection Panel and point out what strengths and weaknesses can be found in its current formal and informal institutional position according to scholars of law and public policy. In addition, we survey the institutional position of the World Bank’s Inspection Panel and what is known of its work practice. In section 6, we apply the method of institutional transplantation to the case at hand. Finally, equipped with the insights obtained in this particular case, we present the main implications of our findings. It appears that the ‘rule of law’ as normally understood by Western political and legal thinkers is taken as an absolute given with universal applicability. This position can actually preclude constructive international dialogue. However, if the rule of law is adopted as a political ideal and regarded as a means rather than an end, a discussion can evolve from which various participants can draw lessons and on the basis of which a legitimate international organisation can be established (section 7).

## 2 International Financial Institutions and Geopolitical Relations

The two main international financial institutions (IFIs), the International Monetary Fund and the World Bank, originated in the immediate post-war period and can be seen as reflecting the geopolitical relations existing in those days. Western countries (especially the United States) have disproportionate voting power in their general councils and are represented in their management and their research and project staff to a degree far exceeding their demographics and economic power.<sup>7</sup> The benefits for non-Western countries of Western legal, political and economic ideologies promoted by the above-mentioned international organisations have for a long time gone undisputed, but are now coming under increasing attack. Influential scholars, such as political philosopher John Gray, in his *False Dawn: The Delusions of Global Capitalism* and *Two Faces of Liberalism*,<sup>8</sup> and former World Bank senior economist William Easterly, in *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good*,<sup>9</sup> have been vocal in claiming that, whatever the merits of free-market economies may be (and they can be considerable when combined with strict state control over basic property rights and anti-monopoly issues), it is impossible to impose them on societies where informal trust relations

<sup>6</sup> For example, A. Orakhelashvili, ‘The World Bank Inspection Panel in Context’ (2005) 2 *International Organizations Law Review* 57-102; and E. Nurmukhametova, ‘Problems in Connection with the Efficiency of the World Bank Inspection Panel’ (2006) 10 *Max Planck Yearbook of United Nations Law* 397-421.

<sup>7</sup> N. Woods, ‘The Challenge of Good Governance for the IMF and the World Bank Themselves’ (2000) 28(5) *World Development* 823-842; and N. Woods, ‘Making the IMF and the World Bank More Accountable’ (2001) 77 (1) *International Affairs* 83-100.

<sup>8</sup> J. Gray, *False Dawn: The Delusions of Global Capitalism* (New York, The New Press 1999); and J. Gray, *Two Faces of Liberalism* (New York, The New Press 2002).

<sup>9</sup> W. Easterly, *The White Man’s Burden: Why The West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (London/New York, Penguin Books 2006).

between business partners are organised differently or where dominant social groups grasp power in large firms when they are rapidly privatised under pressure. Such forced ‘Westernisation’ often has negative rather than positive consequences, since the formal and informal rules of the game are *incongruent*. In *Beyond Liberal Democracy: Political Thinking for an East Asian Context*,<sup>10</sup> Daniel Bell points out that, in his view, democracy and human rights are not useless terms for Confucian traditions and cultures but that their preferred interpretation is likely to be more elitist (democracy modified to give a stronger voice to the ‘educated and wise’), more collectivist and more focused on material subsistence (human rights in terms of rights for communities and families rather than individuals and in terms of obtaining material prosperity before claiming political rights).

It can be safely assumed that Islamic and Hindu political and legal values also differ markedly from Western ones in various aspects. The costs for non-Western societies are mainly that they develop more slowly (if at all) than they otherwise would and that they may have corrupt political regimes that are unlikely to reflect the concerns of the people but are held in office by Western support. Moreover, Antony Anghie<sup>11</sup> claims that the neo-liberal economic recipes that the IFIs provide to financially ailing developing countries (privatisation, liberalisation and the creation of legal regimes facilitating commercial transactions and foreign investment) are even redolent of neo-colonialism. International organisations dominated by powerful shareholders continue to remodel non-Western countries after their own image. Imposing neo-liberal policies on developing countries has often aggravated unemployment and indebtedness in the long run and has at times even reinforced social tensions and ignited interethnic conflicts. The emphasis on free-market economics, an individualistic interpretation of civil and political human rights and certain forms of democracy has rarely resonated well in non-Western countries. Many have succumbed to IFI pressure and the ideological prevalence of neo-liberalism, in spite of the fact that their social context, cultural values and policy preferences were quite different from those promoted by the Fund and the Bank. In fact, as Robert Wade points out in ‘Japan, the World Bank and the Art of Paradigm Maintenance: The East Asian Miracle’ and ‘Showdown at the World Bank’,<sup>12</sup> some Asian economies resisted World Bank pressure, held on to their own economic paradigm and ultimately fared better. But theirs was far from an easy struggle to win, even for a reputed economic giant like Japan, which set up Asian-style development programmes for its Asian neighbours, thus presenting itself as an ideological rival to the more US-oriented World Bank. Countries such as South Korea, which did succumb, have not fared so well in the aftermath of the 1997 Asian financial crisis. In fact, in *Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism*, Ha-Joon Chang points out that what destroyed prosperity in economically successful Western countries as well as in his native Korea was protectionism and government intervention in the economy.<sup>13</sup>

Within these IFIs, there is growing desire among governments of large countries (e.g. China, India, Indonesia and Brazil) to be treated on a par with the

<sup>10</sup> D. Bell, *Beyond Liberal Democracy* (Princeton/London, Princeton University Press 2006).

<sup>11</sup> A. Anghie, ‘Time Present and Time Past: Globalization, International Financial Institutions and the Third World’ (2000) 32 *New York University Journal of International Law and Politics* 243-290; and A. Anghie, ‘Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations’ (2002) 34 *New York University Journal of International Law and Politics* 513-633.

<sup>12</sup> R. Wade, ‘Japan, the World bank, and the Art of Paradigm Maintenance: The East Asian Miracle in Political Perspective’ (1996) 1 *New Left Review* 217-239; and R. Wade, ‘Showdown at the World Bank’ (2001) 7 *New Left Review* 3-16.

<sup>13</sup> H.-J. Chang, *Bad Samaritans; The Myth of Free Trade and the Secret History of Capitalism* (New York, Bloomsbury Press 2008).

Western countries, Japan and Saudi Arabia, since their growing importance in the global economy and in world politics has not yet become visible in the legal and organisational framework. Moreover, the informal custom that the president of the World Bank should always be a North American and that the president of the IMF should always be a European is peculiar, in light of the fact that the lion's share of their funds is lent to developing countries and that their economies are affected by far the most heavily as a consequence of IFI interventions. This situation has negatively affected the legitimacy of IFIs in the eyes of many. Although the North Americans and Europeans who dominate these organisations in spite of their limited share in the world population seem reluctant to cede a share of their say to others, the IMF and the World Bank have adopted a limited set of adjustments aimed at enhancing the accountability of their operations, especially in the eyes of borrowing countries, such as publishing reports on-line and opening themselves up to NGO involvement. However, observers have concluded that the results are mixed and that much more far-reaching measures are needed.<sup>14</sup> It is significant in this regard that the size of the development aid investments of emerging non-Western donors such as China is rapidly growing in comparison to that of established Western donors, and that their conditions are often considered far more attractive by recipient countries than those imposed by IFIs, which sometimes require profound and painful policy changes. Since the Chinese lenders are less keen to impose ideological or good governance conditions on borrowing countries and the credibility of the Chinese economy has grown dramatically as a result of its economic success, Western countries in general and IFIs in particular will have to work on their international legitimacy if they are to continue playing a role of global significance.<sup>15</sup>

Decreasing acceptance of and rising resistance to Western political and economic recipes backed by asymmetrical legal frameworks puzzles few people in the world, except for most inhabitants of North America, Europe, Australia and New Zealand. The latter, after centuries of success, face the difficulty of having to question their own ideological assumptions and legal frameworks. However, accepting this new reality on a voluntarily basis is not only politically expedient but also morally desirable. Adopting such a perspective would not only show respect for the cultural values and social settings of non-Western countries to guide their development policies but might also result in development policies attaining a higher degree of legitimacy at home. In fact, Western countries may even learn something by looking at others and fixing weaknesses in their own systems.

It is against this background that we approach and appreciate the concept of rule of law at the international level. With reference to Chesterman, we argue that it makes more sense to define the international rule of law as a means rather than an end or as blueprint.<sup>16</sup> The extraordinary support for the rule of law among theorists has been possible only because widely divergent views of what it means in practice were developed in parallel in different and sometimes wildly divergent administrative traditions. However, efforts to promote the rule of law through and within international organisations have necessitated a reassessment of this pluralism. We therefore propose a core definition of the rule of law as one closely connected to the pragmatic political ideal of *legitimacy*.

<sup>14</sup> N. Woods and A. Narlikar, 'Governance and the Limits of Accountability: The WTO, the IMF and the World Bank' (2001) 170 *International Social Science Journal*.

<sup>15</sup> N. Woods, 'Whose Aid? Whose Influence? China, Emerging Donors and the Silent Revolution in Development Assistance' (2008) 84(6) *International Affairs* 1205-1221; and M. Leonard, *What Does China Think?* (London: Fourth Estate 2007).

<sup>16</sup> S. Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 3331.



With regard to this political ideal of legitimacy, we have made a normative choice here to respect cultural variety and encourage open dialogue on recipes for economic development among divergent global players and to let a legal framework evolve to accommodate this pluralism. This implies that we advocate a comparative law and legal transplantation method called ‘institutional transplantation’. Institutional transplantation deviates from legal transplantation in the sense that it pays specific attention to cultural and administrative congruence, thereby increasing the probability of acceptance and, thus, socio-cultural legitimacy in the state of adoption.

For the purpose of this article we define legitimacy here as consisting of two main components:

- 1) *Legality*, which refers to legal legitimacy. To achieve this, mere consideration of the legal validity of the transplantation process is sufficient.
- 2) *Acceptance*, which refers to cultural legitimacy. For this, a transplant also needs to be congruent with the social context, cultural values and political preferences of the adopting entity.

Although the *effectiveness* of an economic development policy resulting from a transplantation process is obviously not irrelevant, we will not deal with it here. In this article, we analyse the meaning that the theory on institutional transplantation can have for the establishment of international organisations in accordance with the rule of law, i.e. the establishment of legitimate international organisations.

### 3 The Institutional Transplantation Method

Students of comparative law are generally familiar with ‘legal transplantation’,<sup>17</sup> which implies the transfer of constitutional, organic or other legal frameworks or pieces of legislation from one constituency to another, most usually from country to country. This practice has a long history in the form of forced adoption under colonisation and political domination and has led to the prevalence of civil law, common law, Soviet law and Islamic law around the world. In more recent times, forced adoption has faded into the background and been replaced by the imitation and emulation of legal frameworks and practices of leading nations by those that are considered and/or consider themselves to be economic, political and legal laggards. More often than not, international benchmarks encourage countries to engage in legal transplantation, and international organisations obviously play a large role in this area.

Legal transplantation is a species of a more general genus known as ‘policy transfer’<sup>18</sup> or ‘lesson-drawing’,<sup>19</sup> which was developed in political science and revolves around the practice of adopting policy ideas, models or programmes developed elsewhere. The copying of legislation and regulation, then, is considered to be a component or aspect of a much wider phenomenon. It is therefore important to note that ‘legal transplantation’ normally just refers to the legal side of the phenomenon, which generally does not take the social functionality of the transplant into consideration. It focuses mainly on legality, not cultural acceptance. In

<sup>17</sup> A. Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, University of Georgia Press 1993).

<sup>18</sup> D. Dolowitz and D. Marsh, ‘Who Learns What from Whom: A Review of the Policy Transfer Literature’ (1996) 44 *Political Studies* 343-357.

<sup>19</sup> R. Rose, *Lesson-Drawing in Public Policy: A Guide to Learning across Time and Space* (Chatham, Chatham House 1993); and R. Rose, *Learning from Comparative Public Policy: A Practical Guide* (London/New York: Routledge 2005).

comparative law, only the functionalist approach to legal transplantation encourages sensitivity to the social context in which transplants take place. Although we feel that this approach is germane to ours, it lacks the necessary social science underpinnings to fulfil this task and remains too abstract to lead to useful suggestions.

When conducting a process of legal transplantation, it is obvious that one cannot say that anything goes. Apart from the fact that different legal systems sometimes depart from different premises and that incompatibilities might arise when elements of one system are incorporated into another system (legal congruence), there is also the issue of administrative and wider cultural congruence. If assumptions about citizens' rights and duties, the powers and duties of governments and the separation of powers between the legislative, executive and judiciary in the country of adoption do not coincide with those in the legal framework on offer, the legitimacy and functionality of the transplant are bound to suffer. For example, the Chinese legal tradition that has developed in the past three decades formally attaches great value to the legality principle and in comparative terms also attaches greater value to citizens' duties (as opposed to rights) than Western legal regimes. Legislative, executive and judiciary functions are ensconced in the bosom of the public sector but are not separated. Courts often act as administrative organs or produce documents telling executive organs how to interpret legislation passed by the Congress, while executive organs are not hierarchically lower than judiciary organs and can therefore dismiss the implementation of court orders.<sup>20</sup> A superficial glance may give the impression that, since the People's Republic of China has adopted many bodies of law from Europe and the United States, its extensive programme of legal transplantation has led to Westernisation. However, the basic ideas underlying the constitution and the way in which organic legislation and administrative practices have grown around it reveal that age-old Confucian ideas and more recent Communist party practices still permeate China's legal system.

A sensible and thorough understanding of legal transplantation takes such deeper aspects into account in order to anticipate the consequences of Western-style transplants. This does not mean that adoption is impossible or illegitimate (in fact, Japan, Korea and China have done it many times and have become experts at it), but the outcome may diverge wildly from what donors expect and the legitimacy of the exercise is largely dependent on the question whether the recipient country has been able or allowed to express its wishes and needs. Interestingly, Far Eastern countries have been able or allowed to exercise the freedom to set up transplantation processes that meet their needs and have thrived after doing so, while many other non-Western countries have not been able to do so. As a result, their legislative frameworks are often incongruent with local practices and therefore suffer from serious legitimacy problems. Apart from more ancient leftovers from the colonial era, there are also more recent legal transplants. These were more or less imposed by IFIs that bartered new loans for compliance with Western-style economic policy solutions. In fact, radical analysts argue that the IMF and the World Bank are the neo-colonial continuation of Western tutelage<sup>21</sup> and that they are thus responsible for the lack of congruence, legitimacy and functionality of modern transplants in developing countries.

<sup>20</sup> D. Chow, *The Legal System of the People's Republic of China* (St Paul, MN, Thomson West 2003).

<sup>21</sup> A. Angie and B. S. Chimmi, 'Third World Approaches to International Law and Individual Responsibility in International Conflict' (2003) 2 *Chinese Journal of International Law* 77-103.

It is here that the wider concept of ‘institutional transplantation’ comes into play. Institutional transplantation,<sup>22</sup> or institutional transfer,<sup>23</sup> refers to the transfer of policy ideas and institutions from one legal context to another. It has been derived from bodies of theory such as legal transplantation in comparative law,<sup>24</sup> lesson-drawing,<sup>25</sup> policy transfer<sup>26</sup> and policy convergence<sup>27</sup> in political science. In effect, it has become a blend of legal, political and cultural academic insights and emphasises the distinction between *formal institutions* (political and legal), on the one hand, and *informal institutions* (social and cultural) on the other. Formal institutions can be defined as legal rules, regulations and procedures, whereas informal institutions are the social practices and rituals around them, based on underlying cultural values and norms. Consequently, institutional transplantation has become a version of legal transplantation in which aspects of legal and administrative culture are explicitly taken into account.

In general, institutional transfer processes target formal legal institutions. Installing legal safeguards to ensure that international law and legal bodies introduce and sanction the rule of law can be seen as an example of this aim. This can be regarded as the promotion of having the legality principle in place around the world and ensuring political and civil rights in all countries. However, if the informal institutions are not transformed, or if no new body of informal practices develops around a new legal transplant, such transplants will merely be a dead letter and will not enjoy any acceptance or functionality. One could say that, by means of the legal transplant, legality has been formally safeguarded but that it has not been absorbed into the wider social environment and thus ‘institutionalised’. This lack of acceptance causes a serious legitimacy problem, and the new legal transplant and its wider administrative and cultural environment remain incongruent. This explains why the concepts of capitalism, democracy and human rights often receive such a bad press in many non-Western countries. It may be true that many Africans, Asians and Latin Americans truly do not like these legally enforced values, but it is more likely that the way in which they are currently interpreted and promoted at the international level has something to do with this resentment.

The very assumptions underlying the rule of law are currently based on individualistic and egalitarian Western values. When these are automatically taken as a starting point for international law-making, mismatches, dissatisfaction and conflict are bound to arise. Again, this does not mean per se that the rule of law as such has no universal or global merit, but it does mean that its interpretation and practical implementation have to be debated among all adopting states. To acquire global legitimacy, the rule of law may also require reinterpretation and reformulation or a specification as to which of its elements are truly universal and which are particular to certain groups of states. It may even be that Western representatives become acquainted with new values that were never protected in Western societies but may actually be quite worthwhile, such as the value of family or community rights in combating alienation, the importance of strong state power to generate economic

<sup>22</sup> M. de Jong, *Institutional Transplantation: How to Adopt Good Transport Infrastructure Decision-Making Ideas from Other Countries* (Delft, Eburon 1999); and M. de Jong, K. Lalenis and V. Mamadouh, *The Theory and Practice of Institutional Transplantation, Experiences with the Transfer of Policy Institutions* (Deventer, Kluwer 2002).

<sup>23</sup> W. Jacoby, *Imitation and Politics; Redesigning Modern Germany* (Ithaca/London, Cornell University Press 2000).

<sup>24</sup> Watson, above n. 17; and D. Nelken and E. Orucu, *Comparative Law: A Handbook* (Oxford, Hart Publishing 2007).

<sup>25</sup> Rose (1993), above n. 19; and Rose (2005), above n. 19.

<sup>26</sup> Dolowitz and Marsh, above n. 18.

<sup>27</sup> C. Knill, *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence* (Cambridge, Cambridge University Press 2001).



growth or the relevance of having a minimum level of economic prosperity and literacy in place before free elections are allowed. Most Westerners demonstrate a natural reluctance to even consider these issues, thus depriving themselves of opportunities to gain a deeper insight into alternative cultural values and economic choices and spot weaknesses in their own models.

In sum, the theory of institutional transplantation highlights the importance of informal institutional preconditions for legitimising transfer of formal institutions. Of course, it is not unthinkable that informal institutions are altered over time by the establishment of new formal institutions (a process known as ‘modification’), but the opposite is more likely: if informal institutions are incongruent with newly implanted formal ones, it is the latter that will prove to be unpopular and dysfunctional among the population at large and possibly also among policy-makers and legal scholars.

There is currently little empirical evidence pertaining to either legal or institutional transplantation from the level of the state to international organisations, but similar mechanisms are at play there. The people involved in the design and establishment of international organisations are citizens of states and usually work for national governments, which have to approve of their work. In addition, policy-makers involved in transplanting formal institutions to the international level currently rely mainly on national sources and national legal frameworks. In the next section, we explain how the heuristics for institutional transplantation can be applied to the establishment of legitimate organisations at the international level.

#### 4 Heuristics for Institutional Transplantation at the International Level

In a previous work, we proposed a number of important design heuristics for good institutional transplantation.<sup>28</sup> However, these heuristics are primarily based on case studies of state-to-state or city-to-city transplantation, so adjustment for national to international level transfers is required. What *is* known, mainly from research carried out in the framework of political and policy studies, is that

- 1) legal and policy frameworks adopted at the international level (whether in the European Union or by the United Nations) are often derived from proposals that are made by one or more dominant, proactive national members and are subsequently often adopted in revised form following reactions from more recessive, reactive members;<sup>29</sup>
- 2) experts that operate in policy networks at various levels (local, regional, national and international) have a vital role to play in the spreading of ideas in various corners by acting as transfer agents of ideas. They pick them up in one policy arena, transform them to fit their purposes and then coin them again in another policy arena.<sup>30</sup>

We will now proceed as follows. The currently known heuristics on institutional transplantation will be taken as a starting point for devising a framework for the development of legitimate international law and governance at global level in a broad sense (incorporating both legality and acceptance). Immediately after formulating

<sup>28</sup> De Jong, above n. 22; and De Jong et al., above n. 22.

<sup>29</sup> C. T. Ramaekers, ‘The Influence of the Aarhus Convention on Public Participation in French and Dutch Infrastructure Projects’ (Delft University of Technology master’s thesis 2004).

<sup>30</sup> Diane Stone, ‘Transfer Agents and Global Networks in the “Transnationalization” of policy’ (2004) 11(3) *Journal of European Public Policy* 545-566.

these state-to-state heuristics, we will transform them in such a way that they become suitable, in our view, for state-to-international level transplantations. This is what we will do in the remainder of this section.

After that, in sections 5 and 6, we will use the case of the World Bank's Inspection Panel to illustrate what such a translation means for a specific case of institutional transplantation from national to international level. We realise that, on the basis of this article, it is only possible to provide a rough draft of the implications of applying the heuristics of institutional transplantation. More extensive and empirical research is needed to be able to draw firmer conclusions. However, we think that the description of the case of the Inspection Panel is useful, because it at least provides some preliminary insight into the usefulness of the theory on institutional transplantation for enhancing the legitimacy of international law and governance.

*Heuristic 1: Strengthen the position of international proponents of change*

Voluntary adoption or even forced imposition normally only leads to legitimate transplants if there is a critical mass of domestic proponents of institutional change whose position is strengthened during and as a result of the transplantation.

- For international law-making and governance, this heuristic implies that transplants will only take root if the position of reformers and proponents of institutional change within the international body is strengthened. Regular contacts with these reformers should be maintained, but they should not be put under pressure. Instead, they should be allowed to decide the agenda and be given leeway in the way they incorporate the change in their administrative practices. National representatives (usually Westerners) should not take their place or corner them by giving strict directions. They should cater to the recipients' needs rather than showing that they know how things should be done.

*Heuristics 2a, b and c: Avoid 'xeroxing' – use multiple models and go from the general to the specific*

'Xeroxing' (copycat transplantation) invariably leads to illegitimate and ineffective transplantation. 'Bricolage', i.e. adaptation to local circumstances through mutual adjustment by domestic players in a tinkering process, will lead to policy and legal constructions that are more in line with domestic needs and wishes (heuristic 2a). Considering multiple models and generating compatible creative combinations (hybrids or syntheses) generally leads to more legitimate transplantation than adopting only one model. This is because tinkering with various models allows for more creativity and suitability and creates more space for bargaining among various domestic players (heuristic 2b). Using the generic character of a transplant rather than specific, detailed legal frameworks or procedures is key to enhancing its legitimacy and functionality. More general and abstract policy lessons, ideas and ideologies can give direction, but detailed legislation is necessarily very context-specific and should only receive attention in the implementation phase of the transplant (heuristic 2c).

- For international law-making and governance, this heuristic implies that national members that promote legal or policy frameworks should never push for the adoption of an exact copy of their model and that there is no such thing as a one-size-fits-all best practice that transcends the cultural context. The most appropriate tailor-made legislation is produced in a debate and bargaining process among various member states in which the most promising and appropriate models are compared

and synthesised. A general political debate should precede the drafting of the actual legal framework; the latter is merely the conclusion of the transplantation process, not its starting point.

*Heuristic 3: Hire and use proactive institutional entrepreneurs*

Hiring one or more energetic, charismatic and knowledgeable institutional entrepreneurs is vital to having the transplant accepted and adopted at all. In order to generate legal and policy change, many barriers need to be overcome, and this requires enthusiasm, perseverance and expertise. Psychology and staffing aspects are often ignored in the legal and policy sciences, but this is unjustified.

- For international law-making and governance, this heuristic implies that such competent institutional entrepreneurs should preferably not only occupy key power positions inside those organisations but also but also serve as transfer agents linking the national and international levels.

*Heuristic 4: Recognise and use windows of opportunity when they appear*

Being able to spot and utilise emerging windows of opportunity in order to generate change in international organisations (e.g. after disasters and/or media reports) to propel and effectuate the transplantation process is equally crucial to having an initiative adopted successfully and garnering the necessary support of the participants. Transplants are experienced as far more legitimate if a legal or institutional system is felt to be in a state of crisis or emergency. This may be a rather questionable issue for legal scholars, but political scientists have long been aware that people first need to acknowledge problems before they can be open to changes that can improve the situation for all concerned.

- For international law-making and governance, this heuristic implies that national and international proponents of change should capitalise on acute crises or overtly failing policy systems at national or international level in order to submit proposals that were already prepared and drafted before and which they have long been wishing to see implemented. It essentially means that it is important to get the political timing for the initiation of the transplantation process right. At such 'critical junctures', the context is likely to strengthen the proponents of such proposals strong and weaken their opponents.

*Heuristic 5: Account for cultural and administrative differences and similarities*

Taking cultural and administrative similarities and differences into account during the transplantation processes is important in order to anticipate the occurrence of possible acceptance problems. Overall, transplantation between countries belonging to the same family of nations is easier to realise, but this is not always desirable. Legal and cultural similarities between donor and recipient facilitate the transplantation process, but only if subtle institutional differences are still taken into account in such cases. In other words, like-to-unlike transfers (cross-family transplantation) are more complicated than like-to-like transfers, but in both cases the anticipation of divergence is still a precondition for a legitimate transfer. In like-to-like transplantations, the likelihood of this problem being underestimated is higher.

- For international law-making and governance, this heuristic implies that substantial legal, administrative and cultural awareness is required of the various groups of states that will be constituencies in the international organisation to which the transplantation takes place. This should be the case both in terms of basic constitutional, administrative and cultural assumptions and with regard to the sector-specific institutional arrangements in those countries. Constructive dialogue between national/international donors and national/international recipients about these assumptions is necessary. If international treaties, agreements or pieces of legislation are produced, these should be sufficiently generic or flexible to allow for a variety of administrative and culture-specific interpretations. If the process results in stricter legal documents that apply to a variety of states, these should represent an innovative legal conception that exceeds those of the constituencies and should be explicitly endorsed by representatives from these various legal, administrative and cultural families.

*Heuristic 6: Use only neutral or positive symbols*

Ensuring that controversial political, legal, ideological, cultural and/or religious symbols attached to the transplant are avoided and that positive connotations are emphasised is extremely important for increasing its chances of acceptance. Since institutional transplants are ultimately rarely value-neutral and country representatives tend to have emotional mental imprints of others, this will affect the feasibility and shape of a transplant, even if this is not 'rational'.

- For international law-making and governance, this heuristic implies that explicit reference to controversial world hegemonies or rogue states is to be avoided. Representatives of all constituent states of an international organisation are unlikely to embrace a transplant whose origins are explicitly stated as being in the United States, the People's Republic of China or Saudi Arabia. Similarly, only negative lessons can normally be drawn from Yugoslavia, Myanmar or Sudan, since positive reference to them is bound to lead to mixed emotions in many places around the world. Conversely, references to Sweden, South Korea or Botswana can be made more easily, because these countries are seen as leading and successful policy pioneers on their continents and are not tainted by connotations of imperialism, war crimes or extreme ideologies.

Institutional transplantation is aimed not only at realising legality but also at achieving *acceptance* of policy initiatives among recipient countries or institutions. This implies that the sense of institutional and project 'ownership' among borrowing countries in their dealings with the World Bank might grow if the above-mentioned heuristics are applied. The applicability of these heuristics will now be tested in the case of the World Bank's Inspection Panel. The expectation underlying this institutional adjustment enacted in 1993 was that it would lead precisely to such a growing sense of 'ownership' among borrowing countries in relation to the development projects that they 'co-partner' with the World Bank, thus enhancing the legitimacy of these projects.<sup>31</sup>

<sup>31</sup> Woods (2000), above n. 7; Woods (2001), above n. 7; and Woods and Narlikar, above n. 14.

## 5 The Inspection Panel of the World Bank

### 5.1 History and Foundation

During the last decade, the acceptance has grown that international organisations, including the World Bank, should be held responsible for their activities that cause harm. However, non-state actors that are adversely affected by the Bank's projects do not have an effective remedy, especially before national courts where international organisations enjoy immunity.<sup>32</sup> Therefore, if national courts are unavailable, some alternative forum is necessary to enable non-state actors to pursue their claims, possibly within the structure of the relevant institution.<sup>33</sup> If this reasoning is applied to the World Bank, compliance with the Bank's developmental purposes implies a requirement to provide some forum for individuals and groups that are adversely affected by the Bank's projects to pursue claims against the Bank. These factors may explain why, in the early 1990s, the Bank's directors and management started to look for alternative means of accountability, such as the establishment of an independent inspection function within the Bank's structure. This was viewed as a response to the increased recognition that the Bank's projects were not always of adequate quality and sometimes had an adverse, and often irreversible, impact on the environment or on local populations. The Bank was disregarding its policies on involuntary resettlement and knowingly tolerated borrowers' violations of its policies. As a consequence, Resolution No. 93-10 of the board of executive directors of the World Bank established the World Bank Inspection Panel. The members of the first Panel were appointed in 1994. The Bank's executive directors reviewed the Resolution in 1996 and 1999.<sup>34</sup>

The Inspection Panel is an investigative, not a judicial body and is based in Washington, D.C.<sup>35</sup> The scope of the Panel's mandate extends to IBRD loans and IDA credits, but not to projects financed by other member institutions of the World Bank Group.<sup>36</sup> Although the Inspection Panel is part of the World Bank, it is supposed to work as an independent body. Paragraph 4 of the Resolution states that the members of the Panel shall be selected, among other things, on the basis of 'their independence from the Bank's Management'.

One of the reasons for establishing the Panel was to provide greater transparency in the World Bank's operations. This is clearly reflected in Paragraphs 25 and 26 of the Resolution, which provide that, after the executive directors have considered a request for inspection, the Panel's recommendation and the decision of the executive directors shall be made available to the public.<sup>37</sup>

### 5.2 Composition of the Panel

The Panel consists of three members of different nationalities who are nominated by the World Bank's president and appointed by the executive directors for five years.

<sup>32</sup> Orakhelashvili, above n. 6, at 59.

<sup>33</sup> *Id.*, at 60.

<sup>34</sup> *Id.*, at 60-61.

<sup>35</sup> For more information, see: <<http://www.worldbank.org/inspectionpanel>>.

<sup>36</sup> M. Ragazzi, 'IBR & IDA: Inspection Panel Operating Procedures, Including Executive Directors' Resolution and Explanatory Memorandum of the General Council: Introductory Note', 34 ILM 1995 at 503.

<sup>37</sup> *Id.*, at 503.



The chairperson of the Panel is elected for one year.<sup>38</sup> There is no requirement of fair and equitable geographic representation. In fact, the majority of the Panel has always been represented by the nationals of Western countries.<sup>39</sup>

Members are selected on the basis of the criteria set out in the Resolution.<sup>40</sup> The paramount consideration is independence: members cannot serve for more than one term (Paragraph 3), are independent from the World Bank's management (Paragraph 4), if previously employed by the World Bank Group may serve on the Panel only if two years have elapsed since the end of their employment (Paragraph 5), are disqualified from participation in cases where they have a personal interest or have had a significant involvement (Paragraph 6), can only be removed for cause (Paragraph 8) and cannot be employed by the World Bank Group after serving on the Panel (Paragraph 10). At the same time, the members of the Panel are officials of the World Bank. As such, they are bound by the obligations set out in Paragraphs 3.1(c) and (d) and 3.2 of the World Bank's Principles of Staff Employment'.<sup>41</sup>

The current members of the Panel have the following nationalities: Austrian (chairperson), Norwegian and Argentinean.

Previous members had the following nationalities: Dutch, Thai, Ghanaian (chairperson), Canadian (chairperson), Costa Rican (chairperson), American (chairperson) and German (chairperson).<sup>42</sup>

### 5.3 Powers and Procedures of the Panel<sup>43</sup>

The Panel has investigatory, advisory and rule-making powers:<sup>44</sup>

- Investigatory: The Panel can investigate complaints involving the Bank's failure through act or omission to follow its 'operational policies and procedures'.
- Advisory: The Panel will review all complaints and make recommendations to the executive director about which complaints to investigate.
- Rule-making: The Panel has the power to formulate the procedural rules that will govern the complaints process and to resolve the issues not clarified in the Resolution.

The procedure that may lead to an investigation starts when the Panel receives a request for inspection. A request may originate from: (a) an affected party that consists of any two or more persons with common interests or concerns and who are in the borrower's territory; (b) in special cases an executive director; or (c) at any time the executive directors acting as the board. An affected party may be represented by a local representative or, when this is impossible, a foreign representative.

There must be an allegation that the World Bank has failed to comply with its operational policies and procedures. This expression includes the World Bank's operational policies, bank procedures, operational directives and earlier similar documents but does not concern guidelines, best practices and similar documents.

<sup>38</sup> Orakhelashvili, above n. 6, at 65.

<sup>39</sup> Id., at 66.

<sup>40</sup> Resolution No. IBRD 93-10 and Resolution No. IDA 93-6: 'The World Bank Inspection Panel'.

<sup>41</sup> Ragazzi, above n. 36, at 504-505.

<sup>42</sup> This is the current list as published on the website of the Inspection Panel.

<sup>43</sup> For further details, see the document 'The Inspection Panel: Operation Procedures'.

<sup>44</sup> D. D. Bradlow and S. Schlemmer-Schulte, 'The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order' (1994) 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* at 393 and 397-398.

Before hearing a request, the Panel must satisfy itself that the alleged failure to comply with the World Bank's operational policies and procedures has or threatens to have a material adverse effect on the rights or interests of an affected party, that the alleged violation is serious and that the subject matter of the request has been brought to the attention of the World Bank management. Under Paragraph 14 of the Resolution, the Panel cannot hear requests relating to actions that are the responsibility of other parties (most importantly the borrowing state) and do not involve actions or omissions of the World Bank, procurement decisions by the World Bank's borrowers and matters concerning which the Panel has already made a recommendation, unless there are new circumstances that would justify the hearing of a new request.

The procedure triggered by a request for inspection is described in detail in Paragraphs 16 to 23 of the Resolution. Paragraph 23 provides that for projects under preparation the findings of the Panel on whether the World Bank has complied with its policies and procedures will be discussed in the Staff Appraisal Report. This is a technical document circulated to the executive directors that assesses the intrinsic quality of a project and evaluates the critical risks to which the project is exposed. The Panel's administrative procedures specify that, if there is an investigation, the Panel may employ consultants selected in accordance with the principles and procedures applicable to the hiring of consultants by the World Bank'.<sup>45</sup>

The actual course of events is as follows. Once the complaint is lodged and the Panel decides on its eligibility, its opinion is submitted to the board of executive directors, which decides whether or not to authorise an investigation. When the investigation is authorised, the Panel starts with the collection of all factual information. After that, the Panel may visit (with the consent of the borrowing state) the area to which the complaint relates. During the visit, the Panel meets with the complainants, the local population, the local authorities, representatives of NGOs and relevant experts. The Panel analyses the complaints and compares the factual circumstances with the documents of the project and the procedures and policies of the World Bank. The analysis results in a report and recommendations to the board of executive directors. Finally, it is up to the board of executive directors to make a decision based on the report of the Inspection Panel.

#### 5.4 Comments on the Strength and Functioning of the Panel

According to Alexander Orakhelashvili, the legal nature of the Panel, as clarified in the general context of the law of international organisations, is not always well reflected in its working procedures and powers under its constituent documents. The limited powers of the Panel generate serious concerns when considering a transplant of this development into other organisations. To alleviate these concerns, a further progressive development of the Panel's role and powers is necessary, according to Orakhelashvili.<sup>46</sup> For example, a Statute for the Inspection Panel that governs the Panel's activities and thus renders remote the difficulties connected with the interpretation of its powers and functions should be adopted. Other suggestions concern the extension of the Panel's powers, the ability to accept a request independent of any decision of another organ, fair and equitable representation within the Panel and guarantees for due process and equal application of the law.

In an article entitled 'Problems in Connection with the Efficiency of the World Bank Inspection Panel',<sup>47</sup> Nurmukhametova points out that, under the Resolution, the Panel is supposed to determine whether or not management has been in

<sup>45</sup> Ragazzi, above n. 36, at 505-506.

<sup>46</sup> Orakhelashvili, above n. 6, at 100-102.

<sup>47</sup> Nurmukhametova, above n. 6, at 418-421.

compliance with all the relevant policies and procedures of the Bank and has to make recommendations whether to proceed with the investigation of a request. However, it is not supposed to provide recommendations on the subject itself. This is a major obstacle according to Nurmukhametova. Too often, the Panel's recommendations and the subsequent board decision provide only for a brief period of change. The main reason for this problem is the Panel's mandate, according to which its competence to suggest remedies is limited. According to Nurmukhametova, the Panel's mandate should be broadened. It should include, among other things, post-investigation control and a 'preventive function'. However, successful reforms depend on the World Bank's willingness.

Shihata, who has written an elaborate study on what the actual experience with the Inspection Panel has been, has an answer to the above mentioned criticism.<sup>48</sup> In his view, a closer look should be taken at the function and functioning of the Inspection Panel in its interplay with the World Bank as a whole. If the constituent states of the World Bank are of the opinion that the Panel's mandate is unduly limited in scope and that the Panel should have decision-making powers, an entirely different body should be established in a different context, with all the problems this will bring along. Some aspects of the Panel could possibly be clarified or improved, but according to Shihata this was done, at least partly, in the 1996 and 1999 revisions. Prior to more changes, a fundamental discussion is needed on the task description of the World Bank itself.

## 6 Transplanting Institutional Elements to the Inspection Panel<sup>49</sup>

When applying the heuristics of institutional transplantation to the World Bank's Inspection Panel, we should not constrain ourselves to the relationship between the national level of the constituent states of the World Bank and the international level of the Panel. Looking at its structure and procedures, we do not see the Inspection Panel as an independent international organisation but as a part of the World Bank, since its tasks are functional to the policies and activities of the World Bank. There is a direct relationship between the policies and views of the World Bank and the states that donate the most funds to the Bank. These states have a relatively strong influence on the actions and policies of the Bank, which determine its generic character. Because the Bank plays an important role in the establishment and development of the Panel, the position of the Bank is an important part of the discussion on the heuristics of institutional transplantation.

### 6.1 Strengthen the Position of International Proponents of Change

It has been argued that the Panel's establishment and work demonstrates that the independent inspection function is a necessary component of the World Bank's development activities.<sup>50</sup> On this basis, the Inspection Panel should have a fair number of proponents not only within the World Bank but also within the constituencies. However, various scholars argue that the World Bank only supports the Panel because it is crucial for its own legitimacy and functioning, but that the Bank is hostile to suggestions to strengthen the position of the Inspection Panel. In addition, it is worth noting that China, India and Brazil are opposed to the further

<sup>48</sup> I. F. I. Shihata, *The World Bank Inspection Panel: In Practice* (New York, Oxford University Press 2000, 2nd ed.)

<sup>49</sup> This section is based for a large part on the factual information in Shihata, above n. 48.

<sup>50</sup> Orakhelashvili, above n. 6, at 100-102.

enlargement of Inspection Panel's competences and that they would like to see the influence of the Panel decrease. Thus, the social base for the current position of the Inspection Panel is liable to decrease. The support for the proposed strengthening of the position of the Panel seems to be insufficient at this moment. This indicates that the critical mass of proponents within (and outside) the World Bank needs to be increased before measures to strengthen the Panel in a legitimate and successful way can even be designed. The World Bank and the Inspection Panel should take appropriate measures to accomplish this.

## **6.2 Avoid 'Xeroxing' – Use Multiple Models and Go from the General to the Specific**

With respect to these heuristics, we need to make a distinction between the economic models that are promoted and applied by the World Bank and, consequently, by the Inspection Panel and the procedures and powers of the Inspection Panel itself.

Beginning with the latter, the establishment and the functioning of the Panel should be regarded as a unique phenomenon in a specific context. Authors who promote the strengthening of the position of the Panel should be aware of the global and specific context of the Panel. The tendency to refer to and copy the structure and procedures of national or other international judicial bodies must be avoided.

At this moment, it is difficult for us to examine to what extent existing frameworks and procedures have been used as models for the current structure of the Panel. The Panel has the features of an ordinary Western dependent investigative body. The fact that the position of the Panel is relatively weak, that its jurisdiction is relatively limited and that the board of executive members of the Bank can influence investigations are indications for the assumption that the World Bank has established a panel that does not interfere with its policies. For these reasons, it is defensible to argue that the 'model' of the World Bank has been xeroxed to the Inspection Panel.

According to our interpretation of the rule of law and legitimacy, as discussed in section 2, the structure and procedures of the Inspection Panel can only satisfy these criteria if multiple models are used in a gradual process of mutual adjustment of all the actors involved. For this purpose, the policies of the World Bank and the related activities of the Inspection Panel should reflect not only North American economic models but also other economic models, like the Asian or African models. The same can be said about the democratic, cultural and legal aspects of the World Bank.

Another option is to turn the Inspection Panel into a body that is independent from the World Bank and to ensure that its structure and procedures are based on multiple models that reflect the socio-economic features of donor countries as well as borrowing countries. With reference to the previous heuristic of the enhancement of the position of local proponents of such transplantation, we think this second option is not very likely to happen.

Whatever option is chosen, a fundamental discussion should first take place on the different, more general and abstract policy lessons, ideas and ideologies that can give direction. In this phase, the constituent partners should definitely avoid all deliberation and negotiation of the suitable legal framework, procedures and rules that are needed to implement the agreed policies and ideas. All effort should be used to narrow the substantial differences that exist between the different states on a global level. In order to comply in a legitimate way with the rule of law on a global level, it may be necessary for the partners to reflect on their own view on this concept and to modify them in such a way as to make room for other views. Only after the constituent partners have agreed on a generic level can the designs for the

legal frameworks be discussed. These legal frameworks should be so flexible that they can express and facilitate different legal values.

Shihata, who extensively describes the establishment and the board reviews of the Inspection Panel's experience, teaches that little discussion took place at the abstract level of policy ideas.<sup>51</sup> From the beginning, the constituent partners of the Inspection Panel spoke about the desirable design of the legal framework and the required procedures. With respect to the heuristics of institutional transplantation, we regard the establishment and reviews of the Panel as a missed opportunity, which can have consequences for the social base of the Panel and thus for its legitimacy.

### 6.3 Hire and Use Proactive Institutional Entrepreneurs

Transplantations do not occur by themselves. Energetic and knowledgeable institutional entrepreneurs are vital to having the transplant accepted and adopted at all. In order to generate legal and policy change, many barriers need to be overcome, and this requires perseverance. Much attention needs to be paid to the psychological aspects of transplantation.

Within the scope of this article, it is difficult for us to analyse to what extent well-qualified institutional entrepreneurs have been involved in the establishment of the World Bank's Inspection Panel. Additional empirical research data needs to be gathered for an analysis of this subject. In any case, the relevant literature reveals that many authors are critical of the weak position of the Inspection Panel and that they have suggested many changes to strengthen the Panel. In our opinion, these criticisms can be seen as an indication that, if the powers and the position of the Inspection Panel are to be strengthened, this change can only be made if there are enough sufficiently qualified institutional entrepreneurs available. In the case of transplantation to an international organisation such as the Inspection Panel, these entrepreneurs should not only occupy key positions within the World Bank but also serve as agents linking the national and international levels.

### 6.4 Recognise and Use Windows of Opportunity When They Appear

Transplants are experienced as far more legitimate if a legal or institutional system is felt to be in a state of crisis or emergency. In our opinion, it is defensible to argue that the increasing criticism of the World Bank and its policies during the last fifteen years of the previous century were an important factor in the establishment of the Inspection Panel. Although there were also mounting internal factors relating to concerns about performance, the failures that were made by the Bank in the Narmada projects are generally seen as the external cause for the establishment of the Inspection Panel.<sup>52</sup>

For further development of the current position and powers of the Inspection Panel, there therefore has to be a general awareness and a sense of urgency. Not only national governments but also interest groups, NGOs and academics can contribute to the emergence of this sense by actively participating in (public) debates on the functioning of the Inspection Panel with reference to its purposes.

Another option is that the World Bank will realise that its current position cannot be maintained because of the rising powers of non-Western states. This causes particular problems, because larger developing countries are not in favour of the Inspection Panel, which they regard as indirectly interfering with their sovereignty. Therefore, it is important that windows of opportunities are recognised and used to

<sup>51</sup> Shihata, above n. 48.

<sup>52</sup> *Id.*, at 2-8.



design institutional improvements that take account of the objections of these states. We suggest that members of the World Bank and the World Bank itself take this heuristic of institutional transplantation into account.

### **6.5 Account for Cultural and Administrative Differences and Similarities**

This heuristic implies that substantial legal, administrative and cultural awareness is required of the countries that will be affected by new legal and policy initiatives. In the case of the World Bank's Inspection Panel, both these institutions should be aware of the cultural and administrative differences between the states that donate the funds and the borrowing countries. For example, in all projects, the World Bank requires borrowing countries to provide large amounts of information; it is one of the tasks of the Inspection Panel to judge whether all the required information is available and whether the complaints are eligible in the context of the information. However, the World Bank and the Inspection Panel should be aware of the fact that in many countries informal relations are much more important than formal relations and that in those countries it is considered 'a waste of time' to collect information on the projects and to write reports. Of course, this does not mean that the World Bank or the funding states need to drop the wish to have some kind of information on and registration of how the money is spent. A dialogue should be started and explicit attention should be paid to the cultural and administrative differences between the member states, and these differences should be reflected in the structure, policies and procedures of the World Bank and its Inspection Panel.

### **6.6 Use Only Neutral or Positive Symbols**

In the case of the World Bank and its Inspection Panel, this heuristic implies that explicit reference to controversial hegemonies or rogue states should be avoided. In this respect, the dominance of the North American and Western countries in the World Bank and the Inspection Panel is a 'dead-end road'. The construction of these kinds of international organisations should be based on an inventory of different best practices from all over the world. The typically Asian value of harmony and soft pressure in settling disputes of harm done by public agencies is increasingly valued in many countries over the American approach of advocacy, confrontation and litigation. It is important that these alternative values are explicitly taken into account in the discussions on improving and strengthening the position of the Inspection Panel. The governments (and people) of developing countries should also be able to identify with the proposed design of the reform.

## **7 Implication: Cross-Cultural Dialogue and the Rule of Law**

The different aspects that legal scholars traditionally associate with the rule of law have had their merits in structuring Western societies through their legal systems. However, this praise does not imply that it can be safely assumed that their application around the world is unproblematic and universal. This article has emphasised that many underlying cultural and administrative premises determine whether transplanting legal constructs derived from rule of law principles in Western countries can be considered legitimate. Since we are convinced that legitimacy entails both legality and acceptance, it is not irrelevant that some legal constructs of European or North American origin do not resonate well in non-Western countries. International organisations consisting of and dealing with representatives of such

countries are experiencing mounting resistance to their prescriptions for more capitalism, democracy, rule of law and human rights, in spite of the fact that Western countries usually occupy the leading positions in these organisations.

To obtain legitimacy within such non-Western or mixed international environments, the rule of law and all it entails can no longer be considered an assumption but has become a set of constitutional and administrative values. Legitimate international policy-making and law-making require an acknowledgement of a variety of values and opinions and an attempt to synthesise them and incorporate this cross-cultural and administrative synthesis in international policy-making and law-making bodies. If only 12 per cent of the world population is 'Western' and 88 per cent is 'other', it is vital for the legitimate continuation of international bodies to pay due heed to the governments of those 88 per cent and what accountability, transparency, civil rights and sustainable economic institutions mean to them. Dialogue implies listening, not making assumptions, even where the rule of law is concerned. Such an open attitude does not imply that the representatives of Europe and North America have to give up their own value systems and the legal and political opinions based on them, but rather that their conception is merely their *stake* in a constructive bargaining process around international law-making. The Western conception is one among many, prone to its own strengths and weaknesses, like those taken from Confucian, Islamic and other families of states. John Gray has rightly described accepting 'value pluralism' and finding a 'modus vivendi' in dealing with tensions between political preferences deriving from different conceptions of the 'morally good' as the only viable course for future liberalism.<sup>53</sup> We feel that the first contribution this article makes to the literature on comparative law is the admonition that the cultural variety underlying legal systems is more than just a theoretical insight but that it also has practical implications for how international legal bodies operate and what policies they propagate.

In this article, we have also pointed out that the method of institutional transplantation with its six heuristics is a promising way to embark on such an international dialogue-oriented process. Working out these heuristics for use within international legal bodies is the second main contribution of this article to comparative law. In this article, we have applied these heuristics to the World Bank's Inspection Panel, thereby showing that the heuristics of institutional transplantation are valuable and useful for the development of legitimate international organisations. These heuristics do not only apply to the relevant legal framework(s) but also refer to the different underlying political and cultural traditions. Globally, the rule of law should be defined as a political ideal that can be enhanced by addressing administrative and cultural congruence. The theory on institutional transplantation can be helpful in the establishment of legitimate international organisations.

In a restricted and formal sense, legal transplantation refers only to the national-to-international transfer of rules and procedures and safeguards legality. However, achieving legality is normally far easier than obtaining actual administrative and wider societal acceptance. Only the latter implies full administrative legitimacy, while the former does not. We feel that it is wise for leading global organisations to engage in this more open approach to international policy-making and law-making. If they do not, they disregard the values, wishes and lifestyles of a large majority of the world's population and may rapidly lose significance in future decades, given the dynamics of geopolitics.

<sup>53</sup> Gray (2002), above n. 8.