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ADAPTING LEGAL CULTURES

Edited by
David Nelken & Johannes Feest

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Adapting Legal Cultures

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DAVID NELKEN
and
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Series Editors' Foreword

IMPORTING AND EXPORTING bits and pieces of legal orders is hardly a new social phenomenon. It played an important role throughout the twentieth century, particularly in countries anxious to "modernise", to adopt democratic regimes after defeat in war, or to impose them after victory. But such trade has become even more intense and pervasive in recent years, particularly after the political and economic reorientation of the socialist countries in eastern Europe and the needs in many developing countries for legal infrastructure created by a globalising economy. *Adapting Legal Cultures* is a welcome and needed addition to the literature on legal transplants. It is wide in scope, profound in theory and concrete where that is possible. Although primarily dealing with offshoots from common law, it also points the way to the different course that adaptation takes in the context of civil law approaches.

The book is the product of a workshop held at the International Institute for the Sociology of Law (IISL) in Oñati, Spain. The IISL is a partnership between the Research Committee on the Sociology of Law and the Basque Government. For more than a decade it has conducted an international master's programme in the sociology of law and hosted hundreds of workshops devoted to sociolegal studies. It maintains an extensive sociolegal library open to scholars from any country and any relevant discipline. Detailed information about the IISL can be found at www.iisj.es. This book is the most recent publication in the Oñati International Series in Law and Society, a series that publishes the best manuscripts produced from Oñati workshops conducted in English. A similar series, Coleccion Oñati: Derecho Y Sociedad, is published in Spanish.

Preface

THIS VOLUME GREW out of a series of meetings devoted to the theme "Changing Legal Cultures" organised at the International Institute for the Sociology of Law (IISL) in Oñati, Spain. The purpose of the series was to continue the attempt to rekindle and at the same time refocus the discussion on legal cultures started at a conference held in Macerata Universirty in Italy in 1995.[1] More specifically, the aim was to "focus on the ways in which different legal cultures interact, influence and change each other".[2] The workshop cycle was sponsored by the Volkswagen Foundation. It consisted of four parts designed to build on each other:

—a first workshop on theoretical and methodological approaches[3];
—the second one on everyday exchanges of legal cultures[4];
—the third one on piecemeal adaptation of legal cultures;
—the final one on more wholesale socio-legal transition and transformation.[5]

The papers in this volume were first presented at the third of these workshops.[6] Its remit was to "examine different levels and orders of change, looking via case studies of past and present examples of legal borrowing and adaptation in different areas of the world to a more sophisticated theory of the process of law transfers and the interaction between, on the one hand, legal ideals, mentalities and models and on the other, social, political and economic forces". Invitations were extended to scholars in both the social sciences and comparative law in the hope that this would bring together the best explanatory models of "external forces" acting on the legal system whilst also giving due weight to the "internal" reasons for legal evolution and change within any given legal culture. We tried also to achieve a good mix of scholars from the common law and civil law worlds. Regrettably, though we approached a number of civil law scholars with practical experience of current processes of legal transfer, we were

[1] See David Nelken (ed.), *Legal Culture, Diversity and Globalization* (1995), Special issue of Social and Legal Studies 4,4 and David Nelken (1997), *Comparing Legal Cultures* (Aldershot: Dartmouth). See also D. Nelken (2000), *Contrasting Criminal Justice* (Dartmouth).

[2] Co-organisers of the workshop cycle were Johannes Feest, then Director of the IISL, Erhard Blankenburg, Volkmar Gessner and David Nelken.

[3] Cf. Johannes Feest and Erhard Blankenburg (eds.) (1997), *Changing Legal Cultures* (Oñati: IISL).

[4] Cf. Johannes Feest and Volkmar Gessner (eds.) (1998) *Interaction of Legal Cultures*. Oñati: IISL.

[5] Chaired by Sandra Burman and Johannes Feest. Publication of the proceedings is under way.

[6] In addition to the papers presented in Oñati, the volume also includes a commissioned chapter on globalisation and law by Wolf Heydebrand and a lengthy introductory chapter by one of the editors.

unable to secure their presence at the workshop—mainly it seems because they were too busy explaining the advantages of civil law codes to potential borrower countries in Eastern Europe and the ex Soviet Union!

The participants at the workshop were asked to address *inter alia* "the way legal culture comes to be adapted, often deliberately, as a result of a variety of political, social and economic factors which condition the perceived attractiveness of different models of law". Particular attention was to be given to what was "special about present processes compared to those of the past". As the chapters selected for this volume indicate, the workshop covered a wide range of relevant topics.[7] Some of these were theoretical. What are legal transplants? What is the role of the state in producing socio-legal change? What are the conditions of successful legal transfers? How is globalisation changing these conditions? Other problems were more substantive and specific. When and why did Japanese rules of product liability come into line with those of the EU and the USA? How and why did judicial review come late to the legal systems of Holland and Scandinavia? How is legal change produced and experienced in countries which have undergone rapid institutional change, such as Japan or the former Communist countries? Why is the present wave of USA-influenced legal reforms in Latin America apparently having more success than the previous round? How does competiton between the legal and accountancy professions affect patterns of bankruptcy? In consequence the contributions chosen for this volume have been organised broadly, into those dealing more with general or theoretical problems and those more focused on substantive issues.

We would not make too high claims for the results of the workshop. The contributions presented here—as well as other research in the reviving field of interest—show clearly that "state of art" in the study of legal transfers is very uncertain. Potentially relevant perspectives in the wider literatures are often ignored (and it is not always obvious which are the relevant literatures), and discussion of potentially related problems or case-studies is often fragmentary. Empirical studies on the actual impact of earlier or more recent legal transfers are largely missing. We can only hope that the chapters included here, flawed as they may be, will stimulate others to do more and better.

Johannes Feest and David Nelken
February 2001

[7] Others who delivered papers or otherwise contributed to the discussions included Anita Bernstein (USA), Erhard Blankenburg (Germany/Ntherlands), Sandra Burman (South Africa/UK), Jean Comaroff (USA), John Comaroff (USA), Paul Fanning (USA), Johannes Feest (Germany), Volkmar Gessner (Germany), Bob Kidder (USA), Martin Krygier (Australia), Jacek Kurczewski (Poland), Inga Markowits (USA), Carlo Pennisi (Italy), Jiri Priban (Czech Republic) and Rogelio Perez Perdomo (Venezuela).

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PART ONE

Theorising Legal Adaptation

Introduction

THE FIRST PART of this volume offers examples of current debates over the possibility of adapting legal cultures and illustrates the way this question is being transformed under contemporary circumstances. In the opening introductory chapter David Nelken sets out to identify some of the major issues in what he calls the sociology of legal adaptation. In the first section he discusses the somewhat tired and often confused debate over legal transplants. The second section attempts a new start in clarifying what is meant by adaptation and by legal culture, and then offers some comments about how current globalising developments are affecting legal transfers. In the last section of the chapter Nelken examines the descriptive and policy problems of claims to achieve success in legal transfers.

As this suggests, many of those studying legal transfers, and even more those actually engaged in them, are overtly concerned with the problem of how far legal adaptation can be engineered. The chapter by Pierre Legrand offers a strong, if controversial, response to this question. Legal transplants, he says, are impossible. His argument is developed with great lucidity and learning, and has the merit of forcing those who disagree to examine what it is they hope to achieve by transplanting law.

According to Legrand the basic error made by those attempting this mode of legal transfer stems from their failure to understand the way law is always inseparable from its social and cultural context. A rule's very existence depends on its interpretation and application within an interpretative community, and this is historically and culturally conditioned. As

> "an incorporative cultural form . . . a rule does not have any empirical existence that can be significantly detached from the world of meanings that defines a legal culture; the part is an expression and a synthesis of the whole".

We need to appreciate that law is a matter of myth and narrative—in so far as it pertains to another culture we can at best grasp it imperfectly through translation rather than expect to find a method for reproducing its "effects". A number of points could be made in reply to Legrand's objections to legal transplants. Much depends on the meaning given to this term. Alan Watson for example uses his data about transplants to refuse Legrand's claims about the relationship between law and its context but is quite willing to concede that a legal transplant cannot be expected to engineer a determined solution but will take on a life of its own in its new host. Legrand may be battling with his own chosen interpretation of the transplant metaphor. He also appears at times to

treat empirical claims as if they were logical ones—and risks the contradictions of cultural relativism. Can we really be so certain of what must happen in efforts at legal adaptation? Can we tell whether a transplant has been a failure without being able to grasp the differences between cultures? How do we know (how could we know) that the boundaries of "different rationalities and moralities" correspond with those of the nation-state legal systems which participate in transplants?

Roger Cotterrell, in the following chapter, examines what socio-legal theory and research can offer in terms of dealing with these questions, focusing in particular on what Françoise Ewald (1995) has called the logic of legal transplants. Cotterrell begins by arguing that Watson and Ewald misleadingly oversimplify sociological discussions about law into the thesis that law is a "mirror" of society. He claims that to demonstrate the counter-thesis that law has no social function would itself require socio-legal research. Cotterrell admits that it is certainly important to study the professional communities of lawyers and lawmakers who are at the centre of Watson's analyses, but he proposes widening our framework to encompass other communities. To understand the possibilities and the obstacles in transferring law we need to examine (as Durkheim would have said) how different kinds of law relate to the different kinds of bonds which create a sense of identity and lead to solidarity and co-operation between people. Drawing on Weber's typology of forms of action he then goes on to distinguish four types of community bonds which are formed by instrumental interest, traditional identity, shared beliefs and affective involvements. Each of these communities can facilitate or deter the transfer of different kinds of law; Cotterrell hypothesises that outcomes will be influenced by what he calls the interaction between "strong" and "weak" law and "strong" and "weak" community. While offering a valuable stimulus for research there may be some doubts about how far this framework encompasses the variety of processes by which legal transfers take place in a globalising world—and the way these are connected to the emergence of transnational communities. Care also needs to be taken not to make culturally biased assumptions about when law is likely to be more or less capable of regulating community, as for example regarding the role of law in family life.

In his comments, Lawrence Friedman goes even further than Cotterrell in condemning what he calls "the dead end" to which we are led by the Watson/Ewald claim that we must seek the link between law and lawyers as opposed to one between law and society. To put paid to this idea it should be enough to see how much more contemporary legal systems have in common with each other rather than with their previous history. As far as legal transplants go Friedman argues that convergent technological economic and social trends and pressures would produce roughly similar legal arrangements even in the absence of outright borrowing. Even family law in Islamic countries is changing rapidly under the influence of such trends. Conversely, where transplants fail, Friedman reminds us that even in its originating society law may not always have "pene-

trated" that much into everyday life. While applauding Cotterrell's ideas about relating law and communities Friedman also notes the limits of his typology; for example business communities also have affective ties and continuing relationships are vital for their survival. There may also be other sorts of problems. Much law comes into being precisely because of the breakdown of communities, and law and community are in some sense in tension—"law has very little to say about happy long term marriages". In general, Friedman suggests that we stop talking about transplants and think instead of how to study the processes of diffusion, borrowing and imposition of law. There is still much to be learned about these processes; new norms such as "no fault divorce", he says, spread mysteriously, like a virus, and it is culture, not the legal system, which is the carrier of these norms.

In his chapter Alex Jettinghoff renews the Watson/Ewald challenge to the assumption that legal developments reflect changes within a society. He argues that much legal change is not a response to internal socio-economic evolution or social needs but is rather a matter of politics and historical contingency and depends on unpredictable geopolitical events and necessities including wars. Modern law emerged from struggles between kings and the bourgeoisie. The types and uses of courts continue to reflect political circumstances. If law was used to create the national state it is also used by it for its purposes. Jettinghoff stresses the distinctive and relatively autonomous role of the State, especially in its preparation and conduct of war-making. This was crucial, for example, in the creation of the welfare state and all the legislation and administrative regulation which accompanies it—the same applies to the emergence of political and social rights for women. Much law reflects relationships between states. Countries may seek to imitate militarily or economically more successful powers; law is often imposed by an occupying or colonial power, and legal reforms may be made a condition of financial aid.

Jettinghoff ends his chapter by illustrating his argument with reference to three "Dutch" dispute institutions which are often seen as characterising the specifically "Dutch legal culture of avoidance". In each case he shows these institutions were rather the result of internal or external political exigencies. Jettinghoff provides us with a valuable corrective to one-sided evolutionist accounts of legal development. But sophisticated theorists such as Friedman and Cotterrell would have little difficulty in enlarging their own approaches to socio-legal change so as to accompany the evidence he presents, since what they argue is only that socio-economic developments within a society transform law, not that they themselves are always the origins of legal developments. Jettinghoff also does not give us any way of telling when and where the state or political developments is most likely to be the crucial mover of change—there are for example important differences between Anglo-American cultures and societies influenced by the state tradition of continental Europe. And the role of the state is itself undergoing transformations in an era of globalisation.

It is these developments which are the subject of the wide-ranging chapter by Wolf Heydebrand which concludes this part of the volume. Heydebrand helps us see both how globalisation is in one sense itself a process of legal transfer (see in particular the chapters by Dezalay and Garth and by Flood) ,and how it is at the same time a phenomenon that is bound to affect all the other examples of legal transfer which are discussed by the other contributors. He distinguishes between the globalisation *of* law in the strict sense and the various processes which result from the interaction between globalisation *and* law (and include the production or bypassing of law). The first of these trends, pushed forward by many participating actors involved in strategic networks, includes the spread of the (Anglo-American) bargaining culture of law—or a transnational common law—which seems most apt for such networks. More generally the "network society" witnesses the de-differentiation, deformalisation and deinstitutionalisation of law and the interpenetration of formally separate institutional spheres.

The second of these dynamics sees a diminished role for the state as compared to the heyday of national law in the nineteenth century. He comments on the advantages in terms of secrecy and efficiency for business organisations of transnational disputing fora which are self-legitimating and better enforced than when national courts are involved. In this and other ways he sees the emergence of a new forms of economic citizenship bestowed by global corporate governance. Heydebrand comments on the difficulty of achieving transnational hierarchical legal regulation. Seen from a Continental point of view legal regulation is becoming less like "law"—though more "democratic". He points to growing contradictions between normative validity and economic efficiency with consequent danger that constitutional restraints and individual rights could become a subject of transactions to be eliminated where costly. The strategic use of law can also easily transform itself into illegal behaviour. But, on the other hand, there are also signs of resistance to these trends, in the form of nationalist backlash and of mobilisation against the bearers of globalisation by a variety of social movements.

1

Towards a Sociology of Legal Adaptation

DAVID NELKEN

THE GOAL OF the Oñati workshop on "Adapting legal cultures" was to bring together a range of international scholars with different disciplinary loyalties to expound their views on how best to analyse current developments in legal and social change. As will be seen in the following chapters, this proved to be a heady and intellectually challenging experience. The purpose of this introductory chapter is to offer an overview of some of the key matters raised by the papers and discussions at the workshop by setting them in the framework of the literatures from which they draw and to which they hope to contribute.[1] The first section of the chapter will critically examine the relative contributions of comparative law and sociology of law as illustrated in the debate over legal transplants. The second seeks to broaden our way of conceptualising and investigating the issues of "adaptation" and "legal culture". The final section asks about the meaning of "success" in achieving legal transfers in a globalising world.

1. COMPETING APPROACHES TO THE STUDY OF LEGAL TRANSFERS

What can socio-legal scholarship contribute to the understanding of legal adaptation? For some legal scholars this question should rather be turned on its head. They would argue that we should instead enquire what the evidence of legal adaptation can tell us about the strengths and weaknesses of such scholarship. For such scholars what is striking about law is the extent to which it succeeds on building on itself, doing so to a large extent irrespective of the society in which it finds itself operating. A forthcoming book by David Ibbetson (1999), for example, claims that:

> "the English law of obligations has developed over the last millennium without any major discontinuity. Through this period each generation has built on the laws of its

[1] This introduction builds on and seeks to extend earlier work on the comparative sociology of "legal culture" in Nelken 1995, Nelken 1997a and Nelken 2000a.

> predecessors, manipulating it so as to avoid its more inconvenient consequences and adapting it piecemeal to social and economic changes. Sometimes fragments borrowed from abroad have been incorporated into the fabric of English law; from time to time ideas developed elsewhere have, at least temporarily, imposed a measure of structure on a common law otherwise messy and inherently resistant to any stable ordering".[2]

Not surprisingly, more sociologically inclined scholars insist that it is above all the environing society which shapes and reshapes law. Thus Lawrence Friedman (1996,1998, in this volume) argues that contemporary legal systems in the economically developed world have much more in common with each other than with their past histories, as can be seen by comparing the extent to which law in present day societies deals with essentially modern institutions and problems such as corporations and transport and the rights of individuals and consumers.

At stake in these different ways of relating legal and social change are the competing concerns and pretensions of sociology of law and comparative law. Much of the discussion at the Oñati workshop (as evidenced also by many of the other chapters in this volume) was stimulated by a paper by William Ewald (Ewald, 1995)[3] which attempts to reformulate Alan Watson's energetic attempts to use the existence of "legal transplants" as an attack on the very possibility of sociology of law (see e.g. Watson, 1974, 1977, 1983, 1985,1991). Ewald seeks to reformulate and moderate Watson's arguments, and makes an important distinction between the level of autonomy of private and public law. But he basically agrees with Watson's view that the frequency of legal transfers—or legal transplants as they both like to describe them—proves the fallacy of seeking to correlate developments in law with the internal evolution of the society in which it is found.

Ewald's argument forms part of a larger broadside in which he contrasts what he considers the historically and legally informed character of comparative law scholarship with the allegedly reductionist approach of sociologists of law who assume that law is no more than a reflection of social structures and relations. But the claim that sociologists of law are unaware that law travels can hardly be taken seriously. The influential "Law and Society" movement in the United States, for example, was pioneered by authors such as Abel, Galanter and Trubek, whose early careers were spent studying law in places heavily affected by transplants such as Africa, India and Latin America, and who played important parts in the "law and development" movement.[4] The "law in context" approach in Great Britain, likewise, was pioneered by law professors such as Twining, Atiyah and Wilson, whose exposure to attempts to apply English

[2] As summarised in the 1999 Oxford University Press Law Catalogue.

[3] The paper was circulated in advance to participants at the suggestion of Pierre Legrand.

[4] As Feldman points out, "the idea that law and legal rules are portable and autonomous, and can therefore be transplanted, was a fundamental asumption of those writing on law and development in the 1960's and 1970's" (Feldman, 1997: 219).