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HISTORIES OF LEGAL TRANSPLANTATIONS

Comment on Pnina Lahav, *American Moment[s]*

A Comment on: "American Moment[s]: When, How, and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools?" by Pnina Lahav.

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Pnina Lahav's article¹ identifies three phenomena in legal education in Israel: the student-run law review; curricular reform; and teaching methods that demand active involvement on the part of the student. The article argues that these phenomena are American transplants, and then goes on to examine when, how, and why they took root in Israel. The initial *when* is identified as the late 60s, when Aharon Barak and Izhak Zamir returned from a visit to Harvard Law School. As for the how and why, the article takes up the individual development of each transplant and suggests a number of explanations for their adoption, sometimes also for their disjointed trajectories. The analysis as a whole is framed as an explanation for the assumption that the frequent American visitors to Israeli law schools find themselves in a space that is culturally and professionally similar to their own.

There is very little in the account I would disagree with. Indeed, in some respects, I think the argument that U.S. models influenced Israeli legal education can be strengthened by pointing to more recent developments. The creeping curricular reform in the early 70s did very little to bridge the gap between Israel and the U.S. The significant change came in the late 90s, when Uriel Proccacia, then Dean of the Hebrew University Law School, revolutionized the "compulsory-elective" ratio — quite explicitly on the basis of the American law school curriculum. This initiative spread almost immediately to other university law schools. So, too, at around the same time, he encouraged what was a purely grass-roots student initiative to establish a wide range of legal clinics that would provide a needy public with legal services, and students with practical training. Here too, whatever the source of the student initiative, he was probably influenced in favor

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¹ Pnina Lahav, *American Moment[s]: When, How, and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools?*, 10 THEORETICAL INQUIRIES L. 653 (2009).

of the move by the prevalence of clinics in U.S. law schools. Finally, the number of "law and . . ." courses as well as the number of business-oriented law courses offered by young faculty members who recently graduated from U.S. law school programs are much greater than they used to be, a fact that can presumably be traced to their exposure to American education.

I would perhaps differ in emphasis here and there, particularly with respect to curricula and teaching methods. For example, however eager Barak and Zamir may have been to change teaching methods, they, like almost everyone else, did continue to lecture *ex cathedra*. They deviated from traditional methods only in their reduced formality and in their greater openness to questions. In Jerusalem, there were only two people who assumed the Socratic or problem method successfully and continuously: Weisman and Kretzmer. As the article points out, neither of them was inspired by the U.S. example. Similarly, the increased informality of teaching is a university-wide phenomenon and could as easily be attributed to what the article refers to as broader generational changes, as well as to a general breakdown of the social hierarchies in Israel that occurred during this period. So, too, as the article concedes, interdisciplinary teaching, in one form or another, was a very early feature of Israeli legal education, a feature which was, ironically, reduced somewhat just as it began its ascent in the U.S. Its resuscitation need not be a result only of American influence. Finally, privatization of the law schools can hardly be regarded as a strengthening factor in the influence of U.S. legal education in Israel, at least to the extent that that influence is regarded as a reforming and improving influence. Quite the contrary. I am told that increased access to a legal education has produced far more sterile, formal lectures in many of the private colleges, far less attendance in class, and far more misleading, pirated class notes and potted summaries of original materials or of their bad translations. It has produced a consumer culture quite antithetical to the ideal of élite legal education as exemplified in the U.S.

Putting aside these and other quibbles, it is incontrovertible that the three phenomena identified by the article exist, that they did not exist before the late 60s, and that there is evidence to suggest that they are the result of American influences. The story the article tells is compelling.

Rather than develop this, I would like to focus on the *problématique* of legal transplants implicit in this discussion and see if this focus yields any further insights. It seems to me that at least four questions relating to legal transplants present themselves. One question that I shall mention, but not go into, is whether changes such as these in legal education are really *legal* transplants, or rather *social* transplants, and whether this should make any difference to the way in which they are treated or understood? I think this is

an interesting question, but as I said, I shall not go into it here. The second question is whether the material teaches us anything about the conditions in which transplants such as these take place — when a system is ripe for a transplant, what sources it chooses, and why? The third question is why these transplants struck less deep roots in Israel and developed here differently from in their home? The fourth question is whether such transplants can forge relationships of familiarity between the target society or system and the system of origin, as suggested by the article? I will make only a few comments on the last three of these four questions.

The question, what can we learn about the conditions in which transplantations take place, concerns the *when*, *where from* and *why*. In the 1960s the Israeli legal system was still in its infancy, actively searching for an identity distinct from its former definitive components: Ottoman law and English common law and equity. In such formative periods, it is not surprising that local soil should be receptive to foreign transplants in general. Turning to the U.S. might well have compensated for the growing distance from English law. What is perhaps surprising is that at least from 1967 until 1982, two of the significant dates stressed in the article, Israel was transforming its private law from the common law to the *civil* law model. The virtues of formal, codificatory legal thinking were being paraded, not only, but very significantly, by Barak the teacher, Barak the actively legislating Attorney-General, and Barak the newly appointed Supreme Court justice. To the extent that U.S. educational models had an influence in this period, this might perhaps be explained as a counterweight to the continental turn. However, the bulk of the curricular reforms and the more general reforms in teaching methods came into bloom much later, at a time when the legal system could be said to have gained some degree of maturity. If this is the case, how can it be explained? One partial explanation may be that this later period coincides with the constitutional moment in Israeli law, which is at least partially characterized by a complete abandonment of the English constitutional model in favor of its American counterpart and American public law discourse.

At the same time, however, it is instructive that changes in teaching methods and curricula have occurred, in different degrees, all over the world. If you look at the websites of any law school in the U.K., in Europe, in Canada, Australia or New Zealand you will find many more varied courses than were there a few years ago and far fewer compulsory courses. And while teaching methods may not have changed dramatically, there is far greater variety and significantly less formality there too. It *is* possible that these mature legal systems were also affected by foreign transplants. It is, however, no less likely that local or global social events such as the student

unrest of the 60s and its aftermath — inspired though they may have been by events in the U.S. — are an explanation; at least when they are taken together with the enormous globalization of academic and legal life that has taken place all over the world in the past fifteen years. If this phenomenon is instructive as to the social conditions conducive to transplantation, it suggests that Israel may not be a special case and that the influence is neither exclusively nor directly American.

The next question relates to the depth of the roots struck by the transplant and its different nature in its new environment. The resistance of students to more informal and more demanding styles of teaching is legendary in Israel, and the proliferation of private law schools is at least one factor that has strengthened its accompanying "student-as-consumer" attitude. The preference for electives rather than compulsory subjects is also waning a little. This is partly due to the fact that even what might be regarded as core electives are often taught by adjuncts, and are coming to be thought of as soft options. It is also partly because students graduate without basic knowledge in important fields such as criminal procedure, evidence, family law and labor law. It is not uncommon now to hear proposals that we revert to a larger core of compulsory or semi-compulsory courses. In other words, these changes have not taken strong root and have not become characteristic of Israeli legal education. With the increased interest on the part of young faculty members in publishing their research in the U.S., even the prestige of the law reviews is declining. Taken together, all of the above suggest that among the factors that can facilitate or impede the adoption of transplants are local market forces and social norms, which act on institutions in much the same way as climate and soil conditions on fruit or vegetables.

The final question is whether even successful transplants create a cultural and professional community of the two societies involved, and whether the transplants in legal education described can explain both the proliferation of American academic visitors to Israel and their sense of familiarity once here. On this point, I venture to disagree with the article. In the first place, Israel is no special case in terms of American or other visitors. American and other foreign law professors can be found in almost every major, and in many a minor, law school all over Europe, South America, the Caribbean, Australasia, Russia, and the Far East. So too, American law schools are overflowing with visitors from almost every other country in the world. Scholars from Britain, France, Germany, Italy and many other countries have permanent, full- or part-time appointments or visiting appointments in U.S. law schools. And this is not a purely American phenomenon. Again, a glance at the websites of any law school or faculty reveals the prevalence of foreign visitors and the importance attributed to the learning of foreign law.

Israel is hardly special. The phenomenon is surely related to globalization in general, and to academic and legal globalization in particular, rather than to seeds planted in the late 60s.

More importantly, I venture to doubt that any familiarity our American visitors may feel is with our legal education. On the contrary, what we often hear from visitors is that our students are quite different from theirs in terms of their intellectual commitment, their expectations and their demands. To the extent that some of them feel at home, I suspect that for the actively identified Jews among them, it is at least partly this identity that makes them feel comfortable. For others, I think it is more closely related to the fact that so many of our young faculty have studied in the U.S., write for a U.S. publishing market, can participate in U.S. legal discourse and actively wish to. I think that Israel may be unique in this regard. But I would not attribute this to Israeli legal education either. There is one far simpler explanation for their going to the U.S.: English has always been the closest second language for Israelis, and in the past two decades, funds for study abroad were available mostly in the U.S. As the article suggests, now that money is widely available throughout the E.U., and now that many courses are taught there in English, students are at least as eager to go there.

But many other foreign students also study in the U.S.; the article suggests that American academics feel particularly comfortable *here*. I suspect that the reason for this, if true, is more closely related to the fact that Israeli legal academics, as distinct from other foreign academics, are so keen to publish in the U.S. as distinct from other places including Israel, and thus develop a research agenda that will allow them to participate in U.S. legal discourse. Why this is the case is a little more complicated, and perhaps not relevant to the topic of this article. I suspect that it is not simply that foreign publications are required for promotion. But it also seems to me that this is hardly a result of any American influence on their Israeli legal education.