INTRODUCTION

This is a collection of readings about many societies, for scholars in many societies, and students in many societies—in short, for everyone who is interested in the basic questions of the relationship between law and society. There is a large literature on this relationship, most of it about law and society in specific countries. There is a much smaller literature that compares the legal systems or legal cultures of more than one country, from the standpoint of scholarship in law and society. But most collections of materials that exist are geared almost exclusively toward audiences in the United States; they are drawn largely or entirely from the experience of the United States and present research done chiefly within the United States. There are also some law and society readers in other languages, such as Spanish (Añón et al. 1998), but in this case all the articles dealt with Spain. Ferrari (1990) published a worldwide documentary enquiry with law and society bibliographies of thirty-five countries; this shows that most publications are national in scope. It is our aim to begin at least to fill the gap in the literature; to put together a reader that is truly global and international; a reader that samples the literature about law and society in many countries and from many different parts of the world.

When we talk about law and society, we have to remember that each country has its own legal system that interacts with the society that encircles it. When we talk about law and society, and speak in general terms, a reader might think that we are implying that there are essential similarities that bind all legal systems and even that different societies are also alike in some fundamental ways. We are implying that there are some generalizations that can be made about the relationship between law and society in all or perhaps most societies.

This book is meant to explore this general issue—that is, the question whether there are "laws" or at least generalizations that apply to whole groups of societies—and investigate its complexity. There is no doubt that many legal systems, especially those of contemporary societies have striking similarities. This is precisely why we can, for example, compare German with Mexican law, and indeed these two systems do have features in common. But, at the same time, it is obvious that they are not identical, and they may have some quite basic cultural and structural differences. The political systems of Germany and Mexico also

have distinctive features that allow us to consider them as separate, and we cannot say that those differences are unimportant.

The many differences that exist demonstrate that each country not only has its own legal system, but that each legal system is unique. In addition, the reach of every legal system goes no further than its own national borders. This makes the serious study of legal systems peculiarly difficult. Physics is physics everywhere; so too of all of the natural sciences. It is even true, to an extent, of the social sciences; they too are transnational (though this is a bit more controversial and complex). What makes a science a science is the very fact that it is universal, that it rests on theory and research that is not limited to any particular country. For this reason, it is hard to imagine a "science" of law that is really parallel to the science of astrophysics or even parallel to economic or political science. However, there most certainly can be science about law: careful, rigorous study of particular legal phenomena. Therefore as we pile up more and more of these studies, we may be able to formulate some interesting, and valid, general statements about how legal systems behave—if not all legal systems, then at least legal systems in classes or groups of societies.

It is conventional to divide legal systems into "families" (common law, civil law, Islamic law). Membership in a family does tell us something about the particular legal traditions of a country and its legal history, but it tells us very little else. The legal systems of France, Haiti, Japan, and Argentina are all members of the civil law family and share some of the traits of that family. But the differences between them are arguably more important than the similarities. One only needs to look at the works of Toharia (2003), Rodriguez, Garcia-Villegas, and Uprimny (2003), and Cepeda Espinosa (2005) to realize this fact. We can take for example, Spain and Colombia, two countries with relatively new constitutional courts. This is a change related to the judicialization of politics, a recent development in the transformation of law and legal culture in modern times. Notwithstanding their similar origin and scope, the two courts have played their roles under different circumstances and the reactions of their respective political systems have also been very different. In other words, the divergence in national contexts may compel similar institutions to have different effects and operate differently in each country.

The same is true of common law countries—Australia, India, Barbados, and Ireland have some traditions in common; and perhaps the way lawyers in Australia think about legal problems is different in some characteristic way from the way a lawyer in Italy might think about similar problems. But in many ways the legal system of Australia might have more in common with the legal system of Argentina than with Jamaica or Nigeria.

Why should this be the case? The most general answer is that what molds a legal system decisively is not so much its tradition, formal juridical norms, habits of lawyers and jurists, or the rules and codes of the statute books, but more the culture, economics, and political structure of that country. This is the main focus of the law and society movement: what the legal system in operation is really like, and why; and it is the main focus of the readings in this book.

Studies of law and society have emerged and developed in great part because traditional legal scholarship—largely focused on the analysis of purely legal materials like legislation and court decisions, and in concepts developed in the academic or professional legal

field—could not explain how legal systems function. But even more serious is the fact that traditional scholarship never even tried to understand *law in action*. And it paid little or no attention to legal impact, that is, to the way in which legal rules, doctrines, and institutions impacted society, or failed to, and what were the conditions that determined whether an impact would be small, large, or nonexistent. Nor did traditional legal scholarship really explore what made legal systems grow and change; it was curiously static. There is no doubt that traditional legal scholarship can be very useful for the practice of law, but if we accept that the *law in the books* is different from the *law in action*, then the latter should more and more become the focus for research; scholarship on law in action may, indeed, also influence the practice of law.

We can make a distinction between external and internal scholarship about the legal system. "Internal" scholarship accepts the formal norms, the official texts, and the inherited doctrines and rules of the legal system, and it works within that tradition. It is a style of legal scholarship that is familiar to almost all lawyers and law students, and it dominates the teaching and scholarship of the law in every country, to the best of our knowledge. Traditional legal scholarship is also highly normative. It tends to ask what the right answer is to legal questions, and its criteria for deciding the right answer comes from the thoughts and writings and habits of legal scholars or judges.

"External" scholarship is study and scholarship about the legal system; it is scholarship that looks at the legal system from the outside and, specifically, from the standpoint of one or more of the social sciences—sociology, anthropology, psychology, political science, economics, and history. It tends never to ask what the right answer to a legal question might be. Rather, it asks questions about how and why and to what effect. Why did this rule arise or persist? Why was this statute passed, and what interest groups benefited from it? What were the forces that led to some particular reform of the law? Who followed the dictates of some regulation strictly; who disobeyed, and why; and who tried to find ways to get around it? What role do lawyers play in economy and society? Roughly, law and society studies have the same relationship to "internal" scholarship that the sociology of religion (for example) has to theology. Doctrines of the Catholic Church, or Islam, or any other religion, can be studied for their own sake and for religious enlightenment. One can ask, within the religion, questions of right or wrong. If Islam forbids *riba*—lending money at interest—then what strategies can banks follow to satisfy Islamic theology? The sociology of religion cannot and does not ask or answer such questions. Sociology of religion might ask: why do more women than men go to mass on Sunday in Spain; why did Buddhism spread through various countries of the Far East, and dozens of other questions, all from an external viewpoint. The same point, more or less, could be made about the relationship between the social study of law and the traditions of internal legal scholarship.

Law and society is obviously a label that encompasses a broad range of approaches and directions. It basically refers to the legal scholarship that employs social science tools and methodologies. There are studies that stress the relationship with culture, that is, the perceptions, attitudes, and opinions that people have about the law. Others give more importance to the relationship with legal structure and formal institutions. Some studies have a sociological focus. In others, more anthropological or ethnographic, the center of attention

is on the structure of traditional societies and the exploration of the behavior of individuals according to their social roles in different historic periods. Another subfield pays attention to the relationship between law and the economic behavior of individuals and focuses on institutions like property or contracts, which are in turn essential for the comprehension of economics and the law. Law and society research may also focus on language. It can focus on the analysis of a given situation at present time, or use a historical perspective, with particular attention to changes over time.

We have already mentioned what we think is the basic axiom or proposition on which the law and society movement rests: the primacy of culture, social norms, and economic and political forces in the genesis and impact of law. Another way of putting the matter is this: the legal system is not autonomous. A system is autonomous if it operates under its own rules, if it grows, changes, and develops according to some sort of inner program. If the legal system were truly autonomous, then outside forces would have little or no impact. No serious law and society scholar believes this. Many of them do believe that legal systems are or can be at least partially autonomous. How much so, and in what regard, is (in theory at least) an empirical question—something we could investigate and measure. Of course this is easier said than done.

One of the major concerns of law and society scholars is impact. A law is passed: Does anyone behave differently? Does the law change people's minds and actions? Is the law obeyed or ignored, and to what extent? This is always an empirical question. There is no truly general answer—at least none at the present time. Hopefully, careful scholarship could at least turn up patterns and make statements that are valid for more than individual instances.

We cannot say anything very general about impact, but we can say this: whatever the impact is, it depends almost entirely on what is happening "outside" the law, that is, in the real world. Something in the social order determines impact, much more than the text of the law. If people in New Zealand tend to obey traffic laws and people in Italy do not, the texts of the laws themselves are very unlikely to give us a satisfying explanation. Nor does the fact that New Zealand is a common law country and Italy a civil law country explain the difference. The answer—if we can find it at all—will probably lie in the local legal culture. Of course, compliance with the law depends on all sorts of factors. The level of enforcement is one of these factors, but levels of enforcement are themselves influenced by elements of the local legal culture.

Another general point worth making is this: any major change in society is bound to be reflected somehow in the legal system. This can be an external event—a war, or a devastating epidemic. Or it can reflect changes in science and technology. Just consider how the invention of the telephone, the automobile, the jet airplane, antibiotics, or the computer has influenced the law. There is, to begin with, the obvious fact that the law will have to deal directly with the consequences of new technology—think of the development of a huge body of traffic law, which the rise of the automobile made necessary. But technological changes can, in turn, lead to major social changes, and major social changes—like the so-called sexual revolution or the rise of modern individualism—have an even greater impact on the law than the technology itself.

Law, after all, is never static; it is constantly in motion, constantly reworked and reconfigured. There is a common belief—or myth—that the law is extremely conservative, that it hates change, that it worships the past. Nothing could be further from the truth. The law sometimes cherishes archaic terms, but legal systems are not sentimental. Something old persists in the law only because it is useful or valuable to some concrete, contemporary interest group. Otherwise, it is ruthlessly discarded. The common law doctrine of precedent is another aspect of many legal systems that creates an impression of reluctance to change—an impression that the legal order loves the antique and the time-honored. However, this is a misunderstanding of what the doctrine of precedent means—and an even greater misunderstanding of how it works in practice.

We should also dispose of the opposite misunderstanding: because law is plastic, because it is intensely practical, one might think that the legal system always "works," that it is always efficient, that it is always adaptive, and that it always fits its society like a glove fits a hand. Legal systems always reflect their society, but that society itself can be full of conflict and inconsistency. It can be a dictatorship, with a ruling clique that is more concerned with lining its own pockets than anything else, and so on. Open, democratic societies tend to be less corrupt than closed, authoritarian societies. Additionally, their legal systems tend to reflect not just the interests of narrow elites, but also (to some extent) the interests of broad masses of the middle classes. The contents of this reader introduce the student to a wide range of societies, some of which have highly efficient and functional legal systems and some of which do not. Some readings will show the ways in which individuals and businesses learn to cope with incomplete or malfunctioning systems of formal law.

Another proposition, which is clearly linked to the others, is that particular types of society produce particular types of legal order, or configurations within the legal order. A capitalist society generates capitalist law—law that provides for markets, private property, enforcement of contracts, free enterprise (within limits), stock exchanges, and so on. A feudal society generates laws that promote and reflect the feudal system. A socialist system, or a fundamentalist Islamic system, similarly creates a legal system that will perform in such a society. The modern welfare-regulatory state, in Western Europe and North America (among other places), produces certain kinds of law that fit the state—in fact, the state is in a way defined by the type of law it generates. A welfare state is a state that has a set of welfare laws. And a regulatory state is a state that has given up the idea of laissez-faire (if it ever had it), and elected to pass laws that call for the control and supervision of business.

The novelty of this book is to call attention to both diversity and similarities among legal systems, in what we hope will be a systematic way. Our plan has been to include works on law and society that cover the different thematic areas of this field within the largest possible geographical area, but in a way that keeps this volume to a manageable size.

Since each country is unique, and each legal system is unique, the reader might well ask what can be learned from this book. We draw on studies from many different legal systems, and even though quite a few countries are represented in this book, there are more than two hundred independent countries in the modern world, and most of them are absent from this collection. We think, nonetheless, that the student of law can learn quite

a bit from looking at a range of topics, drawn from a range of countries. The very diversity of the settings is important; it teaches us something about the way the legal order relates to the society in which it is embedded.

The diversity extends not only to the settings but also to the methodologies the authors have used. Among the authors are sociologists, political scientists, historians, psychologists, economists, as well as legal scholars and jurists, who use the law and society approach in their work. Some of the readings are quantitative; some are qualitative. Some use elaborate statistics; some make use of interviews, or of ethnographic techniques. Some are strongly theoretical; others are light on theory and heavy on description and analysis. Works that are rigorous, that reflect careful research, or which embody theory about such research, make up the contents of this volume. We have avoided studies that view legal scholarship as a self-referential discipline, or which are solely about the formal analysis of legal doctrines, divorced from context.

The topics covered are listed in the table of contents. Hard choices had to be made about what readings to include and exclude and about what topics to cover. There is material on the legal profession, on criminal justice, on globalization, on litigation and other forms of dispute processing; material, too, on the importance of legal culture, and the influence of the structure of legal systems. Structure and culture are key concepts that reverberate throughout the book. Substantively, the topics range from divorce law to crime and punishment and to contract making among business people.

A word should be said here about language. The readings included in this book deal with countries whose citizens speak many different languages, European languages like Dutch and German, as well as Asian languages like Chinese and Japanese. But the original articles for the most part were written in English. Interestingly, during the last decades the salience of English as a lingua franca has successfully moved beyond the natural sciences and medicine into the social sciences. English has also become the language of finance, international trade, and development. International aid agencies, nongovernmental organizations, and other global institutions have embraced English as their language of choice, thus influencing the way in which people communicate with these institutions and how they in turn communicate with the rest of the world. Nowadays, English is not viewed necessarily as the language of a dominant culture or powerful nation, but rather as a pluricentric one, and this perception has facilitated its acceptance and success as a global language (Kaplan 2001). English is the language that more and more professionals and scholars must acquire. It is the second language for millions of people; and the second language, very notably, for international-minded legal scholars. Of the three editors of this collection, only one speaks English as his native language.

The dominance of English in sociolegal scholarship, as in other fields, is itself a consequence of globalization. In many contexts, there simply has to be an agreed-upon international language. The most obvious case is air-traffic control. A Brazilian airliner approaches the Istanbul airport. Nobody in the cockpit can communicate in Turkish with the air-traffic controllers, and none of the air-traffic controllers speak Portuguese. Nor do the air-traffic controllers speak Japanese, if the next plane due is from Tokyo, or French for the plane arriving out of Paris. There has to be, by common understanding, some way

for the air-traffic controllers to communicate with the pilots—some language that they, and everybody else in this position, must share. That language, for various reasons, turns out to be English, and once established as such, its position as the international language only grows and grows.

English has also penetrated the legal jargon of many countries, in spite of the formalistic, conservative, and static nature of their traditional judicial language. English (as Latin or French were in the past) is now the dominant language of international and comparative law, the United Nations, the International Court of Justice, and the European Court of Human Rights. Academics have also felt compelled to use more English than in the past as it has become the default language for international conferences, and many of the leading scientific journals are also published in English. Our particular field is not an exception. After browsing through the International Institute for the Sociology of Law's database, we found out that of 1,497 works published in the field of law and society between 2000 and 2007, 942 were in English. These numbers continue to grow at a fast pace. The fact that the vast majority of the law and society literature is in English clearly facilitates our task in addition to assuring a broad audience for our book.

With respect to language, globalization also means that people have become more aware of cultural diversity and many learn other languages in addition to English. In the scholarly legal community people who speak two or more foreign languages are common. For this reason we have included in this volume some bibliographical references in Spanish, French, and Italian.

In broader terms, modernization and globalization are social facts. But it is not clear that all societies are bound to modernize or globalize, or in the same way. And both modernization and globalization have plusses and minuses. Paradoxically, one aspect of modernization is respect for tradition and culture, which leads to a certain revival of aspects of society that in theory modernization was meant to destroy. The growth of fundamentalism, or the movements for indigenous rights, shows how complex "modernization" is in practice.

Globalization, in turn, has not meant the end of national identities, or of nationalism itself. The modern world is the world of the European Union, Mercosur, the African Union, and the United Nations, but it is also the world in which Nauru and Vanuatu are independent countries, in which the Soviet Union is now sixteen different countries, and Yugoslavia at least six, in which the Czechs and the Slovaks decided they were separate entities, the Basques and the Welsh have more autonomy than they had before, and Belgium is in danger of splitting into two or more pieces. Moreover, there is a global culture of human rights, a World Trade Organization, an International Criminal Court, and a worldwide spread of judicial review. But there is, by contrast, the threat of terrorism, a kind of worldwide cancer, reflecting a vibrant and dangerous culture of extremism and intolerance. Terrorism is a threat, not only to the lives of innocent people but also to the rule of law itself, in that it leads to anti-terror campaigns in the developed countries that are widely popular, but that include important restrictions on liberty and human rights.

A final word: we think the law and society approach is important—indeed, fundamental. Law is too important to leave in the hands of orthodox legal scholars. One of the basic facts about modern societies is that they are societies with enormous and complex legal systems.

No modern society can function without an elaborate framework of law. It does not matter whether it is capitalist or socialist, whether it is committed to privatization or government ownership. In all cases, it needs a huge amount of law.

But that legal framework is not just the visible, obvious framework of constitutions, statutes, ordinances, rules and regulations, and decisions of courts. It is also a framework of behaviors and attitudes. A legal system is a moving, functioning machine. What makes it move is not texts and words so much as the social context, the legal culture, the society itself. What do we learn about a society from its written constitution? The constitution might be, for example, full of noble words about the rights of the citizens, but what does this mean, if the government violates those rights consistently and if a corrupt court system fails to enforce the rights? A country can enact a beautiful code of commercial law, but the living law of commerce, which might well be influenced by the code, will also include norms and values and customs of supreme importance that are not included in the code. And so it goes.

There is nowadays a vast production of nonacademic materials that are relevant to law and society studies. For example, Amnesty International publishes an annual report and other important documents on the human rights record of governments. Transparency International does the same with regard to corruption. These materials are important and useful, but we also need basic research, more studies, more understanding of how legal systems actually operate. Our hope is that the studies included in this book contribute to that end.

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