

# Systems theory's contribution to cross-cultural legal adaptation: over-complexity or adequate complexity?

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# Cross-cultural legal adaptation

- Apparent support for possibility of transfers between legal systems
  - Globalisation
  - Convergence
  - Uniform standards
  - WTO
  - “End of history”
  - Washington consensus
  - Emergence and expansion of regional blocs
  - ...

# Cross-cultural legal adaptation

- Apparent doubts about the possibility of transfers between legal systems
  - Fragmentation
  - Clash of civilisations
  - Divergence
  - Centrifugal forces within regional blocs
  - Differing interpretations of legal concepts associated with democracy and markets
  - ...

# The Watson-Legrand bipolarity

## ➤ Watson

- Legal transplants are possible
- “Continual massive borrowing” of rules, institutions and structures
- Rules separable from “spirit” of legal system

## ➤ Legrand

- Legal transplants are impossible
- “Rules cannot travel”
- Rules inseparable from legal “culture”

# Watson and Legrand Explanations

## ➤ Watson

- Law has become disembedded from culture
- Autonomy of the legal profession and its preference for precedent
- Legal evolution not necessarily connected to social, political or economic evolution

## ➤ Legrand

- Even where superficial convergences, unbridgeable deep structures remain
- Legal culture is a spiritual creation, a product of unique historical experience and imagination
- The meaning of a rule cannot survive from one culture to another

# A violent agreement?

- Watson's riposte
  - Never discounted *partial acceptance* of transplant
  - Task for comparative lawyers to understand reasons
- Closer to Legrand than they each care to admit?
- BUT idea of *partial* acceptance seems contrary to concept that admits only of acceptance or rejection

# Problems for Watson-Legrand *détente*?

- Clarity on the nature of legal culture or spirit that each accept can affect transplant
- What is to count as legal culture?
  - Institutions? Social factors? Economic factors? Political factors? Legal behaviour? Propensity to litigate? Etc.
- Is it possible to speak of national legal cultures?
- Must we now look rather at the culture of specific areas of law that may already cross national boundaries?

# Enriching a too narrowly defined debate

## ➤ Watson

- Stresses legal autonomy
- But how to deal with observable politically-driven changes?

## ➤ Legrand

- Stresses importance of context
- But how to deal with observable successful transplants?

## ➤ Teubner

- Something conceptually richer is needed

# Enter systems theory

## ➤ Teubner

- Challenge to accepted ideas within comparative law
  - Globalisation + Functional differentiation = fragmentation rather than *convergence*
  - Different sectors of globalised society face *different* problems → relevance of *functional equivalence*?

# Functional Differentiation

# Systems theory and the polar alternatives

## ➤ Autonomy (Watson)

- In common, ST rejects notion of law mirroring society
- In contrast, ST sees autonomy of law producing greater interdependence with other discourses

## ➤ Culture/context (Legrand)

- In common, ST sees law as interwoven with culture
- In contrast, ST rejects idea of totality of society and sees “selective bonds”

# Irritation not transplant

- Acceptance/rejection = false dichotomy
- “Transfer” of a rule from one system to another is really an *irritation*
- Specifically, it irritates law’s “binding arrangements”
- Creates “perturbations” in the “interplay of discourses”
- Produces an “internal reconstruction” not only of existing rules but also of the new rule
- Thus it is not even about “domesticating” the new rule, but about recognising the potential for the unleashing of an unpredictable “evolutionary dynamic” (or indeed co-evolutionary dynamic)

# Teubner's theses

1. Law's contemporary ties to society are now longer comprehensive, but are highly selective and vary from loose coupling to tight interwovenness
2. Law no longer connected to the totality of the social, but to diverse fragments of society
3. Law and society no longer evolve in a joint historical development but in the conflictual interrelation of two or more independent evolutionary trajectories

# Thesis 1

- Law's contemporary ties to society are no longer comprehensive, but are highly selective and vary from loose coupling to tight interwovenness
  - Loose coupling – where legal norm production is only occasionally in contact with other social process (eg ad hoc interaction in disputes) – transfers are relatively easy (but not mechanical)
  - Tight coupling occurs where formal organisations bind law to one or more other discourses – transfers difficult due to the close influence of other social processes

# Thesis 2

- Law no longer connected to the totality of the social, but to diverse fragments of society
  - Areas of private law may be loosely coupled with politics, but closely coupled with economics or science
  - This close coupling can serve to explain resistance to transplants, because the closely-coupled social process proceeds on its own internal logic
  - It also raises the possibility of unexpected divergences in place of the hoped for convergences

# Thesis 3

- Law and society no longer evolve in a joint historical development but in the conflictual interrelation of two or more independent evolutionary trajectories
  - Structural coupling does not create a new identity, but rather binds via the difference that distinguishes one discourse from another

# Example – Energy Charter Treaty

- Achievement of energy security for producer, consumer and transit states
  
- Creation of level playing field for energy across Eurasia
  - Investment protection
    - pacta sunt servanda
  
  - Implementation of WTO rules in energy sector
    - non-discrimination, MFN, national treatment
  
  - Transit rules
    - dispute resolution in place of supply disruption

# ECT – EU and Russia

# Conclusions

- Systems theory approach offers a richer range of possibilities in examining cross-cultural legal transfers
- Not restricted by absolute ideas of context or autonomy
- Open to a wide range of tighter or looser couplings of law with one or more other aspects of society
- In terms of culture, focuses attention on communicative systems
- Open to possibility of transnational systems as well as those located within national boundaries
- The location and identity of the systems in play is an empirical question, as is the nature of their coupling...
- ...always respecting the limits of cognitive openness and normative closure!