LAW & SOCIETY

LAW AND SOCIAL CHANGE IN MEDITERRANEAN EUROPE AND LATIN AMERICA: A HANDBOOK OF LEGAL AND SOCIAL INDICATORS FOR COMPARATIVE STUDY. By John Henry Merryman, David S. Clark & Lawrence M. Friedman. Stanford: Stanford Law School, 1979. Pp. 618.

*Reviewed by Stewart Macaulay**

In 1971, USAID made a large research grant to the Stanford Law School to fund SLADE (Studies in Law and Development), a study in "quantitative comparative law." Professors John Merryman and Lawrence Friedman recruited distinguished participants from Chile, Costa Rica, Italy, Mexico, Peru and Spain; the Mexican participants later withdrew and were replaced by a noted scholar from Colombia.[1] The research design was refined at Stanford in 1972, and the National Scholars returned to their countries to carry out the research. Professor David Clark joined the project in 1973. In 1975-1976, the National Scholars returned to Stanford to report their findings, and many wrote monographs in Italian or Spanish which were published in their own nations. The book under review is the first major report of the results of the project to be published in English.

However, the book contains only about 40 pages of text to explain 538 pages of tables of data. Even after reading the explanations offered, many are likely to be puzzled as to why they should want to know such things as that 2,879.62 penal cases per 100,000 inhabitants were filed in Costa Rica in 1970, that the number of professional penal court judicial staff in Colombia jumped from 95 in 1963 to 349 in 1964, or that the total number of law teachers in Italy dropped from 3,235 in 1969 to 2,864 in 1970. In order to see why these data were gathered and why we might be interested in them we must both look at this book and consider the background of the project.

At the front of the volume the reader will find about 40 pages of text. Twenty of them deal with the "intellectual origins of the law and development movement," and are adapted from an essay by Merryman which appeared in this journal. From it we learn that the SLADE project was planned to avoid the errors made by all of us who attempted to export U.S. models of legal education and research in the 1960s.[2] American law professors tend to write as if le-

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1. Some may be troubled by the nations selected for study. It is hard to justify a Latin American study which omits Argentina and Brazil and, perhaps, Venezuela. One can wonder why Italy was included since its influence has been confined largely to Argentina. I assume that the countries were selected largely because national scholars could be found both willing and able to conduct a quantitative comparative study of them.

2. See Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in*

gal norms and ideology were the critical elements in legal systems and as if they had no idea who used the legal system for what and with what results or what it is that lawyers actually do. SLADE planned to put aside legal doctrine and turn to things in the legal systems under consideration that could be counted. It was to be comparative and to deal with trends over time rather than with single instance snap-shots of only one nation's legal experiences. In this way patterns might be discovered and differences would demand explanations.

The next ten pages of the book are devoted to the "nature of the inquiry." The authors define development as "social change in developing nations" and say that they are interested in the impact of these changes on the legal system. Law is defined as "legal systems" which, at least in the six SLADE nations, can be viewed as composed of legislative, administrative and judicial components, of private ordering (e.g., contracts, wills and gifts), of law enforcement and of legal education and legal professions. Each of these components is seen to involve institutions ("units staffed by legal actors"), actors, processes and resources consumed. The project was to gather measures of all of these dimensions. Once a quantitative description had been made, it would be possible to compare Chile with Peru and both with Spain and Italy. It was a working assumption that social change would affect such things as the number of lawyers and judges, the number of certain types of cases coming before the courts, the number of certain types of laws passed, and so on. The final six pages of text in the book are devoted to "using the data." Here it is pointed out that such things as population density, education and the percentage of the economically active population engaged in activities other than agriculture can be expected to affect the demands made by the society on its legal system.

Then one confronts 538 pages of tables describing aspects of the legal systems and social change in the six SLADE nations. The material on legal systems is divided into adjudication, legislatures, public administration, legal education and legal professions, and private ordering of legal relationships. Under adjudication, for example, we find data reported from 1945 to 1970 on such things as the number of different kinds of courts, their caseloads, the size of the judicial staffs and judicial budgets. Five major indicators of social change are reported. We find tables on the total population and urbanization, general education, the economically active population engaged in various sectors of the economy, energy consumption, gross domestic product, exchange rates and price indices. Here the book ends. What does not appear is any analysis attempting to relate one thing with another or comparing results across countries.

We can make a good guess as to why these data were collected

Latin America (1980), which credits me with writing "bittersweet" reports about the Chile Law Program of the International Legal Center during my time in Santiago. John Merryman, of course, is one of the major protagonists in Gardner's story.

if we turn to the intellectual background of the project. Friedman, for example, has long been interested in changing patterns of the use of courts in United States legal history. In his *Contract Law in America*, published in 1965, he argues that as areas become socially important they have been removed from the domain of private contract and placed elsewhere. Sometimes a special body of law has been created; sometimes an administrative agency has been formed; sometimes institutions outside the conventional boundaries of the formal legal system have grown up. As a result, classical contract law becomes the law of left-overs—areas not important enough to merit their own special treatment—or the law of newly emerging situations which have yet to gain their special legal norms or agencies. One way areas become socially important and successfully prompt specialized treatment is through their relationship to changes in the patterns of economic development. Friedman's later empirical work focuses on patterns of the caseload of trial courts in two counties in California as they developed.

José Juan Toharia was one of the SLADE national scholars. Before the project was funded, photocopies of his thesis, *Cambio Social y Vida Jurídica en España, 1900-1970*, were passed around the circle of law and development scholars who could read Spanish; a summary translation by Catherine G. Lynch became available in 1973 from the Yale Law School's Program in Law and Modernization. Toharia offered four indicators of development: (1) distribution of the economically active population (he asserted that a society is pre-industrial when more than 50% of the EAP is engaged in agriculture); (2) national and per capita income (when these grow at a sustained rate, a society enters the developmental phase); (3) degree of urbanization (developed societies tend to be more urban, but urbanization alone does not necessarily indicate development in many Third World nations); and (4) mobility of resources, measured by the number of telephones and motor vehicles and the volume of mail.

Toharia then looked at indicators of criminality, both indictments and convictions. As Spain developed, the number of indictments increased. Most of the increase involved crimes against property and motor vehicles. The number of convictions rose much less dramatically. Convictions for motor-vehicle-related crimes account for much of the increase while convictions for what Toharia called "classic crimes" actually decreased. He sees this gap between the patterns of indictment and conviction as reflecting an attempt by authorities to stretch laws written in a pre-industrial time to cover new types of conduct which they see as objectionable but which fit poorly into classical models of wrongs.

On the civil side, Toharia found a tremendous increase in the number of instruments notarized as the number of commercial enterprises increased and as the percentage of the population engaged in agriculture decreased. This pattern becomes even clearer when one considers the individual provinces of Spain; the large increase

in notarized instruments occurred in the developing regions of the country and not in those which remained in a pre-industrial state. Large and small civil claims and debt collection and bankruptcy cases brought before the lower courts also showed an interesting pattern. Initially these cases increased as a region of Spain began developing, but then the number fell off. Toharia suggests that the number of conflicts related to commercial activity continue to increase as development takes place but that courts become less and less attractive as a place to resolve them. Courts become overloaded and disputants face delay. The norms applied assume isolated single transactions between strangers or those who are estranged. As individual business people are replaced by corporations, their officials begin to emphasize the on-going operation of business and cost-effective ways of avoiding and processing disputes. As a result, there is a great incentive to negotiate solutions to disagreements, making adjustments later in the relationship to take account of past problems, or to turn to private mediators or arbitrators who offer quicker solutions more in tune with modern business.

One of the SLADE national studies—Edmundo Fuenzalida's *Fluctuaciones de la Demanda por Justicia en Función del Cambio Social*—suggests that SLADE originally was seen as a series of Toharia-style studies in six countries which could be compared. Fuenzalida looked at particular regions within Chile and found that as modernization (as measured by the density of urbanization and the percentage of the economically active population engaged in agriculture) took place, the composition of the civil cases before trial courts changed. The courts' function shifted from that of adjudicating rights to that of providing coercive power to implement rights established, without real contest, by documents. The courts become less and less involved as resolvers of conflict because important disputes are channeled away to administrative agencies and other-than-legal resolution processes. Moreover, courts become less and less able to spend much time carefully applying legal norms to contested facts in order to decide real controversies because they become swamped by demands. Much of their growing caseload involves debt collection matters which they handle by bureaucratic processing cloaked with only the symbols of adjudication. While individuals asserting rights may be an important part of the ideology of liberal legal systems, a realistic picture of courts in an industrialized-developed-consumer-society would feature the standardized procedures needed to repossess a car that had been sold on credit.

The book under review does not address these questions. I am told that Professor Merryman now is writing a report considering what the SLADE data indicate about social and legal changes; Professor Clark is writing about what SLADE learned concerning the differences and similarities in the legal culture of these six nations. We can await these reports with real interest. It may be that SLADE failed to find evidence to support Toharia and Fuenzalida's picture across all six societies. The SLADE data may neither estab-

lish nor refute Toharia's view. Perhaps the data support something like their picture in some but not all of the SLADE nations. Perhaps Fuenzalida is the only one to replicate Toharia's work. If the Toharia thesis cannot be shown to hold in all industrializing nations, this is worth knowing. We then would have to try to explain why the changes he describes occur in some but not all societies.

Even if the investigators cannot offer true quantitative comparative law, there may be important lessons to learn from this ambitious study. They may have something to tell us about attempting to do research based on the data nations collect and publish and on reports in newspapers and magazines. Even if a quantitative comparative analysis cannot be done with the data the researchers were able to collect, a series of case studies about the business of the legal system in these societies might be valuable. At the very least, we can hope that the various national studies produced by SLADE will be made available in the U.S. for those who can read them in their original languages; summary translations would be even better.

In the last analysis it is hard to appraise the value of the book under review, standing alone. If a reference work accurately reports a fact you need to know, then it is valuable to you. However, I cannot predict who will need this information. Certainly, it is better that this material be made available in libraries than remain on the bottom shelves of the investigators' offices.

Some readers may be intrigued and look for patterns in the data reported here, but such patterns are most likely to be found by those who know a lot about at least some of the six SLADE nations. Less sophisticated readers can try their hand at playing with the data, and it is fun to speculate. For example, what could we make of the drop in the number of civil courts in Santiago and Lima per 100,000 inhabitants from 0.80 and 0.75 in 1950 to 0.62 and 0.45 in 1970 while the number of civil courts per 100,000 inhabitants of Bogota declined from 10.23 in 1950 to 5.00 in 1970? Population growth in national capitals must be part of the answer. It is unlikely that any nation will create or shift courts quickly enough to keep up with population growth or changes. But I can also speculate that courts serve primarily the upper classes who have property worth fighting about in litigation. Most of the increased population of Latin American capital cities are likely to be poor people who have few claims to valuable legally recognized property and so have no reason to come before the public courts, except, perhaps, as criminal defendants. Thus, these data may tell us little about changes in the service available to that small part of the population who have reason to use the civil courts. But this leaves unexplained why Lima and Santiago can get along with less than one civil court for every 100,000 people while Bogota offers five such courts for every 100,000. Do Peruvians and Chileans have fewer civil disputes or do Columbians enjoy more dispute resolution service from their government? Perhaps Peruvians and Chileans have more alternatives to litigation than

Columbians. Perhaps the "legal culture" of Columbia makes litigation before the courts more acceptable.

Perhaps USAID would like to make another grant so that we could take on such questions. Perhaps the research could be designed so that those of us who live in the snow belt could move from North American winters to South American summers. Speculating about these data can make one nostalgic for the era when such money was available.

LEGAL PHILOSOPHY

JUSTICE, LAW, AND ARGUMENT. Essays on Moral and Legal Reasoning. By Chaim Perelman. Dordrecht: D. Reidel Publ. Co., 1980. Pp. xiii, 181.

*Reviewed by Edgar Bodenheimer**

This new volume by the distinguished Belgian philosopher Chaim Perelman contains a number of articles, papers and lectures which (with one exception) had been published previously, for the most part in French, in various periodicals, compilations of essays and proceedings of international congresses. All of these contributions have now been made available in English, preceded by an illuminating introduction by Harold J. Berman.

There are three leading themes which impart to the book its special character. The first concerns the problem whether it is possible to formulate an objectively valid theory of justice which goes beyond the establishment of purely formal criteria. The second one deals with the methodological distinction between demonstrative and dialectical modes of reasoning in law. The third, less closely elaborated, theme focuses on the ancient dispute—still not fully resolved in the Anglo-American legal system—whether literal or purposive construction of legal sources is to be accorded preference in the interpretation and application of legal norms. These themes will be discussed in the three sections of the review which follow.

I.

A study on justice published in French by Perelman in 1945 and translated into English in 1963 is reprinted as the first chapter of the book. In this study, Perelman took a highly restrictive and thoroughly relativistic view of the notion of justice. The only conception of justice to which he attributed general and objective validity in this early work was a purely formal one. He defined justice as "a

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