ELITES, DEAD HORSES, AND THE TRANSFERABILITY OF LAW

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Invited to answer Seidman's critique of my book[1] I am placed in a dilemma. On the one hand, when the doyen of American Law-and-Development-Studies takes the trouble to write such an extensive review, gratitude seems to be a more appropriate attitude than counter-attack. On the other hand, I feel that the policy of ALS to allow for controversy in its pages should be supported. Still I do not think I would have bothered to reply if the review had given a fair account of my position and attacked it, however violently. The reader can make up his own mind between such disagreements. However, Seidman ascribes to me some opinions which I do not hold but reject. In principle, the author of a book is under an obligation to make himself understood and therefore bears his share of responsibility if he is misinterpreted, but I find some of Seidman's misrepresentations of my position difficult to understand (e.g., on the question of the transferability of banking law, see III infra).

I.

There is an open disagreement between us concerning the potential role of law and legal scholarship in development. I would like to share Seidman's optimism about the possibility of development through law but my analysis leads me to rather pessimistic conclusions. For this, I am accused of "academic bankrupty" and of declaring myself "irrelevant." I find this a curious standard by which to judge a scholarly study. Are we under an obligation to provide for a "happy end"? In addition, Seidman's belief that "the state" (or even scholars inventing laws and constitutions in their studies) can overcome underdevelopment through "law" is hard to reconcile with his attack ("fairy-tale") on the very limited[2] role I ascribe to idiosyncratic factors. To me, his belief in development through law makes sense only if you assume that a benevolent and powerful lawmaker is the rule, not a rare exception. In his important article "Law and Development: A General Model"[3] Seidman correctly recognizes problems for law enforcement stemming from bureaucratic corruption. His solution? Laws against corruption! Who, in a society with a corrupt bureaucracy, is to make and enforce such laws? When I did set out to do what Seidman calls "beating a dead horse" I had this kind of reasoning in mind. Reading his review, I have serious doubts about the animal's demise. I find it well and kicking.

II.

In general, Seidman's distribution of praise and criticism neatly matches my own priorities. I am pleased that he found my

book challenging and provocative; I am much less concerned about defects he finds in my methodology. It is difficult to discuss this point without knowing where exactly he draws the line between "educated guess" and "statement of fact." He might be underrating the reliability of my statements, in which case I would have to object. He might also employ extremely exacting standards, in which case I have no quarrel with his characterising my propositions as "guesses" but would doubt that what he calls "statements of fact" do exist in macro-social science. In addition, he should live up to his own standards, which do not allow him to call any of my propositions "dead wrong," although they may be debatable.[4] Why should his guesses be more enlightened than mine; especially since mine are based on an "encyclopedic" (Seidman's word) knowledge of the political science literature and broadly in line with its findings?

I am also not too much hurt by the charge of what Seidman calls rather ungallantly "If-I-was-a-horse-theorising." To me, it is obvious that this kind of subjectivism is something a scholar has to try to avoid while being aware of his inability to avoid it. Seidman's misinterpretations of my arguments, for instance, become easier to understand if I assume that he asked himself "If I was an elite-theoretician, what kind of book would I write." Personally I don't find the label "elite-theory" very apt,[5] but this kind of categorising is very much an arbitrary exercise. So nobody can hinder Seidman from sticking the label "elite-theory" onto all studies focusing on elite behaviour, no matter whether critically or apologetically, whether claiming to establish permanent features of all societies, or concentrating on the African context with its fusion of political and economic elites and the low degree of organization and consciousness of non-elite groups. However, in this case, he has to be aware of having collected a motley crew, which makes it impossible to interpret my book against the background of positions taken by other inhabitants of the same pigeon-hole. I challenge Seidman to point to any evidence in my book that I see (elite) power and (mass) vulnerability as deriving from "innate characteristics," a proposition deeply contrary to everything I believe. Aristotle thought so,[6] but Seidman's lumping us together under the label "elite theory" does not allow him to ascribe to me the opinions of Aristotle. Starting from this wrong premise Seidman constantly takes my pessimism for determinism; I do not, for instance, "reject" the enfranchisement of the underprivileged "out of hand;" I rather point to dangers, difficulties and the low chances for a successful organization of progressive mass participation which I find as desirable as Seidman does (Bryde, p. 50). Communication between us would be much easier if Seidman could recognize the small but crucial difference between "certainty" and "likelihood," "constraints" and "impossibility." This could also help to clear up the contradictions he professes to find in my book. I am afraid, Seidman will see this as building "escape-hatches." But for African problems, there are as few "obvious answers" as there are answers to be "rejected out of hand."

III.

The least defensible of Seidman's misrepresentations of my

position concerns the "transferability of law" (Part II). The discussion of this problem has suffered from too general an approach and, in my book (pp. 88 ff.), I try to improve on this. Seidman's review brings all the confusion back by misstating my position in a way that makes it look ridiculous.

While I cannot develop the whole argument in this rejoinder, it is important to note that I distinguish general features of legal systems and the content of specific rules. This distinction should explain the inclusion of East European law in my definition of "Western Law" (Common Law/Civil Law) which seems so astonishing to Seidman. Most Comparative lawyers agree that the socialist states of Europe belong to the civil law tradition as far as the formal and technical features of their legal systems are concerned.[7] I repeatedly stress the difference in content (Bryde pp. 86, 95, 102), because it is exactly this ability of the "Western" law tradition to serve widely divergent policies that is important to my argument.[8] I fail to see how one can infer from this that I hold Soviet and English Banking law to be interchangeable, and I find Seidman's lecturing on the differences between socialist and capitalist law besides the point, as my book hardly warrants the conclusion that I am unaware of this difference.

When I turn to the more difficult question whether specific norms and institutions can, and/or should, be transferred I attack Seidman's "Law of the Non-Transferability of Law"[9] (a context that should not be hidden from the reader) which I find too abstract and uninformative. I argue that laws often address circumscribed issues and that it might be possible to identify comparable objects for regulation in very different societies. As an example, I use banks in Great Britain and Kenya which "work in different economic and political systems." I go on (and here it is important to quote three sentences where Seidman quotes only one):

> As a result different regulations are imperative in many respects, especially in the field of public law (public control, Africanization).[10] Yet they are comparable to such a degree that the general regulatory framework and organizational structures can be transferred with some benefit.[11] On an even more concrete level the way cheques are indorsed and cashed are quite similar, and there are no serious obstacles against importing the English law and reaching pretty much the same results with its application as in the mother country (Bryde, p. 104).

It should be obvious that this is very different from the rather nonsensical suggestion that developing countries should make a wholesale import of capitalist banking laws. I carefully distinguish different levels of decreasing socio-economic and cultural specificity and increasing "transferability" (and I am immodest enough to find this an advance over "Seidman's Law" which combines logical beauty with practical uselessness). The first sentence alone answers Seidman's whole argument about the need to control the "commanding heights" etc. I could not agree more,[12] and I

think I made this quite clear in my book. Seen in this context rather than torn out of its context, the sentence Seidman cites does not refer to public control of banks at all, but to their organization and day-to-day working, once this control is established. For such problems (board-management relations, auditing) I see "some benefit (!)" in adopting (or retaining) a foreign model. The third sentence, finally, about endorsing and cashing of cheques in self-explanatory and likely to be widely accepted.[13] But I am even more careful, and admit (Bryde, p. 105) that there might be a point for "Africanizing" even the law of negotiable instruments, e.g., to protect the uneducated signer of a bill. It is at this junction that I use the pragmatic argument about the limited drafting capacity of African countries confronted by a massive need for laws. They should certainly draft their own laws about the role of banks in the national economy; they should tackle negotiable instruments only if they do not know how to keep their civil servants busy. Considering that the whole argument starts with the need for specifically African public banking law, considering also the emphasis I put on administrative law throughout the book, I think my list of other priorities for African lawmaking (internal conflicts of laws, codification and reform of family law, land tenure legislation) can be taken for what it is, a list of examples, not a complete inventory. While I feel that Seidman underestimates the political importance of these examples, I readily agree that most of the areas he mentions also belong high on a list of priorities for African lawmaking.

IV.

On priorities for future research, I could agree with Seidman much more than he thinks, if only he could phrase the program more modestly and open-ended, less sure of definite answers, and more ready to accept that our research might lead us into a dilemma rather than to perfect solutions. I do not expect much from a mono-causal search for "legal sources of elite power and mass vulnerability," but I find it important to study the relationship between law and elite power and mass weakness. I think that my book makes a greater contribution to such a study than Seidman admits. I can only presume that his charge that I ignore "economic class" (like the label "elite-theory") derives from my using the word elite instead of class. I did this on purpose because of the rather confused state of class-analysis of developing societies among Marxists and Non-Marxists alike.[14] With a less nominalist approach Seidman would have noticed that the relationship between economic power and the working of the legal system is a major theme of the book. It is this theme which asks for further research to help us understand in Galanter's apt phrase, "Why the Haves Come Out Ahead."

NOTES

1. The Politics and Sociology of African Legal Development, Frankfurt, 1976 (hereafter "Bryde").

2. Readers of my book will note that I am even more careful in building my "escape-hatch" and do not find idiosyncratic factors sufficient explanations (pp. 59 ff.).

3. 6 Law & Society Review 31 (1971).

4. One might, e.g., discuss whether student radicalism is a general trend or only typical of an "organized and vocal" minority; as this would make little difference in its political impact, my generalisation is hardly "dead wrong."

5. I would reserve this label for pluralists like Seymour Martin Lipset who try to show that democracy works perfectly without mass participation.

6. He writes in Politics: "It is thus clear that there are by nature free man and slaves...."

7. See R. David, Les Grands Systèmes de Droit Contemporains, 6th ed., 1974, p. 27.

8. See also L. Friedman, The Legal System, New York 1975, pp. 199 ff.

9. Seidman, op. cit. at note 3, p. 325.

10. The original footnote points to the relevant legislation and practice in Kenya.

11. The footnote quoted by Seidman is not authority but again points to Kenyan practice and shows, together with the preceding one, that Kenya did indeed follow a discriminating approach, Africanizing the public law of banking while adopting the English model for their company structure.

12. See also Bryde, "Die Bankenverstaatlichung in Indien," 3 Verfassung und Recht in Übersee (1970) p. 303.

13. On this level, by the way, it does, indeed, not matter whether English or Soviet Law is adopted.

14. See, e.g., Bryde, p. 40, nn. 129, 130; the confusion has started to clear but recently, see Tetzlaff, "Staat und Klasse in peripher-kapitalistischen Gesellschaftsformationen," in 10 Verfassung und Recht in Übersee (1977), p. 43.