

**LEGAL TRANSPLANTATION: IS THIS WHAT THE DOCTOR
ORDERED AND ARE THE BLOOD TYPES COMPATIBLE?
THE APPLICATION OF INTERDISCIPLINARY RESEARCH TO LAW
REFORM IN THE DEVELOPING WORLD –
A CASE STUDY OF CORPORATE GOVERNANCE IN INDONESIA**

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I. INTRODUCTION

A. A New Model for Law Reform (The Model)

The focus of this Article is the practical interface between culture, nationhood, globalization, economics, law reform and development, and the sometimes uncomfortable compromises that arise from these relationships. This Article provides a progressive intellectual and political focus to the current policy and legal debate regarding the relationship between the developed and developing worlds.

We are a global community, and like all communities have to follow some rules so that we can live together. These rules must be – and must be seen to be – fair and just, must pay due attention to the poor as well as the powerful, must reflect a basic sense of decency and social justice.¹

Joseph Stiglitz's powerful statement underlines the need for laws and rules, internationally, regionally, and domestically, that focus on decent and equitable international relations and sustainable long-term development.² His statement provides the ethos with which this essay is written. It is hoped that this Article will inspire discussion about the nature and processes of law reform in Asia and the developing world.

The guiding idea behind this article is to utilize the resources of interdisciplinary research to assist with providing a means of legal change more appropriate and effective for the developing world than those currently being

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1. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS xv (2002).

2. *Id.*

used.³ This would create a new intellectual approach to comparative law, with the intention of providing an alternative law reform mechanism that goes beyond the overused (and abused) intellectual prism of market economics.⁴ This Article does not represent a hypothetical analysis, but focuses on outlining a real issue facing developing countries. This issue involves the imposition of new legal regimes upon them (e.g., as a requirement of accession to trade agreements, such as the legal changes Mexico was required to undertake under NAFTA,⁵ and/or to meet the requirements of international donors and financiers, such as the requirements for law reform forced by the International Monetary Fund upon Indonesia subsequent to the Asian economic crisis, which began in 1997).⁶

In order to identify a practical application for this intellectual framework for law reform, this Article will focus upon corporate governance in Indonesia. Corporate governance has been selected because it has become a major law reform objective for international institutions⁷ in the Asia-Pacific Region since the beginning of the economic crisis.⁸ This Article will outline how corporate governance reforms could be implemented with the aim of applying a *fresh* approach to law reform in Asia. The model espoused in this Article is based on interdisciplinary research requiring the preparation of empirical research to develop recommendations for law reform.⁹

3. The academic disciplines that will be reviewed in this article include anthropology, sociology, history, political science, philosophy, and economics. The application of these interdisciplinary techniques will be used to obtain a contextualized understanding of the legal problems and solutions surrounding the transplantation of laws.

4. This model does not imply the necessity or legitimacy of legal transplants and law reform policies promoted by international institutions in developing countries, rather it is hoped that it will provide a more critical and comprehensive mechanism to decide whether and in what form legal reform should take place.

5. The implications of free trade agreements, such as NAFTA, will be discussed in Section 3 of this article. They highlight the inequalities in power relations between international institutions and developing countries.

6. STIGLITZ, *supra* note 1, at 40-46.

7. References in this Article to "international institutions" means organizations such as the International Monetary Fund (IMF), the World Bank, and the Asian Development Bank. All these organizations have vastly different methods of operating, however, for the purposes of this article they will be grouped together. For further discussion on this subject see STIGLITZ, *supra* note 1.

8. The Asian economic crisis, discussed later in this Section of the Article, was a significant economic downturn causing Asian markets to slump leading to massive economic problems such as the depreciation of currencies and widespread unemployment. See Alexander F.H. Loke, *A (Behavioral) Law and Economics Approach to Reforming Asian Corporate Governance*, 20 CO. & SEC. L.J. 252 (2002), for a detailed analysis of the Asian economic crisis; Thomas Clarke, *Haemorrhaging Tigers: The Power of International Financial Markets and the Weaknesses of Asian Modes of Corporate Governance*, 8 CORPORATE GOVERNANCE 101 (2000).

9. *C.f.* David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 48-50 (1972) (discussing problems with studies

The legal changes in Indonesia¹⁰ are destined to fail if they remain premised on merely protecting outside interests, utilizing Western frameworks without adaptation, and continuing to fail to accept a more pluralistic approach that recognizes the cultural diversity of Indonesian society.¹¹ However, a pluralistic and localized view of law reform is something the international community needs to consider, not just for Indonesia, but also for the rest of the developing world. For law reform to be of assistance to the developing world, the international community needs to localize its approach. Effective law reform can only be achieved by a more complex response than is currently being applied.

In order to ascertain a full picture of this venture, the first two sections are dedicated to providing important background on the effects of globalization in the developing world and the factors motivating the corporate governance debate in Indonesia. The following three sections will outline in more detail the law reform model proposed in this Article, which provides the engine for this *fresh* approach to law reform. Section Three deals with the theoretical issues of legal transplantation and the possibility of establishing a conceptual framework through utilizing the concept of legal culture. Section Four outlines some of the practical issues related to the application of the model, and, finally, in Section Five, corporate governance reform in Indonesia will be used as a case study for reviewing the practical application of the proposed model. Although treated separately, the theoretical and practical elements of the model are deeply intertwined. Thus, the theoretical element of the model will focus on the practical exercise of undertaking interdisciplinary research and law reform.

When reviewing the theoretical issues regarding how to assimilate legal transplantations of law into Asia, and more specifically, corporate governance law into Indonesia, the Article's analysis is prefaced on viewing law reform "*from* society into the legal system, and *out* of the legal system into society".¹² For law reformers, this means not only reviewing legal texts and scholarly writings, but also surveying the way institutions function, the behavior of those practicing the law, and those subject to the law's application.¹³ Scholars have asserted that it is

lacking such research).

10. Indonesia has been selected as a case study due to the depth of its economic hardship subsequent to the Asian economic crisis and the stringent conditions for its IMF 'bailout' package which included significant law reform requirements. For further information see STIGLITZ, *supra* note 1, at 89-132.

11. See Mary Hiscock, *Changing Patterns of Regional Law Making in Southeast Asia*, 5 AUSTL. J. CORP. L. 364, 376-77 (1995) [hereinafter Hiscock, *Changing Patterns*], for discussion regarding the deep concern about law reform that is disconnected from local/indigenous Asian realities; see also Mary Hiscock, *Remodelling Asian Laws*, in INDONESIA: BANKRUPTCY, LAW REFORM & THE COMMERCIAL COURT 39-40 (Tim Lindsey ed., 2000) [hereinafter Hiscock, *Remodelling Asian Laws*].

12. Lawrence M. Friedman, *Is there a Modern Legal Culture?*, 7 RATIO JURIS 117, 118 (1994).

13. *Id.*

imperative not just to look at the *text* of the law, but to also look at the *context* of the law.¹⁴

The difficulty for law reform processes is in translating this idea of “living law” into a practical and real activity.¹⁵ As a consequence this article proposes that a law reform approach (“the model”) should be considered as an intellectual and practical framework for implementation in Indonesia (and elsewhere in the developing world). The model will provide a new approach to the practical application of comparative law.

Several steps are included in the proposed law reform model. The first step is *the acceptance of a conceptual framework: Legal Culture*.¹⁶ This step provides a theoretical basis from which interdisciplinary researchers can conduct their investigations. The assessment of legal culture involves investigating the structure, nature, forces, traditions, strengths, and deficiencies of a legal system. The combination of these influences creates a nation’s “legal culture,” and as a consequence, impacts upon the interpretation and acceptance, or otherwise, of legal transplants.¹⁷ The second step is *the establishment of core parameters*, in which the current laws and possible deficiencies arising out of these laws are reviewed, with a focus on law reform efforts. In addition, the proposed reforms cannot merely be ambiguous “framework” statements utilizing vague propositions; rather, clear areas of reform need to be delineated in order to allow adequate review and preparation for detailed research. The third step is the *application of interdisciplinary research*. Here, the tools of social science and the humanities will be utilized to focus on law reform questions in a coordinated manner. The application of interdisciplinary research requires a clear structure for coordinating the research efforts, compiling the research findings, and eventually recommending reforms.¹⁸

The three steps appear to be simple in application; however, in reality, this is a complex and untested process in which common methods of legal change are challenged, and bold proposals for law reform and the application of the social sciences and humanities to the law are identified.¹⁹ An additional conundrum

14. Benny S. Tabaluja, Corporate Governance in the Indonesian Capital Market: A Legal-Sociological Study of Legal Culture 270-71 (2000) (unpublished Ph.D. dissertation, University of Melbourne) (on file with the University of Melbourne Library).

15. Law should be reviewed within a contextual framework, going beyond conventional textual analysis (‘law in books’). See David Nelken, *Disclosing / Invoking Legal Culture: An Introduction*, 4 SOCIAL & LEGAL STUDIES 435, 439 (1995).

16. The definition and application of “legal culture” will be evaluated in Section 3.

17. Nelken, *supra* note 15, at 437.

18. Despite this Article dealing primarily with corporate governance reforms in Indonesia and elsewhere in Asia, the law reform model is as applicable to smaller more discrete law reform initiatives such as reviews of the speeding laws – because knowing how the laws are being applied or ignored will dictate whether to maintain or amend the laws. See Friedman, *supra* note 12, at 117-19.

19. Nelken, *supra* note 15, at 435-37.

exists not just in integrating social sciences and humanities with law in an interdisciplinary manner, but also in dealing with different academic cultures that often claim theoretical supremacy or operate using different research methods that may conflict.²⁰

The approach adopted here aims to move the review of the theory of legal transplantation from a theoretical exercise into a practical application. The model proposed will extend upon the theories and work that scholars such as Friedman, Trubek, Galanter, Merryman, and Franck who have been involved with progressive scholarship into law reform in the developed and developing world since the 1960s.²¹ This model promotes the ideal that legal reform should place more emphasis on practical research and rely less on preconceived and assumed knowledge²²

B. Localizing the International Architecture

Underlying the development of the model is the aim of providing a theoretical and practical means of dealing with a complex global environment where developing nations seek capital investment and financial aid in order to develop their economies and societies.²³ The money is not supplied without condition, and often, to facilitate the inflow of capital, law reforms are required to protect those providing the money.²⁴ Consequently, the difficulty lies in balancing the need for the inflow of money, while instituting law reform in a manner that is fair and equitable to the developing country.²⁵ This process must combine both the interests of international business and institutions and the requirements of developing nations. Law reform cannot be a “one-size-fits-all” approach; rather, a more indigenous and organic structure is required.²⁶ This will prevent the *rejection* of legal transplants.²⁷

Thomas Franck cautions that rapid economic development can create significant social and cultural problems, but he suggests that law may be a means

20. Michael Salter, *A Dialect Despite Itself: Overcoming the Phenomenology of Legal Culture*, 4 SOCIAL & LEGAL STUDIES 453, 455 (1995).

21. These professors were instrumental in challenging traditional approaches to legal analysis and dealing with law reform. They promoted contextualized analysis and methodologies that utilized interdisciplinary research to assist with law reform, rather than purely textual and assumption-based approaches to law reform. Their progressive scholarship will be explored throughout this Article.

22. Friedman, *supra* note 12, at 117.

23. Tabalujan, *supra* note 14, at 133.

24. *Id.* at 11-12.

25. See STIGLITZ, *supra* note 1, at 14.

26. Hiscock, *Changing Patterns*, *supra* note 11, at 377; Hiscock, *Remodeling Asian Laws*, *supra* note 11, at 28-31.

27. Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 6 (1974).

of reducing these negative impacts.²⁸ In the last few decades, development efforts have focused on the application of economic, predominantly macroeconomic, reforms.²⁹ Development policies need to move beyond this economic focus, and the dozens of economists aiding the development process must be augmented with law reform teams able to help integrate developing nations into the global economy in a constructive and indigenous manner.³⁰ Law will not solve all the ills of the developing world – it will not provide food for the hungry or electricity for those without power – it will, however, allow developing countries to have a legal infrastructure to assist their development in order to attain these very important social rights.³¹

The globalization of business, increased international capital flow, and the shock of the Asian economic crisis have led many Western policymakers to perceive an urgent need to provide uniformity in legal structures, and specifically, for the development of corporate governance laws to allow for transparent, accountable, and predictable business practices in the developing world.³² As a consequence, massive changes have been sought within Indonesian corporations law and corporate regulation, such as the development of the *Code for Good Corporate Governance*,³³ with the transplantation of Western legal concepts and frameworks.³⁴ In the past two centuries, law reforms imposed in Asia upon colonies by colonial powers, and, more recently, international institutions upon developing nations, have traditionally failed to meet the indigenous commercial and social needs and aspirations, because the reforms have focused on the needs of the colonizer or international community, rather than on facilitating the development of domestic communities, commerce, and markets.³⁵

28. Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767, 767-68 (1972).

29. STIGLITZ, *supra* note 1, at 34-36.

30. *See* Franck, *supra* note 28, at 800-01.

31. *See id.*

32. *See generally* MAGDI ISKANDER & NADEREH CHAMLOU, CORPORATE GOVERNANCE: A FRAMEWORK FOR IMPLEMENTATION (World Bank Group 2000); Loke, *supra* note 8; Clarke, *supra* note 8.

33. The National Committee on Corporate Governance prepared this document. It aimed to provide guidance for the regulation of corporate governance and ensure that the managements of Indonesian companies were functioning more transparently and appropriately, thus protecting the interests of investors and minority shareholders. *See* Loke, *supra* note 8, at 253.

34. Western corporate governance frameworks being pushed upon developing nations can be seen in the World Bank's vague guidance. *See, e.g.*, ISKANDER & CHAMLOU, *supra* note 32. Unfortunately, the framework does not provide any form of explicit guidance as to how corporate governance should be implemented.

35. The problem with many of the law reform undertakings has been that they have focused on the demands of the foreign interest, or investor, at the expense of creating legal infrastructure for supporting domestic social objectives and commerce. *See* Hiscock, *Remodeling Asian Laws*, *supra* note 11, at 29.

In relation to corporate governance,³⁶ this Article will review whether there is going to be a “global convergence that eliminates systemic difference” *or* “the emergence of a hybrid best practice system” *or* whether both of these alternatives are inappropriate.³⁷ William Bratton and Joseph McCahery in their influential work on comparative corporate governance assert that each national corporate governance system is a significant system in itself.³⁸ Each national system is not a “loose collection of separable components” but rather, an interdependent system of incentives.³⁹ These incentives create barriers to cross-reference, question the viability or merit of “global convergence,” and, more seriously, ask whether this “could perversely destabilize workable (if imperfect) arrangements.”⁴⁰

No empirical research demonstrates a clear necessity or requirement for convergence of corporate governance laws.⁴¹ Therefore, there is a place for developing individual national models of corporate governance and no need for developing nations to simply cut and paste Western laws into their law books. Law reformers, therefore, have the ability and opportunity to tailor solutions to the specific legal culture(s) of a nation.⁴²

This law reform debate is distinctly active in relation to corporate governance because of its social impact and the values that underlie it. Canadian scholar Thomas Courchene advocates nations tailoring their corporate governance systems to meet their societal interests. For example, he argued that Canada should adopt a Quebec model that integrates “financial, social, educational, [and] technological” infrastructure in an “attempt to integrate Quebec’s socio-economic fabric” into their corporate governance model.⁴³ Despite Courchene thinking this emphasis on social and communal factors may run outside of the “Americana” model, he feels that this tailoring of corporate governance is appropriate to the Canadian environment and national expectations.⁴⁴ To attain this policy outcome, Courchene advocates practical steps such as more bank involvement – akin to the German approach – in the share market by removing any restriction on them

36. Corporate Governance relates to the rules governing the management of corporations. This is outlined in more detail in Section 2.

37. William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT’L L. 213, 219 (1999).

38. *Id.*

39. *Id.* at 219, 222-24.

40. *Id.* at 213-14.

41. *Id.* at 222.

42. See Richard P. Applebaum et al., *Introduction: The Legal Culture of Global Business Transactions*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 6-7 (Richard P. Applebaum et al. eds., 2001).

43. Thomas J. Courchene, *Corporate Governance as Ideology*, 26 CAN. BUS. L.J. 202, 208 (1996).

44. *Id.* at 209.

buying shares in listed companies.⁴⁵ He advocates such practical changes because they correlate with the Canadian social compact and priorities.⁴⁶ Therefore, when reviewing what form of corporate governance law reforms are required in Indonesia, attention must be paid not solely to the desires of the international investor or institution, but also to the social compact, or compacts, that Indonesians may envision for themselves.

C. The Asian Economic Crisis

To understand the desire for corporate governance reform in Indonesia, one must attempt to comprehend the marvel with which international donors and foreign investors perceived East Asian economies prior to the Asian economic crisis.⁴⁷ Just before the crisis erupted, a World Bank Report was released “celebrating the unique combination of high investment and sustained high growth rates of the Tiger economies of East Asia as an inspiration to the other developing economies.”⁴⁸ This flattery was not unique, rather, a 1993 World Bank report also considered the economic success to be nothing short of miraculous.⁴⁹ Asia was seen as a beacon of the success of the Washington Consensus⁵⁰ that had policy settings that were export orientated and focused on the deregulation of markets.⁵¹

Things changed dramatically in June of 1997, the month the Asian economic crisis is considered to have begun, after the Thai currency⁵² was floated⁵³ and its value went into “free fall.”⁵⁴ The Thai Government, in an effort

45. *Id.*

46. *Id.*

47. The analysis of the perspective of the donor nations and foreign investors is no less important than understanding the Asian experience, but for the purposes of this Article, we will be focused more upon the pain caused to the Asian region and the setback to their development that occurred during the Asian economic crisis. However, international institutions are pushing for these corporate governance reforms, and understanding their perspectives for making these demands is important background when considering alternative approaches.

48. Clarke, *supra* note 8, at 101. The term ‘tiger economies’ was a phrase coined by international institutions to describe Asian economies, such as Indonesia and South Korea, who subsequent to the Second World War gained their independence and undertook a path of *dynamic* economic growth.

49. *Id.* at 102.

50. The Washington Consensus refers to the policy consensus that existed between the IMF, the World Bank, and the U.S. Treasury before the economic crisis of the late 1990s (such as Asian and Russian economic crises). See STIGLITZ, *supra* note 1, at 16-17.

51. Kanishka Jayasuriya, *Governance, Post-Washington Consensus and the New Anti-Politics*, in CORRUPTION IN ASIA: RETHINKING THE GOVERNANCE PARADIGM 25-26 (Tim Lindsey & Howard Dick eds., 2002).

52. The Thai Baht.

53. This is when a national government removes restrictions and regulation for the setting of their national currency exchange rate, allowing the market to establish an

to have a managed float, had exhausted almost all of its foreign currency reserves with a U.S. \$30 billion attempt to ensure that the Thai currency remained pegged to the U.S. dollar.⁵⁵ The contagious fears and problems about economic national/regional stability quickly spread to the Philippines, Indonesia, Malaysia, and South Korea.⁵⁶ No one, not even the specialists of the International Monetary Fund (IMF) and World Bank, had expected the collapse and the vast market panic that ensued led to a flow of capital out of Asian markets.⁵⁷ As probably the first truly globalized economic collapse with twenty-four hour media coverage through the Internet and news services,⁵⁸ it was this media coverage that facilitated the spread of panic throughout world markets.⁵⁹

Asian economies had grown significantly in the three decades prior to the Asian economic crisis.⁶⁰ Among the reasons for the growth were: (1) rapid industrialization; (2) financial liberalization; (3) strong export orientation; and (4) the use of short-term loan facilities.⁶¹ However, the later generator of rapid growth, short-term debt became very problematic and allowed for the rapid outflow of capital.⁶² In Indonesia, the use of short-term debt went from US \$17.1 billion at the end of 1994, to US \$34.2 billion by December of 1996.⁶³ Short-term debt is dangerous because it applies extraordinarily high interest rates, and can be easily and quickly “called in” when a lender desires repayment.⁶⁴ Panic during the collapse of the Asian economy was further fueled by the ease with which international financial institutions could require repayment of their debts and withdraw from Asian markets.⁶⁵

The incredible growth over the preceding years had raised the expectations of foreign and local investors and led them to have a sense of invincibility – “speculative bubbles involve the mass delusion that asset prices

exchange rate arguably more reflective of the currency’s value.

54. The currency devalued substantially, and the Thai Central Bank’s attempts to prop the currency up through buying Thai Baht was ineffective in maintaining the currency’s exchange value. *See* Clarke, *supra* note 8, at 104.

55. The Thai Reserve Bank had set the value of Thai currency. This was considered to have led to current account deficits (this is when a nation spends more on imports than it gets from the sale of exports) and as a response the Thai authorities in the mid-1990s decided to float their currency and did so in an organized, systematic manner. However, this did not save the currency from its rapid devaluation. *See id.* at 104.

56. *Id.* at 104.

57. *Id.* at 106.

58. *Id.*

59. *Id.*

60. Clarke, *supra* note 8, at 102.

61. *Id.*

62. STIGLITZ, *supra* note 1, at 98-104.

63. Clarke, *supra* note 8, at 103.

64. Short-term debts can become payable (“called in”) at the *whim* of the lender. *See id.* at 103-04.

65. *Id.*

will rise relentlessly.”⁶⁶ The Asian economic miracle created a frenzy to invest, and issues such as profitability and ability to repay debts became secondary considerations to future prospects that often blinded investors.⁶⁷ This investor “craze” and “pack mentality” is not an isolated experience.⁶⁸ Similarities can be seen with the dot.com boom where, from 1993 to 1997, financial institutions and investors allocated over U.S. \$500 billion to dot.com ventures, which lacked transparency and were based on over-inflated “expectation and prospects.”⁶⁹

With the bursting of the Asian economic bubble, Western policymakers have had to reconsider their policy focuses, and this led to the Post-Washington Consensus (PWC) that changed the focus, from merely liberalizing economies and deregulation of markets, which was the focus of the Washington Consensus, to adding the requirement that nations have appropriate regulatory capacity to protect the proper functioning of the market.⁷⁰ Subsequent to the Asian economic crisis came demands for reforms to protect investors, foreign and domestic, in Asian markets, leading to the current focus on corporate governance.⁷¹

II. CORPORATE GOVERNANCE

A. Corporate Governance – The Imperfect Concept

What is corporate governance? This is not a simple question and unfortunately, no definitive answer is possible, as there is no universally accepted definition.⁷² As will be discussed later, this means that it is complicated, if not impossible, to implement law reform in this area because there is no consensus among legal scholars or international institutions as to what has to be done; therefore, it is extremely difficult to draft or review laws or provide focused research.⁷³ This is the insidious element of the requests for law reform in Indonesia in relation to corporate governance. Unlike the International Monetary Fund (IMF) suggesting a change in official interest rates, the reform requests in relation to corporate governance are ambiguous due to the lack of clear legal structure and definition required, and as a consequence, place Indonesia’s

66. *Id.* at 101 (quoting CHRISTOPHER LINGLE, THE RISE AND DECLINE OF THE ASIAN CENTURY 88 (1997)).

67. Loke, *supra* note 8, at 257.

68. *Id.*

69. *Id.*

70. Jayasuriya, *supra* note 51, at 108.

71. See ISKANDER & CHAMLOU, *supra* note 32, at 15, 85-89.

72. Tabalujan, *supra* note 14, at 13.

73. The broad understanding/frameworks describing corporate governance causes difficulty for implementers of law reform. Much of the work on corporate governance fails to provide workable legal definitions, rather opting for ‘frameworks’. See, e.g., ISKANDER & CHAMLOU, *supra* note 32.

leadership in the unenviable position of being told by international institutions that there is a problem without any real solution being offered and no means of review set forth to resolve the issues.⁷⁴ Additionally, Indonesian authorities then face criticism for inactivity or applying unsatisfactory reforms that are not enforced.⁷⁵

A simple and clear definition, without vouching for its universal acceptance, is provided by the leading Australian corporate law textbook, *Ford's Principles of Corporations Law*.⁷⁶ It states that "corporate governance is about the management of business enterprises organized in corporate form, and the mechanisms by which managers are supervised."⁷⁷ After reviewing an assortment of scholarly texts, several rules are commonly included as part of corporate governance law: (1) clear and legally enforceable decision making bodies such as Boards of Supervisors and Boards of Management;⁷⁸ (2) directors duties and liabilities – such as the duty to act in the best interests of the company;⁷⁹ (3) accurate preparation of accounts;⁸⁰ (4) independent audit standards and advisors;⁸¹ (5) voting rules for meetings of a company's board(s) and members;⁸² (6) the preparation of constitutions which provide clear management processes and controls;⁸³ (7) rules against insider trading;⁸⁴ (8) restrictions upon related party transactions;⁸⁵ and (9) disclosure requirements that require the reporting of things such as the composition and practices of audit committees, the appointment of directors (independent and non-executive) and the mandatory notification of majority share holdings.⁸⁶

Bratton and McCahery outlined the elements of the two major types of corporate ownership structures: the Market System and the Blockholder System.⁸⁷ The Market System⁸⁸ involves a form of ownership that is favored in the United

74. Paul Brietzke, *Governance and Companies Law in Indonesia*, 2 AUSTRALIAN JOURNAL OF ASIAN LAW 193, 205 (2000).

75. *Id.* at 195.

76. H.A.J. FORD ET AL., *FORD'S PRINCIPLES OF CORPORATIONS LAW* 173-74 (11th ed. 2003).

77. *Id.* at 173.

78. Clarke, *supra* note 8, at 109.

79. FORD, *supra* note 76, at 604-05.

80. *Id.* at 518-20.

81. *Id.* at 523.

82. *Id.* at 278-81.

83. *Id.* at 178-80.

84. *Id.* at 460-66.

85. FORD, *supra* note 76, at 446-60.

86. Loke, *supra* note 8, at 263.

87. Bratton & McCahery, *supra* note 37, at 218.

88. This type of system has also been called the "outsider" model. Tabalujan, *supra* note 14, at 14-17. It has also been called the "strong managers, weak owners" system. ERIK BERGLOF & ERNST-LUDWIG VON THADDEN, *THE CHANGING CORPORATE GOVERNANCE PARADIGM: IMPLICATIONS FOR TRANSITION AND DEVELOPING COUNTRIES* 22 (William Davidson Inst., Working Paper No. 263, 1999). An additional factor noted by some legal

States, the United Kingdom and Australia.⁸⁹ It is characterized by dispersed equity holdings in companies, investors with diverse share portfolios, and the broad delegation of management powers where ownership and control are separated.⁹⁰ The disadvantages associated with this form of control include: (1) difficulty for investors in monitoring the management and performance of their investment; and (2) management that, through imperfect incentive schemes, may not focus on maximizing returns to shareholders.⁹¹ The advantages with this system include: (1) reduction in shareholder risk through diversification, in conjunction with higher investor returns than in the aforementioned Blockholder system; (2) easier access to corporate finance for companies; (3) commonly more entrepreneurial leadership; and (4) better shareholder liquidity.⁹²

The Blockholder System⁹³ is based on a majority, or near majority, shareholding held by large shareholder blocks.⁹⁴ In some parts of Europe, individuals or wealthy families commonly hold these blocks; however, in Germany and Sweden, banks play a significant role.⁹⁵ In Japan, the blocks are not usually individuals, families or banks; rather, the *Keiretsu* system of blockholding involves shareholders who have a close relationship with the company, such as supplier/customer relationships.⁹⁶ There are disadvantages with this system: (1) the proximity of management and shareholders can create a loss of critical objectivity; (2) shareholders often receive lower returns; (3) relational trading, such as trade between a company and shareholder supplier, is often not at market rates; and (4) insider trading is often a problem because the shareholders have increased access to knowledge which can be misused.⁹⁷ However, there are economic advantages, including close monitoring of management by the large-bloc holders, which can lead to cheap and quick shareholder intervention in case of management failure.⁹⁸

Additionally, there are significant differences between the two models of

scholars is that it usually exists in Common Law Systems. See John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641, 644 (1999).

89. Many other nations use this corporate governance approach. The three listed are leading examples of nations utilising this system.

90. Bratton & McCahery, *supra* note 37, at 222.

91. *Id.* at 222-23.

92. *Id.* at 224.

93. This type of system has also been called the “insider” model. Tabalujan, *supra* note 14, at 14-17. It has also been called the “strong blockholders, weak minorities” system. BERGLOF & VON THADDEN, *supra* note 88, at 22. Commentators have linked this system to countries that have Civil Law Systems. Coffee, *supra* note 88, at 644.

94. Bratton & McCahery, *supra* note 37, at 224-25.

95. *Id.* at 225.

96. This is a system of industrial groups made up of companies who have cross-ownership interests in each other. See *id.* at 226.

97. *Id.* at 226-27.

98. *Id.* at 226.

corporate ownership in relation to their institutional structures.⁹⁹ In the Market System, for instance, there is a single board of directors that provides continuous supervision and management. In contrast, the Blockholder model utilizes a two-tier board structure.¹⁰⁰ For example, in Germany, a Supervisory Board acts in an advisory manner, and beneath it, the Management Board deals with day-to-day management of the company.¹⁰¹

While the two systems differ substantially, there is little evidence showing any competitive advantage between the two.¹⁰² As previously noted, there are definite economic and political undertones to the selection of different systems, identifying different streams of capitalism embedded into the corporate structures selected.¹⁰³ Courchene categorized the Anglo-American system as “individualist capitalism” and the German and Japanese system as “communitarian capitalism.”¹⁰⁴ Individualist capitalism focuses on economic return for the shareholder, and labor is seen merely as a tool for achieving this goal.¹⁰⁵ This is compared with communitarian capitalist systems, where all stakeholders are considered and consulted in decision-making, and labor holds a more protected position; however, returns to shareholders are often lower.¹⁰⁶ This system focuses on social concerns rather than merely profit maximization.¹⁰⁷ The differences in structure translate into real cultural and legal outcomes.¹⁰⁸ For instance, the Japanese lifetime jobs guarantee was used to provide employment security, although it came with a price – if you left your job, you were effectively blacklisted, and it was then difficult to find further employment.¹⁰⁹ Therefore, employees received a protected employment position providing them with financial security and tenure of position, but this was at the expense of losing the flexibility to move between jobs and being able to enforce this as a legal right.¹¹⁰ The protected labor position has not only professional/career outcomes, but legal ramifications; for instance, this lack of individual ability to flexible employment has been argued would be contrary to the U.S. Bill of Rights.¹¹¹

It is important to be cognizant that a problem arises upon using the Market System and Blockholder System research, as they predominantly focus on

99. Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan and the United States*, 102 YALE L.J. 1927, 1928 (1993).

100. *Id.* at 1941.

101. *Id.* at 1941-42.

102. Bratton & McCahery, *supra* note 37, at 228-32.

103. *See generally* Courchene, *supra* note 43.

104. *Id.* at 204.

105. *Id.* at 205.

106. *Id.*

107. *Id.*

108. *Id.* at 205-06.

109. Courchene, *supra* note 43, at 207.

110. *Id.*

111. *Id.*

developed nations, i.e., the United States, the United Kingdom, Germany, and Japan.¹¹² Indonesia and other developing Asian countries struggle with development problems such as questionable judicial structures, under-funded judiciaries and cronyism, problems not as prevalent in the developed nations listed above.¹¹³ Furthermore, the Asian markets have not had a chance to properly mature, which changes the implementation of any form of corporate governance laws.¹¹⁴ Additionally, families are a major influence upon Indonesian and East Asian commercial systems; however, the role of family is significantly underrated in the research noted above.¹¹⁵

The following section investigates the application of corporate governance reform in Indonesia. The two systems, the Market System and the Blockholder System, should be understood as background to the divergent mechanisms that can be applied to corporate governance laws.

B. Indonesian Corporate Governance Laws

As a result of the Asian economic crisis, international institutions have sought reforms to enhance corporate regulatory systems and to promote compliance with them, including corporate governance reforms.¹¹⁶ However, to assume that the application of Anglo-American inspired international governance will be transplantable to Indonesia does not take into account the different legal and cultural foundations.¹¹⁷ The law reform model evolving from this Article has been developed to allow for the consideration of culturally appropriate corporate governance.

The national context of law reform is always complex, especially when considering a country such as Indonesia, which possesses a great diversity of traditions, population groups, and geography.¹¹⁸ It has a population of over 209

112. See generally Bratton & McCahery, *supra* note 37; Roe, *supra* note 99; Coffee, *supra* note 88 (articles focusing on developed nations).

113. Tim Lindsey, *An Overview of Indonesian Law*, in *INDONESIA: LAW AND SOCIETY* 7-8 (Tim Lindsey ed., 1999).

114. Tabalujan, *supra* note 14, at 255; see Benny S. Tabalujan, *Why Indonesian Corporate Governance Failed - Conjectures Concerning Legal Culture*, 15 *COLUM. J. ASIAN L.* 141, 171 (2002).

115. This article does not address in detail the problems of crony capitalism, corruption, and judicial misadventure. See Lindsey, *supra* note 113, at 7-8, for additional discussion of these topics. The problem of crony capitalism, which saw the mingling of strong family connections with the government, is not a uniquely Indonesian or Asian experience despite recent caricatures. This sort of experience can be likened to American rubber barons. Brietzke, *supra* note 74, at 203-04. The role of family in Asian business, however, needs separate, specific investigation. Tabalujan, *supra* note 114, at 149-50.

116. Clarke, *supra* note 48, at 108-09.

117. Tabalujan, *supra* note 114, at 143.

118. Lindsey, *supra* note 113, at 1-2.

million people spread across 17,508 Islands, thirty of which are major Islands.¹¹⁹ The national language is “Bahasa Indonesia” and there are five hundred recognized ethnic groups and a corresponding number of languages and dialects.¹²⁰ Even when attempting to bring these ethnic categories into broader groupings, nineteen primary groups remain.¹²¹

Indonesia has emerged from Dutch and Japanese colonial rule to become a dominant economic and political force in Asia. As such, Indonesian law has been evolving since the country’s independence in 1945.¹²² There has been a concentrated attempt to create a unified Indonesian legal culture.¹²³ For example, in 1960, there was the symbolic replacement of the national symbol of justice from the blindfolded woman with scales to a banyan tree inscribed with the Javanese word *Pengayoman* that means “protection and succor.”¹²⁴ Reviewing Indonesian law also involves understanding the legal relics of Dutch colonial rule, *adat* laws,¹²⁵ Islamic law/influences¹²⁶ and national laws.¹²⁷ Additionally, when considering law reform in Indonesia there must also be an understanding of the competing and sensitive relationship between indigenous Indonesians and minority Chinese groupings,¹²⁸ and all of this must be combined with the desires of international institutions.¹²⁹ This basic outline of the plurality and diversity of Indonesian life with its intricate relationships and cultural demands is, in itself, fertile ground for research when dealing with legal reform.

In order to consider the possibility of reforming corporate governance law in Indonesia, a detailed review of corporate law¹³⁰ should be undertaken. Additionally, the structure of general law in Indonesia must be considered. One problem with the general drafting of Indonesian law is legal over-determination.

119. Dep’t of Foreign Affs., Republic of Indonesia, About Indonesia, at <http://www.deplu.go.id/2003/index.php?content=documents&type=94b839bc96c4bb97a992f4ec002eb6f4&menu=About%20Indonesia&strContentMenu=About%20Indonesia> (last visited Apr. 2, 2004).

120. *Id.*

121. The nineteen major ethnic groups are umbrella groupings for the several hundred recognised ethnic groups. See Lindsey, *supra* note 113, at 2.

122. *Id.*

123. See generally Daniel S. Lev, *The Lady and the Banyan Tree: Civil-Law Change in Indonesia*, 14 AM. J. COMP. L. 282 (1965) (describing the change from Dutch colonial law into Indonesian law).

124. *Id.* at 282.

125. Adat laws are traditional indigenous laws. See Lindsey, *supra* note 113, at 2.

126. M.B. Hooker & Tim Lindsey, *Public Faces of Syariah in Contemporary Indonesia: Towards a National Mazhab?*, 4 AUSTL. J. ASIAN L. 259, 269-82 (2002).

127. Lindsey, *supra* note 113, at 5-9.

128. *Id.* at 2.

129. Clarke, *supra* note 8, at 108-09.

130. The major pieces of legislation that make up Indonesian company law include the Company Law of 1995, the Capital Market Law of 1995, and the Banking Law of 1998. See Tabalujan, *supra* note 14, at 40-55.

Over-determination is a flaw inherited from the Dutch colonial period,¹³¹ where regulations were made in great detail and little customization could be made to contracts.¹³² Consequently, bureaucratic power was strengthened, giving rise to the possibility of corruption.¹³³ The problem of institutionally created corruption was further heightened during the 1980s and 1990s with the rapid deregulation of the economy.¹³⁴ Deregulation was championed as a factor in Indonesia's significant economic success.¹³⁵ However, without appropriate supervision and prudential regimes, problems arose. For instance, banks distributed inappropriate loans or possessed limited capital reserves.¹³⁶

To understand the difficulty faced by the Indonesian government in implementing corporate governance reforms, one must also understand corporate governance's conceptual foundation. A detailed understanding of corporate governance is an illusive activity, as it is a "broad and amorphous concept."¹³⁷ As a response to calls for reform, the Code for Good Corporate Governance¹³⁸ was drafted in Indonesia.¹³⁹ Yet Paul Brietzke felt that "it is not clear what such a code must or even should contain."¹⁴⁰ Corporate governance has such a vague and ambiguous meaning that *The Economist* described it as "don't lie, don't steal, keep your promises, and otherwise build trust and improve your reputation."¹⁴¹ Does this simply mean "be good"? If this is all that the concept means, how can law regulate people being "good"? There needs to be more specificity in order for the concept to have any practical statutory application in Indonesia.

In order to attain a conceptual foundation, the work of Tabalujan, in his doctoral thesis, provides a useful, yet still too broad, analytical framework for the application of corporate governance laws in Indonesia.¹⁴² Tabalujan argues that corporate governance laws should be based upon three criteria: (1) transparency, (2) accountability, and (3) predictability.¹⁴³ *Transparency* involves the ability of shareholders and those participating in the Indonesian market to have access to information regarding a companies' operations and finances, the functioning and interests of company officers, and the workings of decision-making bodies.¹⁴⁴

131. Indonesia was a Dutch colony from the early 19th century until 1945. See Lindsey, *supra* note 113, at 1.

132. Brietzke, *supra* note 74, at 195.

133. *Id.*

134. *Id.*

135. Clarke, *supra* note 8, at 101.

136. Tabalujan, *supra* note 114, at 144.

137. Brietzke, *supra* note 74, at 205.

138. The National Committee on Corporate Governance prepared this document.

139. Tabalujan, *supra* note 14, at 463-91.

140. Brietzke, *supra* note 74, at 205.

141. *Id.* at 206.

142. Tabalujan, *supra* note 14, at 80-84.

143. *Id.* at 80.

144. *Id.* at 93.

While transparency relates to openness, *accountability* relates to responsibility.¹⁴⁵ The market regulator and company shareholders must have recourse “against any improper action of company officers.”¹⁴⁶ *Predictability* relates to the consistency of the enforcement of the law.¹⁴⁷ This requirement focuses on the role of regulators and the judicial system as the institutions that should enforce any corporate governance laws.¹⁴⁸ The importance of consistency with the enforcement of this requirement arises because businesses progress when they are able to predict with a fair degree of certainty institutional responses, and therefore, they are then able to properly coordinate their affairs and manage risk.¹⁴⁹

International institutions have considered the issue of corporate governance seriously since the Asian economic crisis.¹⁵⁰ The International Monetary Fund (IMF) found that corporate governance was an important issue because protection for investors was weak, supervision of company management was poor, and the outside owners had little ability to supervise the operation of companies.¹⁵¹

As a consequence of these perceived deficiencies, international institutions developed corporate governance reform projects. For instance, the World Bank created a framework for corporate governance in its report entitled “*Corporate Governance: A Framework for Implementation*.”¹⁵² Unfortunately, despite this document outlining the *reasons* and *importance* of corporate governance in Asia, there is little substantive guidance.¹⁵³ The World Bank broadens the central themes outlined by Tabalujan by adding a *fairness* requirement – which is aimed at “protecting shareholder rights and ensuring the enforceability of contracts.”¹⁵⁴ This report,¹⁵⁵ once again, highlights the central problem with the current debate regarding law reform in relation to corporate governance.¹⁵⁶ It deals with *good* intentions to assist the economic and legal development of Asia, yet fundamentally remains ambiguous as to the specific requirements of corporate governance and consequently reform is difficult to implement.¹⁵⁷

145. *Id.* at 147.

146. *Id.*

147. *Id.* at 202.

148. Tabalujan, *supra* note 14, at 202-06.

149. *Id.* at 202-03.

150. Loke, *supra* note 8, at 259.

151. ANDREW BERG, THE ASIA CRISIS: CAUSES, POLICY RESPONSES, AND OUTCOMES 9-10 (International Monetary Fund, Working Paper No. 138, 1999), available at <http://www.imf.org/external/pubs/ft/wp/1999/wp99138.pdf>.

152. ISKANDER & CHAMLOU, *supra* note 32.

153. *See generally id.*

154. *Id.* at 19.

155. *See generally id.*

156. *Id.*

157. *Id.*

In the next Section, the model at the heart of this Article will be applied in an effort to outline a possible means for implementing corporate governance law reform in Indonesia. As noted earlier, Tabalujan's work does provide a basic framework for the concept of corporate governance.¹⁵⁸ However, the thesis and his later writings, like the World Bank Report, are unsatisfactory in that they do not provide any mechanism for developing the corporate governance framework into practical law reform.¹⁵⁹ Hopefully, the proposed model will fill the void in this area by providing a practical means to implement change.

III. A CONCEPTUAL FRAMEWORK FOR TRANSPLANTATION – THE ROLE OF LEGAL CULTURE

This Section will progress from background information on globalization, corporate governance reform, and the application of corporate governance in Indonesia to applying the first step of the model based on the creation of a conceptual framework centered on the notion of legal culture.

A. Legal Transplants

The purpose of this section is not to ascertain whether the legal transplantation of corporate governance has been successful in Indonesia; rather, the purpose is to provide the reader with an understanding of the complexity of integrating legal transplants into foreign legal systems. It must be acknowledged that legal transplantation is not a new phenomenon as most law has elements or its entirety emanating from a borrowed source.¹⁶⁰ Most of the transplants stem from lawyers reviewing law from “prestigious” jurisdictions in order to deal with legal issues.¹⁶¹

Legal transplants can be motivated by either internal domestic

158. See Tabalujan, *supra* note 14, at 80-84.

159. These scholarly writings provide the basis for developing law reform proposals, such as corporate governance, through the conceptual framework of legal culture. However, it does not go beyond this to create methodologies from which to give the concept any utility. See generally *id*; see also Tabalujan, *supra* note 114.

160. Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 336 (1996). Alan Watson surveyed this through a historical analysis based on the incorporation of the *Corpus Civil Code* throughout Europe.

161. Wholesale application of Western laws occurred in Eastern European countries during their transition from communism to market-based economies during the last decade. They transplanted many laws from the West in order to implement the market reforms. Additionally, the transplanted laws were considered to have an attached prestige necessary to impress international institutions and foreign investors. See Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 93-98 (1995).

requirements, or, as has been common in Asia, the changes may be instituted after outside pressure has been exerted.¹⁶² The political context of the implementation of new laws has a consequence in determining whether or not they are successfully implemented.¹⁶³ If change is perceived as being forced from outside sources and not possessing domestic benefit or legitimacy, the laws are unlikely to be implemented successfully.¹⁶⁴

Legal transplants are often unsuccessful if external forces, such as international institutions, assume certain institutional, cultural, or political realities that in fact are not present or properly developed; therefore, these laws are often simply ignored or rejected.¹⁶⁵ Despite these inherent problems in law reform, it does not mean that legal transplants cannot be successfully absorbed into developing countries; rather, it involves more than merely changing the words in a statute book.¹⁶⁶ Some legal scholars have argued that the shock caused by the Asian economic crisis may lead Indonesians to change the way that business is undertaken and provide the impetus, and environment, for legal change.¹⁶⁷

The reasons for implementing legal transplants and their success or failure are complex and vary depending upon various factors, such as the developmental status of the nation implementing the legal transplants, the economic incentives and cultural imperatives supporting or detracting from the implementation of the law reforms and whether the reforms were undertaken voluntarily or under duress.¹⁶⁸ Legal transplants that are motivated by international institutions are not always based on apolitical intentions or analyses.¹⁶⁹ Therefore, legal transplantations are often understood as impositions, rather than voluntary acts, and this affects the legislative implementation by national governments.¹⁷⁰

162. Hiscock, *Changing Patterns*, *supra* note 11, at 364.

163. Hiscock, *Remodeling Asian Laws*, *supra* note 11, at 40.

164. *Id.*

165. Gary Goodpaster, *The Rule of Law, Economic Development and Indonesia*, in *INDONESIA: LAW AND SOCIETY*, *supra* note 113, at 21-24.

166. It is important that law reform take into account cultural, political and economic factors when reviewing/evaluating law reform options. The laws need to meet the needs of the recipients of legal transplants and provides them with law reform that meets the needs of their society. *See id.* at 28.

167. *Id.* at 29.

168. *Id.*

169. STIGLITZ, *supra* note 1, at 166-70.

170. An example of the attitude that some international institutions have exhibited can be seen in the infamous photograph of Michel Camdessus, Managing Director of the IMF, and President Soeharto, former President of Indonesia, when they signed the letter of agreement between the IMF and Indonesia to refinance the country after the Asian Economic Crisis. Despite the lack of negotiations underpinning the letter of agreement, what many Indonesians (and outsiders) were upset about was the pose of Camdessus, "standing with a stern face and crossed arms over the seated and humiliated president of Indonesia." This visual image was reminiscent of colonial times. *Id.* at 41.

The politicized manner in which international institutions and arrangements often operate is exemplified in the North American Free Trade Agreement (NAFTA).¹⁷¹ Such agreements are more than just about “free” trade; rather, they create a way for international markets to function and this often involves vast legal reforms for the participants.¹⁷² If NAFTA discussed only free trade, then the document would be pleasantly short; instead, it is over two-hundred pages long. As a requirement of NAFTA, Mexico was required to reform its intellectual property laws.¹⁷³ However, migration law reforms allowing for the free flow of labour between NAFTA’s members was excluded, despite Mexico’s protests.¹⁷⁴ Another example of “ideologically” driven reforms are those proposed by the IMF throughout Asia in the wake of the Asian economic crisis.¹⁷⁵ Joseph Stiglitz asserted that the IMF had an unwavering ideological approach to their policy solutions.¹⁷⁶ Stiglitz argues that the IMF uncritically applies the standard competitive model, a form of market fundamentalism, and as a consequence, often requires reform from countries, such as Indonesia, that do not relate to either stabilising their economic position or protecting foreign investors, but ideologically dictates the type of laws and economic models to be applied.¹⁷⁷

There are many critical appraisals of legal transplantations and the manner in which they have been implemented.¹⁷⁸ Unfortunately, most of the scholarly work is representative of the European experience, focusing on the dispute about the possibility of European harmonization, and this does not specifically refer to legal transplantation in developing countries.¹⁷⁹ This dispute has arisen with the continuing integration of the European Union and the debates regarding the implementation of laws across this developing entity.¹⁸⁰ Nevertheless, they do provide important theoretical guidance as to how legal transplants generally operate. Legal transplants have often been referred to as being easily “rejected”¹⁸¹ or “legal irritants.”¹⁸² The desire for harmonization in Europe has been a major battleground for scholars dealing with the practical

171. David M. Trubek et al., *Symposium: The Future of the Legal Profession: Global Restructuring and the Law: Studies of the Internationalization of Legal-Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 467-470 (1994).

172. *Id.* at 467.

173. *Id.* at 470.

174. *Id.* at 467.

175. STIGLITZ, *supra* note 1, at 89-132.

176. *Id.* at 106-09.

177. *Id.* at 57-58.

178. See Kahn-Freund, *supra* note 27; Pierre Legrand, *On the Unbearable Localness of the Law: Academic Fallacies and Unreasonable Observations*, 1 EUR. REV. PRIVATE L. 61 (2002); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

179. See generally Legrand, *supra* note 179.

180. See generally *id.*

181. Kahn-Freund, *supra* note 27, at 6.

182. Teubner, *supra* note 179, at 12.

application of transplantation.¹⁸³ Some scholars passionately pursue harmonization of laws, while others suggest that there are real cultural and legal differences impeding such convergence.¹⁸⁴ Often, even if countries have the same or similar laws, they are applied differently within each country's legal system.¹⁸⁵ For example, European Union (EU) Directives about the application of the notion of "good faith" in contract law are interpreted very differently by member nations.¹⁸⁶ Some of the directives are simply ignored by the legal fraternity of member states, or worse, a directive is not included in a state's domestic law as required under EU Directives.¹⁸⁷

Otto Kahn-Freund provides an analogy of legal transplantations that compared such transplantations to the surgical process of transplanting an organ.¹⁸⁸ He notes that legal transplants are not mechanical processes, and there is a chance of rejection.¹⁸⁹ In essence, he asserts that legal transplants cannot merely be placed into a recipient country without appropriate diagnosis, surgical procedures, and post-operative care.¹⁹⁰ Therefore, it is important not only to evaluate the merits of the law in isolation, but also to review what impact the law may have on the broader legal system, including whether it is institutionally compatible.¹⁹¹ This would include establishing whether there is a functioning regulator and also if the incentives imbedded into the laws are culturally acceptable.¹⁹²

In his analogy and analysis, Kahn-Freund alludes to Montesquieu's two-century-old analysis of legal transplants that acknowledged several features to be considered when incorporating a legal transplant: (1) environmental criteria – geography, the climate, the fertility of the soil, and the geographic position of a country; (2) social and economic factors - the wealth of the people, the population, and the trades undertaken by the citizens; (3) cultural factors – such as a nation's history and religion; and (4) national characteristics – such as national political traits.¹⁹³ While the indicators may be outdated, for example, agriculture may be less important as a specific ingredient in the analysis of transplants, they do

183. This debate has become personal with scholars being accused of undertaking a conservative agenda and holding nationalist sentiments if they fail to endorse a harmonisation agenda. See Legrand, *supra* note 179, at 66-73.

184. Volkmar Gessner, *Global Legal Interaction and Legal Cultures*. 7 *RATIO JURIS* 132, 136 (1994).

185. See Teubner, *supra* note 179, at 28-31.

186. *Id.* at 30-31.

187. Luke Nottage, Address at the Joint-Seminar of the Contemporary Europe Research Centre, University of Melbourne, and the Institute for Comparative and International Law, University of Melbourne (15 April 2003).

188. Kahn-Freund, *supra* note 27, at 5.

189. *Id.* at 6.

190. *Id.* at 5.

191. *Id.* at 6.

192. *Id.*

193. *Id.* at 7.

provide useful guidelines to consider when undertaking law reform.

Gunther Teubner also provides an enlightening appraisal of legal transplants.¹⁹⁴ Teubner analyzes the issues and problems, or “irritations,” involved in the transplantation of laws and legal concepts.¹⁹⁵ His work relates to the integration of transplanted laws and legal concepts into British law that have Continental origin.¹⁹⁶ The institutional legal structures reflect different legal families, i.e. common law and civil law, and even though European nations are very close politically, culturally, developmentally, and economically, legal transplantation can still cause irritation.¹⁹⁷ Therefore, the logical extension of Teubner’s analysis would reveal more substantial difficulties when laws are transplanted from developed to developing nations, whose political, cultural, developmental, and economic differences are starkly different.

Teubner focuses on the legal concept of good faith.¹⁹⁸ This legal concept was imported from the European Consumer Protection Directive of 1994, which states that behavior will be deemed to be unfair if “contrary to the requirement of good faith, it causes significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer.”¹⁹⁹ As an example of the irritation caused, Teubner noted that British courts have rejected the application of good faith as “unworkable in practice.”²⁰⁰ When dealing with legal transplants, Teubner asserts that the most significant question is whether the new transplant will “interact productively with other elements in the legal organism?”²⁰¹ Teubner specifically uses the words “legal irritants,” rather than “legal transplants,” because he argues that it is false to assume that legal transplants can be surgically grafted into another legal system and “remain identical with itself playing its old role in the new organism.”²⁰² As a consequence, when a law is transplanted, the law will evolve and its “meaning will be reconstructed.”²⁰³

Transplantation causes a series of new and unexpected events. For instance, lawyers are educated within an intellectual legal tradition ingrained in assumptions and practices. Transplantation can confront and challenge this understanding leading to the law either being unused or interpreted very differently than in the donor country. In addition to the internal legal problems inherent in accepting legal transplants, the concept of good faith is particularly problematic because it has been developed in a different economic and business

194. *See generally* Teubner, *supra* note 179.

195. *Id.* at 12.

196. *Id.*

197. *Id.* at 24.

198. *See generally id.*

199. *Id.* at 11.

200. Teubner, *supra* note 179, at 11.

201. *Id.* at 12.

202. *Id.*

203. *Id.*

environment. The concept of good faith flows from the Continental European approach to business that operates on the development of cooperative commercial relationships.²⁰⁴ This means that participants in an economy have different “social expectations” as to the way the parties are meant to interrelate. They do business differently, and, consequently, their expectations from business relationships are not the same.²⁰⁵ As a result, business people and consumers expect their business culture and environment to be mirrored in law.

Teubner suggests that formal rules may be converging, but “the deep structures of the law, legal cultures, legal mentalities, legal epistemologies, and the unconscious of the law as expressed in legal mythologies, remain historically unique and cannot be bridged.”²⁰⁶ Therefore, the transplantation of concepts connected to different modes of doing business will not be adequately managed within the *living law*.

Another significant problem with legal transplants is that often the law that is being transferred is not necessarily fully developed in the countries exporting the laws.²⁰⁷ For instance, a common theme throughout this Article is the vague and ambiguous nature of corporate governance law, which is a concept still being developed in Western countries, as can be seen by the difficulty in finding a universal definition of this concept.²⁰⁸

Despite the difficulties with legal transplantation noted above, there are advocates of the process of legal transplantation who assert that on a pragmatic level it is simpler and more effective to borrow legal structures from others, rather than having to reinvent the wheel.²⁰⁹ Legal transplantation lessens the pain of lengthy and complex law reform programs.²¹⁰ The proponents of codification of European Private Law²¹¹ argue that the differences between the nations are not as profound as suggested, but rather “cultural” differences are merely an excuse or hurdle placed in the path of effecting change. In essence, “culture” is part of the post-modernist trend to assert that everything is relative, and thus as a

204. *See id.* at 25.

205. *Id.* at 26-27.

206. Teubner, *supra* note 179, at 14.

207. Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11, 46 (1969).

208. Tabalujan, *supra* note 114, at 147.

209. *See* Watson, *supra* note 161, at 335; Alan Watson, *From Legal Transplants to Legal Formants*, 43 AM. J. COMP. L. 469 (1995); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995) [hereinafter Ewald, *What Was It Like to Try a Rat?*]; William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995); Ajani, *supra* note 162.

210. Watson, *supra* note 161, at 335.

211. Those supporting harmonization seek uniformity through the codification of European laws, such as European Contract Law Code and the European Civil Code. *See* Legrand, *supra* note 179, at 70.

consequence, legal harmonization will inevitably fail.²¹² Furthermore, an additional benefit of applying legal transplants is that they provide for the perception of legitimacy.²¹³ Gianmaria Ajani, commenting on the transition of Eastern European nations from communist economies to market economies, sees legal transplants as providing technical and political guarantees of strong institutional development that is necessary for foreign donors.²¹⁴

Legal transplantation is possible, however, it is a complex and troublesome activity, which needs to be undertaken with great care and detailed research. As a consequence, it has been noted by Volkmar Gessner that the *rush* towards legal harmonization in Europe avoids the issue of legal and cultural difference between member states that leads them to understand and apply law differently.²¹⁵ Therefore, legal transplantation needs to be undertaken in a manner that accepts and respects legal and cultural differences rather than dismissing this.

B. Legal Culture

The first step in the development of the legal reform model deals with the establishment of a conceptual framework based on legal culture. The aim of the application of this concept is to provide a core mechanism for understanding how a particular legal system functions and measure what the response will be to the application of legal transplants.

The task of understanding legal culture is complex. To begin with, the concept incorporates the ambiguous notion of *culture*. The problem with using the word culture is that it holds no clear definition. Unfortunately, as a consequence of the difficulty of defining “culture,” the word can be misused to excuse or rationalize inappropriate behavior or assertions. For examples, Westerner law reformers often make broad generalizations about a culture of “corruption” in order to divert and justify the failure of Western law or market reform processes in Asia, rather than critically reviewing the reform processes themselves.²¹⁶ Additionally, Asian leaders have used the imaginary notion of “Asian values”²¹⁷ to disguise and justify behavior such as “nepotism, cronyism, corruption by dynastic rulers, and paternalistic industrialists.”²¹⁸

Despite the difficulty of defining culture, the concept does provide a

212. Ugo Mattei, *Hard Code Now!*, 2 GLOBAL JURIST FRONTIERS 1, 13 (2002), at <http://www.bepress.com/gj/frontiers/vol2/iss1/art1/>.

213. Ajani, *supra* note 162, at 115.

214. *Id.* at 107.

215. Gessner, *supra* note 185, at 134-36.

216. Tim Lindsey, *History Always Repeats? Corruption, Culture, and “Asian Values,”* in CORRUPTION IN ASIA: RETHINKING THE GOVERNANCE PARADIGM, *supra* note 51, at 1.

217. “Asian values” is a questionable concept beyond its negative applications, because of the plurality of national, ethnic, tribal, and religious groups in Asia. *Id.* at 8-12.

218. Clarke, *supra* note 8, at 107.

basic framework of meaning for which Clifford Geertz, a leading cultural anthropologist, discussed “culture” as a *grande idée*, something that has an overarching conceptualization.²¹⁹ Culture is not meant to be a term with clear or absolute specification, rather a broad basket of factors impacting upon, and arising from, members of a society, and as a result, the term has caused heated academic debate and scholarly argument amongst anthropologists and sociologists.²²⁰ Geertz defined culture like an animal suspended in a web of significance.²²¹ Culture has also been described as the elements of what one must know and believe in order to be a member of a society.²²² Carol Ember and Melvin Ember, cultural anthropologists, have defined culture as “the set of learned behaviors, beliefs, attitudes, values, or ideals that are characteristic of a particular society.”²²³ Ethnographies²²⁴ provide an important mechanism for understanding the culture of a specific society.²²⁵

Due to the difficulties inherent in defining and providing clear meaning for culture, it is “unpopular with the agencies that drive most inter-jurisdictional law reform in Asia.”²²⁶ Despite the difficulty in determining a conclusive definition of “culture,” the application of the notion of “legal culture” should not be surrendered. Culture provides a framework for recognizing and providing parameters for understanding social, political, economic, and religious influences on legal systems.²²⁷ Lawrence Friedman, who developed the concept of “legal culture” used the notion to provide a contextualized approach to legal analysis.²²⁸ Friedman’s definition mirrors, to a large degree the definition provided by Ember and Ember.²²⁹ He asserted that “by legal culture we mean the ideas, values, attitudes, and opinions people hold, with regard to law and the legal system.”²³⁰ Therefore, the proponents of legal culture include an analysis of the application of law that goes beyond legal rules and principles. Legal researchers need to ascertain how the law impacts upon society, “. . . as a social institution, as interacting behavior, as ritual and symbol, as a reflection of interest group politics, as a form of behavior modification. . . .”²³¹

219. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURE* 3 (1973).

220. R.C. ULIN, *UNDERSTANDING CULTURE: PERSPECTIVES IN ANTHROPOLOGY AND SOCIAL THEORY* 27 (2001).

221. GEERTZ, *supra* note 220, at 5.

222. *Id.* at 11.

223. CAROL EMBER & MELVIN EMBER, *ANTHROPOLOGY* 510 (1990).

224. Ethnographic research involves a scientific description of a society’s customs, traditions, beliefs and attitudes. *Id.* at 311.

225. GEERTZ, *supra* note 220, at 19.

226. Lindsey, *supra* note 217, at 3.

227. GEERTZ, *supra* note 220, at 3-4.

228. Friedman, *supra* note 12, at 117-19.

229. EMBER & EMBER, *supra* note 224, at 510.

230. Friedman, *supra* note 12, at 118.

231. David M. Trubek, *Symposium: Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4, 6 (1990).

Friedman's broad conception of legal culture led him to consider that legal systems have three components: (1) structural ("the moving parts, the machine," such as the courts); (2) substantive (the product of the legal system, such as what judges say); and (3) public attitudes or values (this involves decisions made in a society about when, what, and how institutions of the legal system, such as courts, will be used).²³² Therefore, law and societies interact and react to each other,²³³ and legal reform cannot be corralled into a mythical "legal arena" separate and distinct from broader society.²³⁴

The model proposes to use "legal culture" as the core for interpreting and considering the viability and effectiveness of legal transplants. It will provide the parameters for research and then act as a repository for that research. Consequently, legal cultures should be taken into account when analyzing the impact and content of legal transplants. In order to understand a legal culture, intensive research needs to be undertaken.²³⁵ Friedman specifically noted that he has difficulty with assertions about the operation of a legal system or comparison between legal systems without empirical evidence.²³⁶

The broad perspective of legal culture outlined by Friedman is criticized by scholars such as Alan Watson, who defined legal culture in a very narrow manner, and therefore, implicitly criticized Friedman's expansive vision.²³⁷ Watson asserts that legal culture should be defined as the culture and traditions of lawyers and must be understood within the context of applying law through legal reasoning.²³⁸ This definition is too restrictive and applies law as if it exists within a vacuum. It resists acknowledging societal influences on the law and establishes superficial barriers between the law and general society. Moreover, the definition applies a view of lawyers and their roles that may not be accepted in all societies. For instance, in some societies, the role of lawyers is marginalized, and other experts, such as engineers, undertake functions that are often considered to be the domain of lawyers, such as drafting legislation.²³⁹

Roger Cotterrell, another significant critic of Friedman's concept of legal culture, considers it to be too broad and elastic to have any real application.²⁴⁰ Cotterrell's primary criticism of Friedman lies in his belief that legal culture is "ultimately theoretically incoherent."²⁴¹ Friedman's critics focus on the

232. Friedman, *supra* note 208, at 27-28.

233. *Id.* at 28.

234. *See id.*

235. Nelken, *supra* note 15, at 435.

236. Friedman, *supra* note 208, at 12.

237. Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1152 (1983).

238. Watson, *supra* note 210, at 469-70.

239. Franck, *supra* note 28, at 795.

240. Roger Cotterrell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 15 (David Nelken ed., 1997).

241. *Id.* at 14.

questionable practicality of applying the concept of legal culture.²⁴² Additionally, Cotterrell notes that Friedman's definition has changed over time and remains too imprecise to have any utility.²⁴³ Applying the concept is thorny because it is difficult to know from what perspective legal culture should be reviewed – from a national perspective, from a perspective which highlights the plurality of many nations legal system or within the context of an emergent world legal culture?²⁴⁴ Cotterrell specifically highlights the difficulty when dealing in situations where a plurality of different legal cultures coexist in a nation,²⁴⁵ a problem specifically troublesome for Indonesia. In general, Cotterrell suggests that legal culture, as a notion, is too broad, and as a consequence, the concept means nothing because it attempts to do too much and it is hard to understand what parameters could be placed upon it to create an effective application for law reform.²⁴⁶ It is “like a painter's portrayal of a landscape, rather than a surveyor's measurement of the terrain.”²⁴⁷

Friedman's response makes a profoundly important point: when studying humanities and social sciences, it is intellectually comforting to have a conceptual foundation from which to operate.²⁴⁸ The importance of this broad principle is exemplified when attempting to create a “playing field” from which to work when trying to understand how a legal system functions and what influences impact upon the acceptance or otherwise of legal transplants.²⁴⁹ My inclination is to use the idea of “legal culture” as a theory, as Friedman asserts, from which further work can be undertaken. The ability to utilize the notion of legal culture to facilitate and then harness research is the important purpose of legal culture.²⁵⁰ Legal culture allows research to have broad guidance without setting specific and rigid parameters. This conceptual flexibility will be essential to the process of law reform that applies interdisciplinary research that is untested and will need to be refined and developed. Without a flexible conceptual approach, the model proposed in this Article may not be able to develop properly.

IV. GOING BEYOND THEORY

A. A New Model – Applying a New Paradigm for Legal Transplants

242. *Id.* at 21.

243. *Id.* at 15.

244. *Id.* at 16-17.

245. *Id.* at 16.

246. Cotterrell, *supra* note 240, at 15.

247. *Id.* at 21.

248. Lawrence M. Friedman, *The Concept of Legal Culture: A Reply*, in *COMPARING LEGAL CULTURES*, *supra* note 241, at 33.

249. *Id.* at 35.

250. *Id.*

This section aims to offer a possible mechanism for dealing with the evaluation and preparation of law reforms. The purpose of this Article is to move beyond outlining the problems or theoretical questions facing the developing world when accepting foreign legal transplants and to provide an alternative, practical approach from which legal reforms can be undertaken to aid developing nations in meeting their own domestic needs, while satisfying the demands of international institutions and donor nations. This section focuses on the application of legal culture by accessing the tools of social science and the humanities in a coordinated, interdisciplinary activity.

The law reform model aims to provide a mechanism for evaluating whether to reform a developing nation's law through legal transplants and what form these reforms should take, which also considers the structures and bodies needed to implement and enforce these changes. Unfortunately, there have been only limited attempts by the legal fraternity to develop research tools to evaluate whether or not laws will be rejected from the transplant recipient. It is important to understand that the law reform model proposed is untested, and therefore, these research tools will need to be reassessed throughout the project's implementation.

This Article will only establish a model to deal with the question of corporate governance reform in Indonesia and will not provide any detailed answers or findings. As such, the model should be seen as the basis of an intellectual framework from which developing nations and international institutions can undertake, with the assistance of advanced research bodies, such as universities, a comprehensive and researched law reform process.

In considering how to establish a practical means of law reform, attention should be given to the controversial Law and Development Movement.²⁵¹ This failed 1960's academic movement envisioned law as a tool of development.²⁵² Members of this movement were some of the first proponents of the application of social sciences to law reform, which evolved into the Law and Society Movement.²⁵³ This Article neither endorses nor accepts the very serious problems involved in the Law and Development Movement; rather, it embraces the link between law and social sciences and the impact that this can have on law reform in the developing and developed world.

251. This well-intentioned, but highly controversial, questionable and political movement was undertaken by a small group of American academics who unfortunately focused more on being "legal missionaries" rather than learning from the developing nations to which they were living and working. This has been detailed in many articles and is seen as a major blight upon comparative law. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974); Trubek, *supra* note 9; Friedman, *supra* note 208; John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977).

252. Trubek, *supra* note 9, at 6-10.

253. See Trubek & Galanter, *supra* note 254, at 1070.

The Law and Development movement was problematic in that it was viewed by many people in the developing and developed worlds as an almost imperialistic venture – Americans traveling around the world from place-to-place voluntarily promoting (read *imposing*) laws that mirrored their legal structures without focusing on, or learning about, the different institutional structures and behaviors in the places being affected.²⁵⁴ When undertaking the task of international or domestic law reform, lawyers should not become missionaries with assumptions that their legal system is superior and, therefore, be blinded to the possibility that legal systems, other than their own, have merit or are a more appropriate fit for a particular nation's circumstances and stage of development.²⁵⁵ The problem with assumptions is that they reduce critical thought on the part of the law reformer. The proposed model involves not just the application of a process, but also necessitates a change in the mode of activity of most Western lawyers. It requires an attitudinal change, challenging them to embark on law reform without preconceived ideas²⁵⁶ or ethnocentric focuses.²⁵⁷

In order to progress, lawyers will have to abandon their traditional reticence to interact with the social sciences and humanities.²⁵⁸ This is a difficult challenge and will face resistance from many traditional legal scholars, such as Alan Watson, who strongly maintains the legal tradition of a retreat to legal text.²⁵⁹ This Article recommends combining the application of traditional legal reasoning and textual study with interdisciplinary research. As a consequence of this more complex form of legal reform, a “one-model-fits-all” approach to changes in laws cannot exist. This moves the focus from *globalization* to *glocalization*, where global influences accept and integrate “local culture without overwhelming it.”²⁶⁰ There can be a compromise between nations taking part in the globalized economy and local societal interests and forms of legal culture, but this compromise requires international institutions to be clearer in what they actually need in relation to a country's legal architecture while allowing nations to meet these expectations with indigenous responses to law reform.

Interdisciplinary research incorporates social sciences and humanities into the analysis of legal reform, such as history, politics, economics, philosophy, anthropology, and sociology.²⁶¹ Boundaries will need to be established to coordinate their application and analysis, so that law reform outcomes can be achieved.

Within the social sciences, there are two major types of research methods – quantitative and qualitative. Quantitative research focuses on data collection and

254. Trubek, *supra* note 232, at 7-10, 23-24.

255. Friedman, *supra* note 208, at 11-12.

256. Franck, *supra* note 28, at 782-83.

257. Trubek, *supra* note 9, at 16.

258. Friedman, *supra* note 208, at 12-13.

259. See Watson, *supra* note 210; Watson, *supra* note 238.

260. Tabalujan, *supra* note 114, at 169.

261. Friedman, *supra* note 208, at 53-54.

its statistical analysis, while qualitative research deals with a systematic analysis of personal experience.²⁶² It has been suggested that there is too much emphasis in legal research on “anecdotal” understandings and that this can lead to oversimplification and stereotyping.²⁶³ However, “anecdotal” research, if used carefully, provides a personal perspective and view of the world that researchers may need to comprehensively and realistically understand the research results that they are reviewing.

Therefore, the model attempts to integrate the social sciences and humanities into the process of law reform in a systematic manner, and, to achieve this, I have adapted the approach that John Merryman first espoused in the late 1970s. Merryman argued that law reform would only be able to assist developing countries if a more complex methodology would be applied.²⁶⁴ This would involve a two-step process: (1) adoption of a theory-based research approach, and (2) the utilization of quantitative and qualitative research. In relations to the first step Merryman suggested that U.S. lawyers,²⁶⁵ with their common law tradition, have impatience with theory, which is unlike Continental civil law lawyers/legal scholars who have traditionally engaged comprehensively with theory.²⁶⁶ However, the importance of theory is that it can assist with developing effective and focused research programs.²⁶⁷ The second step promotes the application of quantitative and qualitative research into the law reform process prefaced upon the theoretical paradigm adopted.²⁶⁸

This two-step approach provides the starting point for the model and introduces the connection between theory and interdisciplinary research into law reform. However, the model outlined in this article adds an intermediate step adopting an approach that had been proposed by Thomas Franck.²⁶⁹ The role of this intermediate step, the establishment of core parameters, is to clarify the problems and/or needs that are motivating the desire for legal transplants and focuses the review of the current domestic laws of the place being considered for law reform to evaluate their efficacy.²⁷⁰ This process will preempt and guide the research to be undertaken and ensure that the researcher does not ignore indigenous legal structures. Franck suggested that the following questions needed to be addressed: (1) What is the indigenous law? (written and applied); (2) What are the laws designed to accomplish?; (3) What is it accomplishing in practice?;

262. THOMAS SULLIVAN, APPLIED SOCIOLOGY: RESEARCH AND CRITICAL THINKING 35-36 (1992).

263. Nelken, *supra* note 15, at 435.

264. Merryman, *supra* note 254, at 475.

265. This principle can be extended to Australian lawyers.

266. Merryman, *supra* note 254, at 478.

267. *Id.* at 475.

268. *Id.*

269. Franck, *supra* note 28.

270. *See id.* at 786-87.

(4) What ought it accomplish?; and (5) How could the law best be reformed?²⁷¹

This intermediate step provides an ideal opportunity for international institutions to enter in an open and developed dialogue with Asian governments about their concerns and what priorities/issues they require to be dealt with in relation to law reform before they would be comfortable with the provision of private or public finances or foreign aid. This is the opportunity to clarify what are the inadequacies of the current legislation and what reforms could remedy these problems.

B. The Application of Interdisciplinary Study

The third step in this model proposes that in development projects there needs to be an interdisciplinary approach combining legal analysis with the tools of social sciences and humanities. This is no simple task as the coordination and utilization of this research is a massive venture.²⁷² Scholars involved in this process must be cautious of being negatively perceived or unwelcome as foreign “imperialists.”²⁷³ Therefore, it is important to cautiously select projects ensuring that the composition of teams is multinational. The project selection criteria should ensure that projects are chosen on the basis that they can involve appropriate people from the target legal culture and have the ability to interact broadly with the recipient nation’s legal and political establishments.²⁷⁴

The interdisciplinary approach adopted in this Article challenges traditional legal education that is based almost solely on casebooks and legal analysis.²⁷⁵ If this approach is accepted, it may assist law graduates in understanding the practical realities of the laws that they will apply once in practice.²⁷⁶ Globalization requires more urbane, cosmopolitan thinkers who have a broad range of intellectual tools and experiences.²⁷⁷ The review of law is more complex than merely analyzing internal legal reasoning and, therefore, such a limited approach is inadequate.²⁷⁸

This model for preparation, and review, of legal reform should form the basis of further theoretical, and, hopefully practical, investigation. It requires law reform to venture bravely in a new direction, that is, enter into the collaborative

271. *Id.* at 787.

272. See David M. Trubek & Sheldon Jay Plager, *The Place of Law and Social Science in the Structure of Legal Education*, 35 J. LEGAL EDUC. 483, 484 (1985).

273. Franck, *supra* note 28, at 769-70.

274. *Id.* at 800-01.

275. Lawrence M. Friedman, *Taking Law and Society Seriously*, 74 CHI.-KENT L. REV. 529, 539 (1999).

276. *Id.* at 540.

277. See Ugo Mattei, *Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction*, 50 AM. J. COMP. L. 87, 99 (2002).

278. See Lewis A. Kornhauser, *Symposium: The Path of the Law Today: A World Apart? An Essay on the Autonomy of the Law*, 78 B.U. L. REV. 747, 772 (1998).

process with the social sciences and humanities. How this relationship may work requires further discussion. Interdisciplinary review has three points of intervention: (1) prior to drafting the proposed laws (to provide preliminary guidance); (2) during the drafting of the new laws; and (3) upon a law's enactment in order to ascertain any deficiencies and construct any reforms to ensure the legal transplant's efficacy. The following are broad applications of various social sciences and humanities to this project. This is not a comprehensive catalogue, but rather indicative of the roles that different academic disciplines may play in the proposed model.²⁷⁹

Anthropological studies are important to provide data and focus on culture and the way in which it forms a web of significance for the members of a society.²⁸⁰ It is based on ethnographic studies that involve applying a "thick description"²⁸¹ of what is going on in society and motivating the behavior of particular members.²⁸² It is not a scientific exercise, and, as Geertz has explained, cultural analysis is a process of educated deduction and should be considered as such.²⁸³

Anthropology provides background to the traditions and customs of a society and allows a researcher to attain a sense of the "national character(s)."²⁸⁴ This is because one of the key aims of anthropologists is to understand "customary ways of thinking and acting."²⁸⁵ Anthropology can assist in reviewing traditional and modern leadership structures, traditional dispute resolution mechanisms, and ascertain who provides leadership in relation to social regulation.

Sociology is a social science that establishes trends in relation to the behavior of people and societies as influenced by groups, social movements, and other social factors.²⁸⁶ Sociologists develop hypotheses to understand and explain social behavior and the functioning of society.²⁸⁷

It must be acknowledged that there may be a conflict between quantitative analysis that examines empirical trends and ethnographic phenomenology that emphasizes individual experience. This is an example of the

279. Further discussion would be necessary to fully determine and clarify the application of the different disciplines.

280. GEERTZ, *supra* note 220, at 5.

281. *Id.* at 3.

282. *Id.* at 11.

283. *Id.* at 20.

284. Society for the Psychological Study of Social Issues, *Morale and National Character*, in GREGORY BATESON, STEPS TO AN ECOLOGY OF MIND: COLLECTED ESSAYS IN ANTHROPOLOGY, PSYCHIATRY, EVOLUTION AND EPISTEMOLOGY 88-106 (Robert B. Edgerton & L.L. Langness, eds., 1972).

285. EMBER & EMBER, *supra* note 224, at 7.

286. SULLIVAN, *supra* note 265, at 3-4.

287. RUTH A. WALLACE & ALISON WOLF, CONTEMPORARY SOCIOLOGICAL THEORY 3 (1999).

academic conflict between competing schools of thought that emphasize different techniques and priorities when attempting to understand human experience. This tension is faced by both anthropological and sociological researchers and consequently will need to be navigated carefully. However, there should be no real reason for sustained conflict on this point as they are both merely tools of social understanding, and an ethnographic approach can give personalized meaning to the trends that data reveals, thus being a complimentary, rather than competitive technique.²⁸⁸

Political science can be used to evaluate whether political interests may affect the transplantation of particular laws by evaluating how powerful interests would be affected by the changes and how these elites have traditionally responded to threats to their power and authority. Politics is about power, and the laws of a nation reflects this. Therefore, when changing the laws, the power balance can change, and this needs to be considered in relation to the implementation or frustration of legal transplants.²⁸⁹

The benefit of using *historical review* is that it assesses not only when laws changed and how they changed, but also the reasons why they did not change. History gives scholars the ability to comprehend historical developments and attempt to learn lessons about legal change and progress in a given society over a longer period of time.²⁹⁰

It would be irresponsible to undertake law reform without evaluating *economic implications*, including an evaluation of the economic framework of a nation and the incentives that operate to motivate people. This will assist in framing laws, understanding the implementation of laws, and calculating the potential economic cost of the reforms.

As a cautionary note, the use of economics in modeling reform processes should not be used to further value-based assessments. For example, the Law and Economics Movement has been accused of bias by some leading European scholars in relation to their push towards a U.S.-style harmonization of laws, such as the Restatements of European Contract Law.²⁹¹ This criticism does not discredit the use of economics but does indicate that economic influences may not be as objective as presumed. The application of economic assumptions is clearly exposed by leading comparative corporate governance scholars who critically assess those who promote the American model of corporate ownership as the evolutionary outcome of capitalism without any clear or comprehensive economic data to support their assertions.²⁹²

288. Michael Salter. *A Dialectic Despite Itself: Overcoming the Phenomenology of Legal Culture*, 4 SOC. & LEGAL STUD. 453, 467 (1995).

289. Friedman, *supra* note 12, at 122-23.

290. Watson, *supra* note 238, at 1122-26.

291. Ugo Mattei & Alberto Monti, *Comparative Law & Economics: Borrowing and Resistance*, 1 GLOBAL JURIST FRONTIERS 1, 12-18 (2001), at <http://www.bepress.com/gj/frontiers/vol1/iss2/art5>.

292. *See generally* Bratton & McCahery, *supra* note 37; Roe, *supra* note 99, at 1995;

Scholars, such as Lewis Kornhauser, have suggested that analyzing the application and efficacy of laws requires the use of *philosophy*.²⁹³ This raises many competing positive and negative thoughts. It is beneficial to review a target legal culture by reviewing the ideas and concepts that underlie it. However, scholars such as Friedman have called for more practical research that focuses less on theorization.²⁹⁴

Ideas and concepts are necessary components of understanding what drives individuals within a society. Therefore, *philosophical research and understanding* is important to ensure that the ideas of a society are placed into the law reform formula. This can be done without sacrificing the quality of the quantitative and qualitative research being undertaken. Additionally, philosophy is important to assist lawyers cooperating across cultural borders. If lawyers are cognizant of other lawyers' ideas and concepts, this knowledge will assist them in communicating effectively. This team may also deal with ethical concerns related to the law reform process and the laws to be implemented. Though law is not philosophy, the tools of philosophy can be used to understand the reasons and justifications that underlie legal rules.²⁹⁵

C. Cautionary Note

All of the foregoing studies and law reform initiatives cannot be done in isolation. The reform should involve broad consultation within the legal profession, allied professionals, and also the general community. Change cannot be a top-down dictation; rather, change needs support from those who will be intricately involved with the outcomes of law reform, such as business people, lawyers, judges, accountants, and auditors. Therefore, they, and the broader community, must be consulted. Mary Hiscock asserts that top-down dictation is headed towards failure, as exemplified by the Multilateral Agreement on Investment (MAI).²⁹⁶ The MAI may have been an important tool in cross-border investment; however, Hiscock suggests an enormous backlash accrued because people from the developed and developing world felt that they would be affected negatively and that the process was not inclusive and had been dominated by an outside elite. In essence, people must feel part of the process of change.²⁹⁷

The role of consultation is crucial to successful law reform. Therefore, consultation could be considered the fourth step of the model. However, consultation is culturally sensitive. As a consequence, to provide a structural

Coffee, *supra* note 88.

293. *See generally* Kornhauser, *supra* note 281.

294. Friedman, *supra* note 11, at 129-30.

295. Ewald, *What was it like to try a Rat?*, *supra* note 210, at 1947.

296. This was an international agreement modelled on the GATT trade agreement that was to allow for a liberalisation of international investment. *See* Hiscock, *Remodeling Asian Laws*, *supra* note 11, at 38-39.

297. *Id.* at 38-39.

framework for doing this may ignore local norms and political traditions. As a result, it has been omitted from the model, but should be implied into the research stage.

Once research has been concluded and laws have been developed, education is vital so that those who will implement and be required to adhere to the new laws understand the changes. Not only is general education required, but also changes must be accompanied by specific training of people who will implement and enforce the reformed laws, ensuring they have appropriate skills to satisfactorily apply the changes.²⁹⁸

V. APPLICATION OF THE MODEL

A. Case Study – Corporate Governance Reform in Indonesia

The law reform model being proposed in this Article incorporates a complex process. The model presented, and its comprehensive practical application, could be reduced if the available information (such as diagnostic analysis of a nation's legal infrastructure) and the resources available are already extensive. The detail and extent to which the project will be undertaken should be established within the early stages of the project. For the purposes of this Article, I will outline a comprehensive approach, which may, if such a project is undertaken, utilize a more limited/compressed strategy. The information about corporate governance in Indonesia is more comprehensive, for instance, than that available on Laos, but this may not always be the case.

When applying the model to corporate governance in Indonesia, it will be necessary to have clear project management. This will be combined with an integration of research streams and a detailed collaboration between research centers, international institutions, and the Indonesian Government. This case study of corporate governance in Indonesia will exhibit the manner in which the model will provide a focused mechanism for law reform in the developing world.

The proposal is a resource-intensive project and will, as a consequence, have funding implications. The case study encompasses the practical administrative issues and research tasks that will need to be undertaken to successfully implement the model. The case study provides a “best-case” scenario that will deal with a project receiving optimal financial, political, and administrative support from an international institution and the Indonesian Government.

298. *Id.* at 37.

1. Coordination of the Project

a. Organizations Involved

This research project requires strong administrative arrangements and coordination by the key stakeholders – the Indonesian Government²⁹⁹ (the departments and agencies having direct involvement include the Office of the President of Indonesia, the Attorney General's Office, the Justice Department, Bank Indonesia and Bapepam³⁰⁰), a leading international institution (the designated institution – the World Bank), and a research center (the designated institution – an eminent Faculty of Law with specialized centers of learning and scholarship focusing on Asia³⁰¹).

b. Coordinating Committee

To guide this project, a supervising committee will be established with representatives of all the stakeholders. The Committee's Chairperson is to be designated by the Indonesian government and the two Deputy Chairpersons are to be designated by the World Bank and the eminent Faculty of Law project team. The project team will be based at the designated research center and will coordinate the research and preparation of the final report and recommendations.

c. The Project Team

The project will require administrative support, office facilities, and academic resources. The team needs to be based at the tertiary education institution in order to have easy access to these resources. For this project, an ideal setting might be the School of Law at the University of Melbourne.³⁰² There

299. The role of the Indonesian government will be as broad as possible. It will be a 'whole' of government approach rather than limited to economic or legal agencies such as the Bank Indonesia or the Attorney General's Office. This is based on an approach that makes the consultation process as broad and inclusive as possible. The World Bank has found that the development of a strong whole of government approach is essential to economic development. See STIGLITZ, *supra* note 1, at 241-42.

300. The Capital Market Supervisory Board.

301. Such an institution could be the University of Melbourne, Faculty of Law because it has a designated *Asian Law Centre* with existing strength and depth in research into Asian Law. Another research institution should be twinned with the Asian Law Centre – an Indonesia tertiary institution or research centre (preferably this would be nominated by the Indonesian Government). There are alternative institutions which would be appropriate, such as the Centre for Asia-Pacific Initiatives at the University of Victoria, British Columbia, Canada; the Centre for South East Asian Law at the Northern Territory University and the Centre for Asia-Pacific Law at the University of Sydney.

302. This tertiary education institution has a large focus upon Indonesian studies/law (through Asialink and the Asian Law Centre) and is located geographically close to

will be an Administrative Secretariat to coordinate the administrative requirements of the project team. The other academic teams, i.e., the Anthropology and Sociology Team, the Political Science Team, the History Team, the Economics Team, and the Philosophy Team, will be based at their respective faculties in the University.

The staffing requirements for the project team and the other teams, both academic and administrative, will need to be finalized after budget and project discussions in the Supervising Committee. The selections of the academic members for the research teams are significant and needs to balance foreign and Indonesian experts. Additionally, translators would be hired to support foreign experts undertaking fieldwork in Indonesia and translation from Bahasa Indonesian to English, and other languages, if necessary, of documents and texts relevant to the research project. Translators will also be needed to translate material from English to Bahasa Indonesian.

d. Budget

The project requires secured multi-year funding to ensure that staffing levels, administrative resources, and research subsidies are at appropriate levels to facilitate the aims of the project and properly complete the law reform process. This funding will allow for appropriate research and consultation periods to be undertaken.

e. Duration

The supervisory committee will establish a detailed clear timetable prior to the commencement of the project. It is suggested that this project will take place over five years and be divided into clear phases/stages. A clear timeframe will need to be established and agreed upon between the stakeholders prior to the commencement of the project.³⁰³

Indonesia (it is six hours flight to Jakarta).

303. Below is a suggested timetable. The periods outlined provide for appropriate times to establish and manage the project administratively, whilst undertaking the necessary research, formulation of recommendations and their implementation. Of course the breadth of the final terms of reference for the reform process will dictate the final project timetable and there may be amendments in relation to how the laws will be implemented to allow for the Indonesian legislative schedule and bureaucratic requirements.

STAGE	WORK UNDERTAKEN	PERIOD
Stage 1	Organizing the project's administrative infrastructure and clarification of the terms of reference	3 months

2. Preliminary Research Priorities

The supervisory committee will clarify the terms of reference for the law reform process, and this will be the basis of establishing the research priorities. Such priorities include considering any specific problems or interests that require protection, such as the rights of minority shareholders, capital requirements for banks, the clarification of directors duties, and any institutional reforms, such as judicial reforms, the creation of a securities register or the role of market regulators. The project team's activities will flow from the terms of reference as this will be the basis of their development of research priorities and guide the development of a protocol to monitor the project's researchers.³⁰⁴ The project team's initial task will be to survey Indonesian Company and Corporate Governance laws, regulations, and codes. Any deficiencies or problems with the laws, substantively or in their drafting, will be identified.

3. Research Tasks

Below is an outline of the research activities of the different academic teams. Much of the detail in relation to the tasks, such as the areas of inquiry and research methodologies, will have to be finalized during the preliminary stages of the project in order to best utilize the available information, the projects terms of

Stage 2	Preliminary research work and establishment of the project team and academic teams	3 months
Stage 3	Research and consultation period*	24 months
Stage 4	Preparation of research report, recommendations & drafting of amendments to Indonesian law	12 months
	Research phase:	3 years & 6 months
Stage 5	Enactment of law**	24 months
	Total duration:	5 years & 6 months

* Training of Indonesian officials involved in the administration of the proposed new laws will begin in Indonesia or offshore during this stage. The supervisory committee three months into this period, on the advice of the project team, will decide upon the type and place of training to be undertaken.

** This will include the legislation and regulations being enacted and the establishment of infrastructure necessary to facilitate the laws being properly instituted, such as the creation of new regulatory bodies.

304. The monitoring of the research teams will include having monthly meetings, the receipt of quarterly reports from all the groups, and informal meetings focused on upcoming research projects. Information about the supervision of research will be communicated to the stakeholders in the supervisory committee to ensure their satisfaction with the projects research and general progress.

reference, and budgetary constraints.

The researchers are to be instructed to be sensitive when undertaking their research and recognize the pluralism of Indonesian society. Additionally, all the teams will need to incorporate Indonesian lawyers and academics.

a. The Legal Team

This team will act as the project team ensuring that research is undertaken and the results collated. Lawyers will staff this team; however, there will also be academic members who specialize in quantitative and qualitative research methods who will liaise with the other project teams. The research focus of this team will include: (1) an analysis of legislation, regulation and legal texts in relation to Indonesian company law, comparative corporate governance, and Indonesian legal theory; (2) reviewing the Indonesian legal profession's traditions and intellectual background; (3) reviewing the relationship between the Indonesian judiciary, the legal profession, and the business community; (4) reviewing Indonesian lawyers' perceptions as to the application of corporate governance reforms; (5) clarifying the role lawyers play in the commercial life of Indonesia; and (6) evaluating judicial and market regulatory bodies and their efficacy in Indonesia.

A strong focus of this team will be textually based research; however, qualitative and quantitative research into the Indonesian legal system may need to be undertaken. In the discussions with the legal profession, an analysis of the training requirements of the profession should be undertaken to ensure that local lawyers can meet the requirements of implementing the new legislation.

An additional focus of this team will be to liaise with the Indonesian Government, the World Bank, and development agencies regarding their issues or concerns with the research being undertaken and the proposed reforms.

b. The Anthropology and Sociology Team

These two academic teams have been combined because the preparation of their research and results are highly interrelated. The precise relationship between the disciplines would be delineated in discussions between the anthropological and sociological coordinators. This team will focus on understanding, from empirical data (using techniques such as large-sample surveys) and ethnographic research, the behavioral and traditional factors that would assist or undermine any legal transplants. The preliminary research will involve a broad inquiry into the plurality of Indonesian communities, social forces, and traditional groupings.³⁰⁵ Additionally, the team will attempt to understand Indonesian conceptions of *doing* business and review variations to this across the archipelago.

305. See discussion *supra* Part II.B.

Specific research will also be undertaken into: (1) the role of family in societal and business terms; (2) traditional forms of communal leadership; (3) traditional business relationships; (4) traditional dispute resolution methods and the acceptance or otherwise of more “modern” techniques; (5) traditional understandings of law and the acceptance or otherwise of “modern” laws; and (6) modes of interaction between different ethnic and religious communities. The research techniques used will be decided during Stage Two of the research project.

c. The Political Science Team

This team’s primary function will be to survey the current political forces in Indonesia and how they react to change. They will then review whether these political forces would accept legal transplants and develop strategies to deal with any negative reactions. The research methods to be applied by this team will be decided after they have completed an initial review of their research program.

d. The History Team

This team will focus on developing a historical understanding of the development of Indonesian law and Indonesia’s transition from colonial entity to nationhood. This research process will be textually based; however, oral histories may be used if the team believes that this will be beneficial.

e. The Economics Team

The researchers involved with this team will prepare economic and financial models and collect empirical data on three central issues: (1) the costs of implementing law reform – such as the enactment of legislation, the creation or reform of government institutions (such as the creation or restructuring of market regulators), increased enforcement costs, and educational campaigns; (2) the economic incentives that will be affected by the changes and the creation of replacement incentives necessary for business to accept the reforms; and (3) the impact on the Indonesian market and economy of these law reforms.

An additional focus of this team will be to liaise with the Indonesian business community in relation to their issues or concerns with the proposed reforms.

f. The Philosophy Team

The philosophy team’s central focus will be to attain an understanding of the ideas and concepts underlying the actions of the major participants in the Indonesian market and law reform process. Understanding the ideas and concepts motivating actions provides important background when attempting to understand

law and the legal system. The research methods to be applied by this team will be developed after the members have completed an initial review of their research program.

4. Processing of Results

The project team will be responsible for compiling and preparing a final report and recommendations in conjunction with all of the academic teams. The report will then be submitted to the supervisory committee. At the conclusion of the process, if necessary, the project team will also prepare draft legislation with the assistance of legislative drafters from Indonesia. The compilation of the final report would be akin to a major scholarly undertaking such as a doctoral dissertation. The supervisory committee will provide the parameters and structure for the final report during Stage Three.

VI. CONCLUSION

This Article's aim has been to delineate and bring to the attention of legal scholars the possibilities for applying interdisciplinary research to law reform. The model's importance is that it may allow developing nations to create strategies in their attempt to mediate a globalized economic environment. It accomplishes this by ensuring that a developing nation's domestic structures meet *their* own needs and purposes, and, at the same time, *interlock* with international frameworks. The model integrates the legal tradition of rigorous textual analysis; however, it is fortified through the application of the social sciences and humanities.

The model of law reform proposed will provide the basis for foreign expertise to assist developing nations in reforming their legal systems. The changes to the legal architecture of developing nations should be a priority for international institutions, such as the World Bank, because appropriate law reform could provide institutional support for efforts to create economic stability, reduce poverty, and promote social justice.³⁰⁶

The model is a starting point for further discussion and practical application. Imbedded into the model is a recognition that the processes and structures noted in this article would be expected to evolve during the research process. The proposed approach will not only require an attitudinal change from members of the international community, but also will require lawyers to come to terms with interdisciplinary research and move beyond law reform solutions that merely export laws from one country to another without a complex understanding of the intellectual and cultural schisms with which they are dealing. The approach

306. STIGLITZ, *supra* note 1, at xv.

adopted reflects the Law and Society Movement³⁰⁷ that espouses the interconnection between law and societal forces. If the changes are embraced, this will also require law schools in developed countries to consider whether or not their curricula meet the demands of a more complex domestic and international law reform environment.³⁰⁸

There are many societal forces and intellectual traditions that impact upon the law and these cannot be ignored in law reform. Let the debate begin!



307. This movement has been discussed throughout this paper. The author considers that it provides an opportunity to enhance legal analysis through providing a more comprehensive and complete understanding of the environment in which the law operates. See Trubek, *supra* note 9; Trubek, *supra* note 232; Friedman, *supra* note 208; Friedman, *supra* note 278.

308. Vivian Grosswald Curran, *Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives*, 46 AM. J. COMP. L. 657, 659 (1998).