SUMMARY

The Americanization of Law

The "Americanization of the law" is a question of cultural influence rather than a wholehearted reception of American law principles. One can attribute to this influence a greater presence of the law in the public sphere; contractual practice has also been permeated by American influence, due to the flexibility of the common law allowing it to meet the needs of a new economy. The influence of American ways has also been felt in France in the practice of the law, due to the creative energy of American lawyers there. But the basic civil law approach will persist for the foreseeable future, as conveyed by the method of teaching law.

The American influence has pervaded our law, in particular in criminal matters. However the influence of the written law remains considerable in French law, even if the part played by judges is increasing. French magistrates and lawyers are not similar to their American counterparts, regarding their nomination or the way they execute their duties. We seem today to be witnessing more an Americanization of the way we conceive justice than an Americanisation of the judicial institution itself.

The author argues that, at least in the area of commercial law, as exemplified by the United Nations Convention on the International Sale of Goods and the

Unidroit Principles of International Commercial Contracts, what is happening is not the Americanization of law but the globalization of law. The author seeks an explanation for the evident American influence in this process of globalization despite the long isolation of the United States from efforts at international unification and its naïveté in matters of comparative law, as well as the absence of any organizational link between jurists in the United States and those in the countries of Europe in particular. He finds an explanation in seven advantages enjoyed by Americans, most of which are not shared by other common law countries. First, the fact that the United States is an economic super-power. Second, the commendable record of American ratification of existing texts. Third, the extensive reservoir of experts available in the United States. Fourth, the circumstance that the American common law system seems to civilians less strangely different than do other common law systems. Fifth, the extensive codification of American common law, notably by the Uniform Commercial Code and the Restatement. Sixth, the fact that most of this codification is of relatively recent date. Seventh, the existence of a considerable number of jurists in other countries who have in some way been affiliated with American law faculties. After giving an example of American influence in connection with the right to demand assurance of due performance, the author closes by noting some instances in which foreign legal systems exert a countervailing influence on American law.

We have only a scant knowledge about prestige as a factor of circulation of legal models. We just know that this recurrent phenomenon inside the occidental legal tradition – which underwent successively romanisation, gallicisation or germanisation of its law before yielding today to the attraction of American law – cannot usually be dissociated from the myth. In this respect, the contemporary prestige of American law, to which the Academy remains until now fairly impervious, seems to act through the imagery mind of students as well as through the needs of legal professionals. It is to them that the American model offers on the one hand a new way of thinking legal order as a law-tool, paradoxically open to questioning and, on the other hand, background solutions perceived as economically efficient and politically symbolic.

Universalism in law is a delusion. In the absence of transcendence, comparatists must resign and commit themselves to the fact of diversity.

The article considers the so-called Americanization of law as a theoretical question for the sociology of law and as a practical question of worldview and social coordination in the United States. In Part I, the emphasis is on the assumption – implicit in the notion of "Americanization" – that law "has"

cultural identity in national terms. In Part II, Americans' attitudes toward law (as demonstrated by ethnographic studies) suggest that Americans believe "their" law has American elements, but especially – and paradoxically – in their view that society itself is a legal mechanism. The article's conclusions raise critical and comparative questions in light of these premises and paradoxes.

Mathias Reimann, *Positive Law and Legal Culture. The Americanization of European Law as a Reception* 61

This essay looks at the Americanization of European law as a process of reception in an admittedly tentative fashion. Its basis is a distinction between the (narrow) realm of positive law and the (broader) sphere of the legal culture. On the one hand, it considers the American influence on European positive law more limited than is often assumed. On the other hand, it perceives the impact on the legal culture, especially on the organization and style of legal practice, as more profound than one might think. It concludes that, as with many previous receptions, the effects on the legal culture, i.e. on methods, sources, professional roles, and practices, will probably be more significant in the long run than any changes in the positive rules.

Elisabeth Zoller, *The Americanization of Constitutional Law : Preconceptions and Ignorances* 77

In constitutional matters, the americanization of law has mainly been concerned with the conception of sovereignty. However the American influence on the organisation of power is more difficult to outline.

Loïc Cadiet, *The Hypothesis of an Americanization of French Justice. Myth and Reality* 89

The theme of the Americanization of justice is a current success. But what of it really, beyond the cliché obligingly conveyed by the media ? This paper argues that the Americanization of justice is a matter of myth as well as reality. *Of myth* because there is little to be afraid of *on the realm of facts*, of the so-called Americanisation of *practices* related to justice : in the order of *social* practices, French society is not becoming, like American society, a litigious society; in the realm of *judicial* practices, French justice is far from playing the part and the powers of American society, which is the very expression of a government by judges. However, *of reality*, due to the development, *on the plane of ideas*, of the Americanization of *discourses* concerning justice: be it to praise the virtues of an *economical analysis of justice* or to call for a new *political philosophy of justice*, making the judge the epicentre of democracy. These talks attest an ideological mimicry liable to pervert the traditional groundwork of French justice more effectively than the so-called outbreak of litigation.

Using recent legal texts, the author stresses that in France the function of the courts remains strictly circumscribed and that nothing suggests an evolution towards a government by the judges.

After a comparison between the style of French *arrêts* and American opinions, the author moderates this observation by underlining the differences between the arrêts de cassation and conclusions or reports. He questions if it is appropriate to modernize this style, so typical of the French *génie*, just as MacDos have "modernized" French cooking.

The americanization is an exerciced as well as a received influence. The influence of American criminal law cannot be denied : the messianic spirit that enlives American criminal law and above all criminal procedure is supported by a neo-liberal discourse ans a superior logistic that lead to a globalisation of this law. The reception of American criminal influence is certain in French thinking but remains very questionable in positive law. Therefore the hypothesis of an americanization of French penal law is not borne out.

A study of comparative law reveals that none of the two dominant tendencies in American criminal law has succeeded in permeating European legal culture, essentially for philosophical and constitutional reasons. Penal utilitarianism and its aftermath, the "Law and Economics" movement, which apply economic reasoning to law, suffuse Anglo-American but are rejected by Continental penal philosophy, as it appears in two legal examples : "bad Samaritan" (refusal to aid persons in danger) and hate speech (racist libels and insults) laws. Retributivism, an approach of punishment exclusively based on deontological morals, has become prominent in the United States but has not yet penetrated the European legal landscape. In fact, no penal philosophy can, by its own, justify a system of liberty-depriving rules : utilitarianism, despite its indisputable – but long under-appreciated in European penal philosophy – liberal virtues, can result in morally unacceptable situations ; retributivism, on the other hand, despite its prima facie good sense, creates in reality more problems than it solves. The paper offers a sketch of a mixed model of criminal policies close to European penal practices, in which the theory of the criminal's social rehabilitation plays a central role, but is not exclusive of other theories of punishment.

The American law of liability does not seem to have had an influence on the effects of the proceedings in France, where the awards granted remain in the limits of reason. This may be explained by the procedure and sociological differences still existing between the two countries. However, American law has influences on several points our general theory of civil liability as well as the technical rules to be applied in definite fields of liability.

The author finds significant influence of American law through the adoption of the SEC model in France and financial law in general. Although rules governing insider trading are also similar in the US and in France, once they are imported they take on characteristics of French law and become different from the American rules from which they were inspired.

Facing the increasing importance of foreign institutional investors, French firms and institutions are adapting their structures in order to better answer their standards.

After having been under the influence of the English, then the German and then the European law, is French corporate law today threatened by a reception of American law ? It is true that, under the pressure of American pension funds, the rules of corporate governance inspired by the American model (the model of the shareholder) are modifying the balance of power inside French firms. But there are too many differences between the two legal systems. This is the reason why this reception can only take original ways. From a formal point of view, it does not happen, as it was traditionally the case, from one State towards another State, but on the contrary pushes towards an alternative mode of economic and social regulation ; from a substantial point of view, the reception only acts partially, the French model keeping its own peculiarities.

"Multiculturalism" is one expression which the French public opinion has demonised as it seems to convey a vision of a racially divided society, of "ghettoised" cultural minorities and the end of the French "République" as a united community. Here, "Americanization" of French law seems at its most threatening. But, in the present crisis of citizenship, the successes of policies such as "affirmative action" and "positive discrimination" may provide relevant

inspiration. The question of cultural rights, now increasingly central in European public law, has been raised on the basis of such policies. The paper addresses these different questions and answers in a positive way, showing how a respect for cultural differences and the establishment of cultural rights, far from threatening civic integration, can foster a deeper sense of belonging and a greater commitment to democracy.

This paper develops a new and conceptually distinctive analysis of Americanization in European and Japanese industry after the Second World War, based on a comparative research project involving an international group of scholars. The project highlights the autonomous and creative role of local actors in selectively adapting US technology and management methods to suit local conditions and, strikingly, in creating new hybrid forms that combined indigenous and foreign practices in unforeseen but often remarkably competitive ways. The paper itself is divided into two main sections. The first section re-examines the historiography of postwar Americanization, highlighting the theoretical assumptions underlying contending perspectives in order to bring out the distinctive features of the conceptual approach developed in this project. Only by substantially modifying or discarding altogether a series of widely-held assumptions about the nature and transferability of productive models, it argues, can the pervasive evidence of selective adaptation and innovative modification of US techniques and methods uncovered by the studies in our project be convincingly accommodated. The second section considers the implications of the project's interpretation of postwar Americanization for current debates on the transfer and diffusion of foreign productive models across national borders, underlining the historical grounds for skepticism about the likelihood and desirability of international convergence around any single best practice, model of economic and technological efficiency, whether Japanese or Anglo-American.

Miscellaneous Studies

International private family law today seems to be taken into hostage between the internationalisation of its sources, through the affirmation of fundamental rights and the breaking down of international order due to globalization. The traditional landmarks of the international lawyer, like the methodological tools allowing until now to solve the conflicts of law, fall back in front a new vision, dichotomic, of the latter which in fact is nothing more than the effect induced by movements that overtake him, hanging on the disintegration of private family law and on transformations altering the very foundations of legal orders. This is

how we now see the coexistence of a space of confrontation of over-ideologised family models, which gives hold to the upsurge of a meta-conflictual way of reasoning, and another space, a local one, united by a community of values, inside which the differences are admittedly smoothed out through more pacific co-ordination means, which is threatened of being enslaved to purely economic aims. Divided between confrontation and instrumentalisation, international private family law has not been, for the moment, able to meet the challenge of globalization.

Ronald Dworkin's fundationalism defines democracy less by the nature of its decision processes than by their ability to treat all citizens with equal respect and attention. This definition leads him to conceive the role of the American Supreme Court as an exercise of judicial reason consisting in isolating the best acceptance of abstract principles that, in the constitution, define this principle of equality of respect. Contrary to Dworkin's critics who tried to rehabilitate a procedural definition of democracy and to point out the drawbacks of a fundationalist approach for the well-being of the self-government mechanisms.

Philosophy of law and theory of law are recent fields in the view of history. It might be interesting to investigate the reasons and circumstances of their birth, because they maintain a close relation with the conception of law, the epistemological statute of the legal science and the methodology of lawyers.