Post-Cold War implications on Comparative Law: the misguided enthusiasm for legal transplants and its effects on Latin America

Walid Tijerina Sepúlveda
PhD Student, University of York
E-mail: wt608@york.ac.uk

Paper presented at the ECPR’s Graduate Student Conference 3-5 July 2014, Innsbruck

Abstract

The collapse of the state-controlled economies in the Soviet Union and Eastern Europe led to an eventual resurgence of the "law and development” movement. This movement placed its main goals and expectations on the use (or abuse) of legal transplants to implement what seemed the only order that should prevail: free-markets and deregulation as driving forces of economies throughout the world. In Latin America, this “transplant” enthusiasm generated a forced and precipitated introduction to a global competitive economy which mostly resulted in backlashes and what economists and social scientists called a “showcase modernity”. Thus, the main goals of this paper will be to give an integrated perspective on the implications that the end of the Cold War had on Latin America’s development, why the “transplant” efforts failed, and what is still pending in Latin America’s countries to benefit from this experience.
I. Introduction

History is full of ghosts. And just when the world was considering on shutting the door on the Cold War through the 25 anniversary of the fall of the Berlin Wall, its ghost, memory or revival came back to haunt and shake the international landscape with renewed frictions between the United States and Russia. Few could’ve foreseen that an upheaval in Ukraine to renew its government would represent a geographic redrawing of Eastern borders.

Now we have sunk ourselves again amidst uncertainties; amidst international relations bridged by tensions and eventual dubitative actions. The Cold War, which spanned for approximately fifty years, left scars that are still throbbing. One of those scars, apparently, was far from healed: the voluble relationship between United States and Russia.

Even more, beyond the lime lights or center stage, there were whole countries and regions who had to suffer the backlashes of the Cold War frictions: divisions between countries (such as Germany and Korea), along with regions who had to subject their wills to circumstances which were completely beside them (being the case of Latin America).

During the exhaustive Cold War period, United States’ mandatories dwelled on influencing their Latin American neighbors’ political regimes in an effort to sum more capitalist governments to an ongoing commercial and international trade network. The United States were well aware that their hegemony or dominant position in a global scale was highly dependent on open markets and free trade amongst the global community.

In the words of a US official, ““The capitalist system is essentially an international system,” and “if it cannot function internationally, it will break down completely”” (Lafeber 2002, p. 10). The open market system of the US needed thus a reciprocity or net of countries willing to exchange goods and commodities. And since the end of World War II, it was quite clear that the British were no longer the frontrunners of
free trade; now, the US was clearly ahead based on their innovative, and time and work efficient industries.

Moreover, the European countries (specially Great Britain and France) had lost their competitive edge due to the “war-torn” circumstances of their countries; it was clear to Churchill and De Gaulle that they could no longer compete as equals in the free market against the US, but their rather preferred protectionist paths were to be claudicated by their monetary needs for reconstruction: a leverage set forth by the US through the Bretton Woods institutions of 1945 –the World Bank (responsible for reconstruction loans) and the International Monetary Fund (responsible of redirecting loans towards financial stability) (Lafeber 2002, p. 12). Through these monetary means, US was able to secure the openness of the European market. Russia, nonetheless, would prove to be a much harder fish to rail –or eventually, a lost fish that would jumpstart the beginning of the Cold War.

But, as the saying goes, practice makes perfect. And almost fifty years later, the same leverage of monetary loans would be used with some rather promising, though elusive fish: Latin America. In a somewhat parallel case, the US would lure Latin American countries and their monetary needs through the same Bretton Woods institutions. With the continuing debacle of the communist bloc near the end of the Cold War, the US capitalist stance was further legitimized in their view; now, the pending step was to keep constructing and growing the capitalist fields –their free-market capitalism had to work, quintessentially and stubbornly, on an international scale.

II. What about Latin America’s “golden years”?

Before the end of the Cold War, and before neoliberalism grew rampant and inflexible throughout Latin America, there were golden years of growth and progress. At the start of the past century, notwithstanding, Latin America had been characterized for its ardent attitude towards change: when dealing with changes or
transformations, in either reformation or revolution, the Latin American countries seemed to grow fond of the latter in an effort to rid themselves once and for all of their colonial ancestors’ traits or regimes. This ardent attitude ended up configuring Latin America as a region characterized by authoritarian regimes instituted after civil wars or revolutions.

These authoritarian leaders seemed to postpone democracies, respect of oppositions or tolerance towards expression or speech in order to consolidate a firmer integration of a fairly infant national culture and political system. The two “poster-children” of the emblematic and authoritarian regimes throughout the region would be impersonated through two of the region’s bigger countries: Brazil and Mexico, two countries that would try to build their nation’s future on views of long term growth—and, likewise, long term control of the political atmosphere.

In the Brazilian case, barely entering the 1930’s, a disgruntled loser of a doubtful election, Getulio Vargas, would almost singlehandedly trigger a change of political waves in his country. After his presidential election loss, he would organize an alliance among leaders of provinces and municipalities to forge the “Coup of 1930” and throw the oligarchic Old Republic out from the country. Vargas would eventually rule for a quite long period in his first presidential and rather authoritarian term: from 1930 to 1945.

In this timespan, Vargas would rule “with a combination of cunning; ever-changing political coalitions; and a brand of populism that endeared him to many Brazilians, who came to call him ‘the father of the poor’” (Wiarda 2007, p. 140). The cunning aspect resided mainly in his authoritarian traits: he would easily and frequently rely on repressive measures to keep his desired order of the political atmosphere. He would also postpone elections with the excuse or motive of searching for a true stabilization of his nation’s system before any democratic transition could take place.

In Mexico, the General Lázaro Cárdenas (presidential term: 1934 -1940) would send his political godfather to exile, past President Plutarco Elías Calles who was also the founder of the PNR (Party of the National Revolution, currently the PRI), in order to free himself from the strings that Elías Calles still wanted to pull. General Cárdenas
would further consolidate his predecessor’s project of centralizing and controlling the political strings of the whole country through a political party—in an effort, as well, of ridding himself and the federation from the overpowering remnants of the civil war: the regional caudillos (local bosses) who represented a firm opposition to the federal executive.

General Cárdenas, nonetheless, would prove to be much more efficient and cunning in his effort: he would enhance the creation of workers’ unions as a mean for grass-root support, and he would transform his political party into a corporatist organization in which his hierarchy would enable him to control almost every aspect of the country’s political life (from picking governmental candidates to dismissing governors and mayors). Then, and only then, did he initiate a new nationalist vision of long-term growth.

In realistic terms, it might even be said that Cárdenas authoritarian regime lasted much longer than his Brazilian counterpart (around sixty years) by consolidating the corporatist basis that would make of his PNR (Party of the National Revolution, later Institutional Revolution Party or PRI) a long hegemonic ruler of Mexico until the dawn of the century. Cárdenas, equally cunning though more discrete than then dictator Vargas, would take his godfather’s political party project one step further through a centralized and hierarchical structure that gave him a firm and almost omnipresent grip on Mexico’s politics.

As a firm reaction to the 1929 devastating crisis, both Latin American rulers would support their projects with an authoritarian framework to turn the tide of economic progress within their region, helping their countries get a head start on development compared to other of their neighbor countries who still seemed to be fighting for their political stability. The same circumstances of the recent crisis would give both presidents an increased leverage or room for maneuvering, as has been characterized by Panizza (2009) when referring to later crisis.

Now, with an extended authority and autonomy over their respective countries’ paths they would be able to build long-term projects based on national industrialization. Cárdenas would nationalize the oil industry to emphasize his nationalistic views –
gaining eventual animosities from foreign investors. Vargas, likewise, would enact protectionist policies to foster the state monopolies that he would create—in oil, steel, automobile industries, among others.

Consequently, the experiences from Mexico and Brazil in the 1930’s kick-started the industrialization that would later characterize Latin America for decades, supported primarily of state-owned enterprises in a system “called state capitalism in order to distinguish it from the laissez-faire capitalism of the United States” (Wiarda and Kline, 2007, p. 9).

Through it, the building blocks and blueprints towards developmentalism were set in Latin America, leading eventually, decades later, to the consolidation of the desarrollista policies around the legendary import substitution industrialization (ISI): a rather inward-looking model for economic and industrial development that embraced protectionism and expanded state intervention throughout strategic sectors.

The Latin American ISI model seemed to steal quite a few pages from the late Friedrich List—too bad that those pages were only the introductory ones, considering there was quite a lack of the second stage export led industrialization, which consolidated the East Asian economies in a similar trend.

These desarrollista model, according to Ben Ross Schneider (1999) was constituted by four fundamental aspects:

i. Political capitalism: related to Latin America’s state capitalism, in which the political authorities had a strong say and influence on accumulation on capital—either through incentives and policies, or corrupt favoritisms.

ii. Political exclusion: in which the electoral competition of Brazil and Mexico was rather inexistent; in Brazil, made possible through Vargas’ authoritarian and suppressing regime, and in Mexico, through Cardenas’ corporatization of the hegemonic PRN party which monopolized political power.

iii. Developmental discourse: the ideology frequently expressed by government favoring and reinvigorating the role of industrialization as a cornerstone for
the country’s growth, and the necessary role that the state should have in it.

And,

iv. Weak bureaucracy: the main difference with the East Asian developmental model, according to Ross Schneider; in the desarrollista states, the bureaucracy was weak and heavily dependent on the political regimes and hierarchies, in contrast to East Asia where a high importance was put upon a meritocratic bureaucracy that would eventually lead the country’s development.

Argentina would later join Brazil and México in the region’s leadership through national industrialization, and a quite similar system of desarrollista state, both development and political-wise. In Argentina, this transformation would be led by Colonel Juan Domingo Perón. After spear-lancing a massive labor mobilization for which he was jailed, he would be elected as President in 1946.

From here on, Perón, also through the characteristic authoritarianism of the desarrollista state, led the transformation of his country from an agro-exporter to a national industrialized state. He put thus a “considerable pressure (…) on the agrarian sector to divert some of its profits into building an industrial base” (Munck 2013, p. 97), taking that leap of faith so well characterized by Hirschman (1958).

This three fundamental shifts of economic policies in the region would eventually lead in the 1950’s to “an unprecedented level of state intervention directed toward industrialization. This would include the creation of national development banks, tax credits to national industry, and raised wages so as to help create a domestic market” (Munck 2013, p. 114).

The aforementioned shift in the national development project of this countries was firmly supported on one backbone: populism. In Mexico, General Lázaro Cárdenas enhanced and empowered workers through the consolidation of national unions, and the peasants through massive land redistribution schemes –the biggest of Mexican history– creating the ejidos: big parcels of land that were to be owned and worked by peasant communities. This empowerment of workers through labor unions of Cárdenas through the 1930’s would be, in fact, recreated a decade later through
Peron in Argentina: a dictator that had reached the apex of power using labor movements as his springboard, and later rewarding them with a wider entry into the political arenas—though with some façades.

In Brazil, Vargas recreated the marriage of national industrialization and populism through a “programme of state-led industrialization and a commitment to what we today would call social inclusion around class and race exclusions” (Munck 2013, p. 94) which would later gain him the title of “Father of the poor”.

By means of this populist backbone, these Latin American countries would begin a long road of state-led industrialization that would enable them to cut some of the ties that were too dependently attached on their Western developed counterparts—a dependency that played a key role in triggering their crises after the 1929 Great Depression, and, eventually, other crises to come in the 1980’s and 1990’s.

The countries’ own experiments with national industrialization would be further reinforced by an ex-civil servant from Argentina: Raúl Prebisch. Prebisch would then become an unsung hero of Latin American development who travelled an exhaustive road in order to find alternatives to the high dependency of Latin American countries.

After he gathered a team of experts in the headquarters of ECLA, which he now directed, the team would come up with what would be called the Prebisch thesis: “the structural tendency for Latin American terms of trade to deteriorate over time because of the concentration of exports in primary commodities” (Vanden and Prevost 2012, p. 160) again remitting us to Hirschman’s (1958) postulate on the lack of linkages sprung from primary commodities.

The results of the studies would trigger the ECLAC to support Latin America’s effort toward Import Substitution Industrialization (ISI), generating first in Mexico, and then throughout Latin America, “a mixed economy (that) evolved with substantial state involvement and an expanding public sector, which included strategic industries such as telecommunications, railroads, airlines, and electric power” (Vanden and Prevost 2012, p. 347).
The three economies –Mexico, Brazil, and Argentina– would grow at a fast pace between 1940 and 1970. Mexico, with an economic growth average of 6 percent per annum, and industrial growth increase of 8 percent as well per annum (Vanden and Prevost 2012, p. 348). Argentina and Brazil would also become successful examples of Import Substitution Industrialization when in the 1950s and 60s they “saw the creation of a powerful steel industry, a national automotive sector, and a strong national led synergy with foreign capital” (Munck 2013, p. 92).

From the 1960s to 1980s, with the ISI model now at its helm influenced by the first desarrollista experiences of Brazil and Mexico, Latin American countries would grow in Per Capita Income Growth from 3.1% to 6% (Chang 2003, Palma 2003a). But the “golden years” couldn’t last much longer, or could they? Since the first “oil shock” in the 1970’s were the price of vital petroleum went to the roofs, Latin America’s ISI model was seriously questioned. And even a decade before, the inward-looking development that was being produced in the region raised serious issues on an eventual and necessary reinsertion to the global world.

III. Welcome to Fracasomanía

Talking about ghosts, Latin America is filled with them too. The world is made of cycles within cycles, and in the case of Latin American development’s paradigm, it had a long extinguishing cycle (from the 70s to the early 80s) that was being attracted and diminished by an even more voracious cycle: the renewed and reinvigorated paradigm of liberal (now neoliberal) policies.

The oil-shocks of the 70s and early 80s would prove, finally, too much for the fragile and still dependent Latin American economies; their fault would be, precisely, the transition that had been long encouraged by ISI’s first unanimous supporter in the region: Raul Prebisch, resembling also the premises of one of the founding fathers of protectionism, Friedrich List.
In List’s *Natural* (and then, *National*) *System of Economic Policy*, protection and import substitution should only be regarded, in a generalized and nation-wide use, as a temporary measure, a step to foster domestic “productive powers” in a protected domestic bubble only to nourish them and secure their posterior integration to the global economic platforms—a lesson that was well learned by the counterparts on the eastern side: the Newly Industrialized Countries (NICs) of the now legendary East Asian Miracle, which used ISI only as a step toward their export-led growth which consolidated them as an industrial power.

And, to further jeopardize Latin America’s own policy-setting faculties, the Cold War landscape in the 80s seemed increasingly one sided toward the Western Bloc. The privatizing crusade of Margaret Thatcher and Ronald Reagan would seem as their anticipated chant of victory—the Western Bloc having the last word, and, consequently, the last and only model for economic development: free-market capitalism, deregulation, and a taste for the state as a disappearing act.

The privatizing crusade of Thatcher and Reagan, nonetheless, wouldn’t come as a matter improvised. They had the fervent support of International Financial Institutions (IFIs) that had been consolidating little by little in an aim to establish once and for all the unanimous dominance of market capitalism or neoliberalism in the globe: the International Monetary Fund and the World Bank.

What did this crusade end up generating in Latin America? Uncertainty, the need for more reforms, but most importantly failure. The Latin American countries found themselves retracing their steps and placing their political devices on starting positions; again, as if the civil wars, the military coups, the dictatorships, the authoritarian regimes, and the import substitution industrialization weren’t enough itinerary to build upon.

Failure thus rose again in Latin America as its inseparable ghost, a ghost fed with paranoia and depression—a true *fracasomanía* in the words of Albert Hirschman (1971, pp. 88-89), “or the insistence of having experienced yet another failure”. Latin America’s recent revolutionary and feisty past is so for a reason, there has been in the region the uneasy feeling that its economy, democracy, and rulers have failed:
that is why its recent past is filled with civil wars, coups, “transformations”, guerrilla movements, and mass mobilizations. Latin Americans are always seeing yet another failure in the making. And although Churchill said success is about going from failure to failure without losing enthusiasm, Latin America has already a pretty much drained enthusiasm due to a revolutionary paranoia: it has become the land of “clean sheets and fresh starts” instead of a land building step by step upon past experiences.

The only thing missing now amidst the upheaval of free-market capitalism as a panacea was the bridge between the IMF’s and World Bank’s global governance standards and its application on the Latin American countries. The link would thus be implemented throughout the region in a quite cooperative manner –either through technocrats, or the so called “neopopulists” or “bait and switch populists” (Panizza 2009, p. 52).

In words of Panizza (2009) “it is necessary for the transition from elite consensus to policy reform to persuade the technocrats’ principals (normally the president) to adopt the IFI’s economic vision and empower technocrats to enact the reforms.” (p. 34)

Thus, the IFI’s would provide their financial loans in exchange for those countries’ implementation of IFI’s own formulated policies –packages that would eventually conform a “global standard” of fiscal policy, trade, government and labor related measures. The vehicle for these translation or transplant of policies into eventual legal and political formulations would be bureaucrats and presidents that were usually trained in the Western world (mostly the United States) in accordance with neoliberal principles such as those postulated by Milton Friedman: the technocrats.

In some cases, these technocrats would reach the presidential chair campaigning even on complete opposite principles: expanded social expenditures and higher salaries. This example of “bait and switch” maneuvering would be epitomized by Alberto Fujimori in Peru, who ran against the conservative and now Nobel laureate Mario Vargas Llosa, with a neopopulist campaign that contradicted the neoliberal trend that was already setting moderately in countries under dictatorships such as Chile, with Pinochet, and Argentina, with Videla.
But all this “bait and switch” politicians precisely appeared because of the widespread crises amidst the 1980s which gave the presidents more room to maneuver and transit the political spectrum in what Guillermo O’Donnell (1994) would eventually call the effects of the “delegative democracy”; notwithstanding, a substantial amount of presidents in Latin America would not be able to finish their terms due to political unrest -14 presidents in the last 25 years. (Panizza, 2009).

In the other side of the same IFI’s bargain would be the straightforward technocrats who as a legitimization and settling of the subaltern classes, like Salinas in Mexico, would start with a “peculiar combination of political reformism, economic Neoliberalism, and populist welfarism” (Brachet-Márquez 2007, p. 132-33).

From country to country though, the role of the IFI’s would vary depending on the political and economic power of each country and the leverage that the IFI’s could assert on them. This role would consequently go from intimate cooperation to almost outright coercion, and as the 90’s went on, IMF and World Bank had already firmly established their “global standards” in an almost uniform manner throughout Latin America –with the obvious exception of Cuba. They even had already neoliberal “poster-children” such as Argentina and Mexico, countries which seemed to be on the right track toward growth.

The illusion of progress under these neoliberal Structural Adjustment Policies (SAPs) would eventually evaporate near the end of the 90s. It seemed as though there had been a generalized mixture of political and, succeeding, legal transplants conforming a sort of de-attached and “one size fits all” growth transplant that –to further dwell in medical terms– would be like an organ going from one body to another without considering issues of blood types.
IV. Growth transplants of the neoliberal agenda: one for all, and all for one

The history of law has been written upon influences, mainly on those provided by two pillars: civil and common law. With the early colonizing efforts of England, France, Portugal, or Spain, their legal bodies of work would be highly borrowed, implemented or permeated among the colonized countries. America would thus represent the epitome of legal borrowings – from North America to the Southern Cone, the legal influences and results are as varied as can be.

Nonetheless, these influences amount solely to that: influences. The modern common law from the United States, for instance, has a uniqueness and set of deviations which will always distinguish it from its English forefather. Same case can be made between Mexico and Spain, or Brazil and Portugal. Legal influences are only the colors in the pallet, and the countries themselves represent the artist painting his own legal and political landscapes. What will eventually shape the configuration of each landscape is a whole mixture of legal, historic, social, and cultural underpinnings that may not be lightheartedly transplanted from one country to another.

This movements of legal concepts beyond borders, in general, would later be defined by Alan Watson as “legal transplants”: the moving of a legal rule, system or concept from one legal body to another which, according to Watson, were also as old as the law itself (Watson 1974).

In the modern context of development, legal transplants would lead a major global law and development movement shortly after the World War II was over, expanding United States’ codes and regulations to countries with legal origins and contexts as diverse as Latin America, Africa, and Asia. This global borrowing of United States’ common law would be deemed as a failure in the 70s; but that wouldn’t stop legal transplant promoters, mostly legal scholars, to spearhead a second “law and development” effort: precisely in the context of the collapse of the Soviet Union’s
communist bloc in which they “swarmed formerly socialist economies with constitutions, codes, statutes, and regulations” (Berkowitz, Pistor, and Richard 2003, p. 164).

Likewise, within the context of the Cold War though flying a little bit more under the radar, a “law and development” tide was consolidating pretty far away from Eastern Europe: Latin America. Latin America would represent the other side of the sphere that had yet to adopt the free-market model which the US craved for the sustainability of their international capitalism. The “swarming” characteristic of the second effort would also be present in the Latin American region through a “global standard” that amassed political, commercial and fiscal law pertaining to privatization, the shrinking of the state, fiscal measures and devaluation, and import liberalization through reduced tariffs and reduced restrictions to trade.

“The measures typically included cutting the state budget, liberalizing financial markets, unifying exchange rates at competitive levels, lowering tariffs, privatizing state industries, opening the economies to foreign investment on a competitive basis, rationalizing and reducing government regulation and insuring property rights” (Veltmeyer, Petras and Vieux 1997, p. 94).

These measures would also rely heavily on flexible labor markets, and would be defined by Ha-Joon Chang as the “global standard” which had quite a lack of its “global” aspect, being more oriented by and toward Anglo-American institutions, mainly the IMF (Chang 2005). The “global standard” was consequently used by the IFIs as the conditionality package for Latin American countries to be able to access the loans. Moreover, much of the revenues generated by the privatization of state industries was eventually used as a pay-back method on the loans: a “win-win” situation indeed for the IFIs.

It was, finally, in this framework that the first true neoliberal generation of Presidents in Latin America—Carlos Salinas in Mexico, Carlos Menem in Argentina, and Alberto Fujimori in Peru—applied an aggressive approach in an effort to implement the neoliberal governance regime and get rid, once and for all, of any vestiges of the inward elements of ISI.
V. From delegative democracy to delegative decrees: the cases of Mexico, Argentina and Peru

Although there had been some modest efforts before by the Chilean and the Argentinian dictatorships in implementing a neoliberal agenda in the 1970s, they would eventually moderate their initiatives and rely again on ISI (Munck 2013, p. 115). In the case of Mexico, Argentina, and Peru, before the 1990s generation of full-fledged neoliberals, there was somewhat of a moderate and dubitative introduction of neoliberal policies as well; but, finally, this succeeding generation of neoliberal Presidents in Latin America (Salinas in Mexico, Menem in Argentina, and Fujimori in Peru) served as an unconditional bridge for the Washington Consensus' overstretching grip on Latin America – one of the few regions, the other being Asia and Eastern Europe, that still represented a worrisome deviation or confrontation to the Washington Consensus promoters.

Now at the end of the 1980s, there was not much of a fight left in Latin America, or none at all, given that a "lost decade" and a haunting ghost of "fracasomanía" had effectively unsettled the once long-term projects and views of nationalistic growth. Therefore, O'Donnell’s delegative democracy was the appropriate vehicle for executives that had entered in systems which were, already, highly presidential and authoritarian. In a year by year succession, Mexico, Argentina, and then Peru, set out the bases for a wave of political and economic transformation, based on transplants and standards, that is now almost universally regarded as a failed experiment, leaving mostly a “showcase modernity” – founded not on a modernity concerning development, but on consumer behaviors or patterns resembling those of their developed counterparts (Woo Cummings 1999, p. 22).

As with the other two cases of Argentina and Peru, Mexico's adaptation of the IMF’s Structural Adjustment Policies (SAPs) meant a widespread shift from the law-making functions of parliaments or congresses to an exacerbated decree, regulation and law making from the executive power (Veltemeyer, Petras, Vieux, p. 69), consolidating in this manner the legal component of the ambitious policy transfer experiment that this SAPs represented.

To understand the first technocratic experience of Mexico with Carlos Salinas at the presidential helm, a revision of his predecessor –Miguel de la Madrid–, must first be made. Miguel de la Madrid represented the first gradual though definitive rupture with national populism that had been widely present in Mexico’s political sphere since General Lázaro Cárdenas redirection toward national growth in the 1930s. Moreover, this national popular approach was highly emphasized by José López Portillo, who would eventually pass the presidential baton to De la Madrid. López Portillo is widely regarded as “one of the most active, innovative and successful presidents in social policy” in Mexico (Brachet-Márquez 2007, p. 131). Part of Lopez Portillo’s approach to national growth was likewise developed through the “administrative guidance” resembled actions in which many enterprises in deficit were acquired by the state to assist on their sustained reinstatement in Mexico’s economy; nonetheless, he would have to struggle with the convalescent ISI model in México and the 1982 debt crisis which had severe effects on the economy.

Consequentially, De la Madrid would enter into the presidency in a stagflation period that was just getting started. As a result, De la Madrid would recur to the IMF in search of monetary loans to weather the storm in a scenario that would mark the change of the IMF from a bare loaner to an expanded policy maker role (Panizza 2009). The IMF and De la Madrid would sign a Letter of Intention in which the conditions of the loan were clearly set out, among the most important were measures such as “opening the market to the exterior and eliminating industrial protectionism” (Sánchez 1998, p. 80).

One of the other cornerstones of De la Madrid’s rupture with national populism were privatization measures. In the start of his administration there were in Mexico 1,216
State Owned Enterprises (SOE), of which 722 were either sold, dis-incorporated, merged, or transferred. This massive start of privatization was supported precisely on the conditions of the IMF that were later packaged and dealt on other countries as a global standard that relied heavily on financial, political and economic law transplants. In the case of Mexico, these political, economic and legal borrowing built a pioneering case of growth transplant that would therefore lead the IMF’s new self-imposed role on directing policies in between borders.

The legal transplantation of privatizing measures hoisted by the US and Great Britain first started in De la Madrid’s administration through the Federal Law of State Owned Enterprises (Ley Federal de Empresas Paraestatales). Through this measures, along with Mexico’s inclusion into the GATT agreement, the bases would start to be laid for the Mexican’s political law adaptation towards privatization and open markets. As a first step, it was basically a reversion of Lopez Portillos’, De la Madrid predecessor, actions of nationalizing nearly 400 enterprises in the sugar, steel, textile and financial credit industries.

Consequently, when Salinas de Gortari came into presidential power in 1988 – amidst a widely acclaimed electoral fraud –, he would already have the path paved towards the continuation of the IMF’s and World Bank’s global standard or growth transplant. He would further, and much more aggressively, adapt anglo-american principles of free market and a minimal state with a Regulation (Reglamento) on the recent Federal Law of State Owned Enterprises.

This Regulation, as many of Salina’s actions in his first days of government, were guided under the “modernization” goal: Salinas’ goal was to “modernize” Mexico’s economic and political system, using that term mostly as a replacement for more politically controversial terms such as privatization or openness (apertura). In its article 6, it defined “disincorporation” of SOE’s as the “dissolution, liquidation, extinction, merger, sale, or transference to federal entities”. The clarification of the privatizing measures and processes would facilitate even more the sale of SOE’s to private groups in prices that were often exaggeratedly low or bargain prices, starting an economic system that thrived on favouritism and oligopolies. In this manner,
Salinas managed to privatize a “staggering 1,200 public enterprises” (Veltemeyer, Petras, and Vieux 1997, p. 26).

Then, Salinas implemented a much higher flexibility of labour conditions as required by the global standard:

A generalized “deregulation” or “flexibility” of labour norms, through the elimination of substantive aspects of the collective labour agreements, giving way to new labour relationships which were less protective and more competitive, conditioning wages on indices of productive character. (Sánchez, p. 109)

The new labour conditions on the country generated a stagnation of wages and an even bigger gap between poor and rich: as many have put it already, during Salinas' administration, and due to this widespread favouritism and rent-seeking practices in which many government allies or friends were empowered with privatized enterprises at sometimes bargain prices and with a much more flexible labour scheme that benefited shareholders, the poor just got poorer and the rich, richer.

Finally, to join these reform efforts, Salinas would also modify Mexico’s Law on Foreign Investment through a Regulation of the Foreign Investment Law of 1972, ensuring that many of the before strategic, and thus, closed sectors or with limitations to foreign interests were opened up. “As a whole, these (areas) represented a 66% of GDP, including food, beverages, tobacco, textile, clothes, leather, wooden and paper products, restaurants, hotels and commerce”, with added facilities for foreign investors according to geographic, technologic or environmental circumstances (Sánchez 1998, p. 123) –creating in this manner a much more expanded share-holder’s culture of protection and facilities as characterized by the United States’ corporate law.

Through Salinas' neoliberal reforms and policies there came a brief illusion of growth. The reforms would be mostly based on his privatizations, including the National Bank (through constitutional amendment), a pegged-exchange-rate policy (between US Dollar and the Mexican Peso), a huge inflow of foreign capital, and an important rise in consumption levels (Meigs 1997) –this last factor related closely to the “showcase modernity”.
At the end of the administration of Salinas, nonetheless, the technocratic and neoliberal experiment would be acclaimed as one of the biggest failures of neoliberal transitions in recent times, in which “the deeper and more consistent the application of SAPs, the closer Mexico approached the collapse of its economy” (Veltmeyer, Petras, and Vieux 1997, p. 162), culminating finally in the 1994 financial crisis when Salinas’ successor had just 20 days in the presidential office. In this manner, the artificial illusion of a neoliberal or Washington Consensus triumph within Mexico came to an end, though still leaving a redesigned legal and political framework that, in the years to come, would continue enhancing favouritism and a generalization of oligopolies throughout Mexico’s economy.


Menem was quite a particular case in Argentina. He would come into the 1989 elections thriving on a campaign against neoliberal principles. He promised an enhancement of social policies and expenditures that would ameliorate the living conditions of workers and Argentinians living below the poverty line in what many started to call “neopopulism” (Panizza 2009). When he was eventually elected into office, notwithstanding, Menem implemented an all-around neoliberal framework as aggressively as Carlos Salinas in Mexico.

Facing economic pressures, due to hyperinflation, that an anticipated end of his predecessor (Raúl Alfonsín) had left him, he would also rely on the IFIs as a source for infrastructure and stabilizing loans –with the corresponding SAP or neoliberal conditions. Through a populist discourse of crisis, Menem would concentrate such power that he would basically erase any possibility of checks and balances on him: he would deinstitutionalize his country’s political system and rule with a hyper-presidentialism supported on decrees in order to avoid the Congress’ controls or limitations. He would thus use what were political resources of emergency (mainly decrees) to control completely the decisions made during his administration and transplant the growth recipes of legal and political measures extended by the IFIs.
When entering his presidential administration in 1989, Menem would enact two laws with the approval of Congress, Law of Economic Emergency and Law of State Reform. In one hand, the Law of Economic Emergency instated, among other measures, an extensive reduction of public expenditure –such as subsidies and fiscal benefits to SOEs. On the other hand, the Law of State Reform would redefine the political law framework of Argentina in a way to allow and facilitate the massive privatization scheme of public enterprises –shifting away from Argentina’s then nationalistic development project, and allowing the privatization of SOEs in sectors such as steel, telephones, aviation, railways, and petrochemicals (Gerchunoff and Torre 1996, p. 736). These two laws were the initiation of the generalized introduction of the SAP measures conditioned by the IFIs into the Argentinian legal, economic and political landscape.

Furthermore, these two laws would facilitate even more the President’s use of decree measures on the matters regarded by both laws –deregulation, privatization schemes, fiscal measures, public expenditure, opening of the market with the banning of then used quotas and import licenses, among other aspects.

The result would be an exaggerated increase in the use of these decrees of emergency: 336 decrees during his first presidential term (1989-1994) compared to just 35 decrees from 1853 until Menem’s arrival, giving rise to what the Argentinians called the “decretazo” or government by presidential decree (Rubio and Goretti 1996, p. 443-4).

By means of the “decretazo”, Menem would manage to reframe the whole legal infrastructure of Argentina’s political system with legal transplants that worked as patches of a deformed and decontextualized version of free-market capitalism. The growth transplant, consisting of conditioned SAP measures introduced either by decrees or Congress approved laws, would eventually start to melt down at the end of 1994, projecting the fragility of the neoliberal structure that had been tried to be cemented upon the Fordist approach, so frequently relied upon by neoliberal policy-makers, of stabilization over growth.
In 1996, amidst another crisis and after a constitutional reform that had allowed his re-election, President Menem would yet continue with his second reform effort, with “the strong emphasis of making the labour market more flexible” in which there was “a unilateral reduction of wages, the modification of the labour hours, an extension of the labour day, negotiations amongst enterprises (…) and a new regime of contracting” (García 1997, p. 5), an emphasis that he had tried to implement since 1993 but was battered away due to strong resistance of labour unions –important allies to his government (Gerchunoff and Torre 1996, p. 756). The newly implemented labour flexibility would inevitably join the past failed efforts of making the country’s economy a more dynamic one according to the IFIs.

Finally, in 1999 the neoliberal experiment in Argentina, through two uninterrupted terms of its pioneer, had come to a disappointing end. “Throughout his second administration, Menem was faced with a decline in economic growth, a dramatic rise in unemployment, and severe socioeconomic crises” (Vanden and Prevost 2012, p. 439). After failing to habilitate yet another re-election, Menem’s peronist party would eventually lose the 1999 presidential election in a country that found itself dwelling again in the profound and unrestful ambience of yet another economic crisis.

c. Fujimori in Peru: if you can’t win them, close them out

Peru was yet another case of “decretazo” and “bait and switch” manoeuvring during an almost parallel timeframe (1990-2000). Fujimori would get to the presidential chair also with a country in dire economic crisis. His predecessor, Alan García, had left him a country that reached 2,775% of inflation in 1989 with the population in poverty quadruplicating in five years (Wehner 2004, p. 27). The campaign that had brought Fujimori there? A populist discourse indeed, just as in the case of Menem in Argentina.

His campaign would be construed upon the need of going back to state interventionism as the only way to reverse the grave economic numbers that the country was projecting. Fujimori would in fact contend against a now Nobel Laureate,
Mario Vargas Llosa, who built his campaign on the premise of neoliberal (and shock) policies to overcome the country’s crisis. After Fujimori was elected, nonetheless, he would shift more toward the campaign of his opposition: the implementation of neoliberal policies as an exchange for the monetary and infrastructure loans of the IMF and World Bank – giving rise again to the term “delegative democracy” introduced by Guillermo O’Donnell. Peru’s “structural adjustment” would thus begin.

For a change, in Peru the practice of the “decretazo” had been already abused by Belaúnde (1980-85) and García (85-89), promulgating a total of 2,114 decrees. In the words of Veltmeyer, Petras and Vieux (1997) “In Ecuador, Peru and Bolivia the executive decree was used to establish ‘the core components of the neoliberal experiments’” (p. 80). Fujimori, notwithstanding, ran eventually into heavy opposition from a Congress that had already been well acquainted with such practices; after his first years of struggling with Congress, Fujimori would just take the easy way out: shutting down Congress, arresting many of its leaders along with the removal of Supreme Court members, the Attorney General and more than a hundred judges and prosecutors (Veltmeyer, Petras and Vieux 1997, p. 81).

To legitimize these actions, Fujimori enacted the Law of Bases for the Government of Emergency and National Reconstruction (Ley de Bases para el Gobierno de Emergencia y Reconstrucción Nacional), through which he ordered to dissolve Congress, whose duties were to be substituted temporarily with presidential law decrees, whilst promoting economic development through “a market economy within a legal framework which gives certainty and security, and fosters the competitiveness and efficiency of the economic agents, promoting also economic stability and allowing domestic and foreign investments” (cited Law).

What was initially generated in the 1980s through this abuse of presidential decrees to transplant neoliberal policies into the constitutional order of Peru was, as stated by César Landa (2003), a “process of constitutional mutation of the extraordinary measures into decrees of emergency, which produced a separation between Peru’s constitutional law and its constitutional reality” (p. 132), referring us again to an extremely alienated and decontextualized practice of the legal or growth transplants
that were reshaping, though with enormous deficiencies, the political landscape of Latin America.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Emergency Decrees</td>
<td>667</td>
<td>1,033</td>
<td>1,655</td>
</tr>
<tr>
<td>(Executive)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legislative Decrees</td>
<td>348</td>
<td>263</td>
<td>303</td>
</tr>
<tr>
<td>(Executive)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Laws (of Congress)</td>
<td>990</td>
<td>848</td>
<td>1,373</td>
</tr>
</tbody>
</table>

*Excerpt of César Landa’s data (2003, p. 133)

The result of Fujimori’s “decretazo” reforms were along the same lines of Mexico and Argentina: commercial and financial liberalization, reduction of public expenditure and wages, and a heavy privatization scheme that was amply corrupt –with charges that are now pending upon Fujimori and were upheld by Peru’s Supreme Court recently. Amidst evidence of bribes, Fujimori would travel to Japan, where he received the news of being impeached by a Congress that did not recognize the ex-President’s resignation.

VI. Conclusion

The ending of the Cold War had in fact much more geographic implications on “law and development” than just in Eastern Europe. This second wave of adaptations or transplants ended up shaping, pretty much under the radar, the whole political, legal and economic landscape of Latin America as well. The results were varied, though most frequently disastrous –increased rent-seeking agreements, corruption, favouritism, extended dependency on Western counterparts, frequent economic crises, and the list goes on.
There was a grave lack of emphasis on legal institutions as contextualized and cognitive experiences. In words of Berkowitz, Pistor and Richard (2003) “for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law” (p. 167), emphasizing again the importance of considering local conditions for a legal institution to be effective or responsive to the host country’s needs.

But since there was little or no consideration for this contextualized aspect of the law and policies, “Fracasomanía” showed up around the corner of the euphoric transplant and transfers of neoliberal or Structural Adjustment Policies (SAPs) into Latin American countries. The systematic failure of the SAP measures undertaken in the 1990s throughout the region’s countries resulted not just in the questioning, again, of the own countries’ paths toward economic consolidation in a globalized world, but also the logical task for IFIs (mainly IMF and World Bank) to reconsider their Washington Consensus stance. A Post-Washington Consensus would thus rise although now amongst developing countries that were much more on a defensive or mistrusting attitude—not only among governments but among societies and citizens as well.

Due to this generalized disappointment of Latin American citizens with neoliberal policies, a leftist tide or “pink tide” would end up brushing the region—with Hugo Chávez in 1998 in Venezuela, Ricardo Lagos in 2000 in Chile, Lula da Silva in 2002 in Brazil, Evo Morales in 2005 in Bolivia and Rafael Correa in 2006 in Ecuador (Panizza 2009). This pink tide would further reinvigorate the region’s leaders anti-neoliberal position through regional integration projects such as the MERCOSUR (Southern Common Market) and the UNASUR (Union of South American Nations), which were highly emphatic, likewise, on diminishing the region’s dependency on their developed counterparts.

Now, the political and economic landscape in the region has definitely changed, and with it, the postures of the Washington Consensus promoters—there is a certainly a reinstatement or reconsideration of measures that a little more than a decade ago
were almost cursed: industrial policy, state intervention, and types of administrative guidance or indicative planning which were characteristic of the developmental states.

What the aforementioned circumstances also imply is the importance of individual and contextualized measures beyond any global standards of growth, because, as stated by Gerschenkron (1962), no past or foreign experience “can save the living generation the creative task of finding their own answers and shaping their own future” (p. 5). There are no definitive traces in the sand for a solution of economic development: the circumstances keep changing, not only domestically (regarding politics or economy) but internationally as well; therefore, countries need the sufficient policy space and freedom to build their own solutions for their own future.
References.-


