Approximation of Laws by Non-EU Countries to the EU *Acquis*:

Setting the Scene

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Accepting the *acquis communautaire, en bloc*, is an important demand the EU has placed on acceding states in the process of enlargement. Extensive approximation of laws to the *acquis* was also carried out by the EFTA states under the aegis of the Agreement Establishing the European Economic Area and by Switzerland in the bilateral EU-Swiss context. In the same vein, recent attempts to enhance relations between the EU and neighbouring states in Europe, Asia and North Africa are linked to the expectation that these countries should align their legislation with the *acquis*.

Such approximation of laws may bring much benefit for both the EU and each non-EU country, but may also prove to be challenging, complex, problematic, and disadvantageous, in normative, legal, economic, political, and practical terms.

The Leonard Davis Institute for International Relations, with the assistance of the Israeli Association for the Study of European Integration and the EC Delegation to Israel, invited renowned scholars and policy-makers from the EU, EFTA, United Kingdom, United States, Switzerland, Spain, Turkey, Poland and Israel to an international conference titled 'Approximation of Laws by Non-EU Countries to the EU *Acquis*'. The conference examined the theme forming the subject matter of its title from interdisciplinary, theoretical, and thematic perspectives. The European Journal of Law Reform agreed for its part to provide the academic platform for the publication of the conference proceedings. Eight of the contributions of the conference were selected to comprise this Volume.

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Approximation or harmonisation of laws may be defined as the process of making different domestic laws, regulations, principles and government policies the same or substantially similar.[1] In the course of this process, which can take

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1 G. Mayeda, *Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries*, 7/4 Journal of International Economic Law 737 (2004).

European Journal of Law Reform, Vol. IX, no. 3, pp 357-360.

place unilaterally, bilaterally or multilaterally, features of different legal systems are reconciled.[2]

The EU is a fine example of regional integration under which extensive harmonisation of laws has continually been carried out. In the EU this process has gone beyond merely reducing legislative differences and adopting common legislative instruments, and has extended to harmonising the Member States' policies and regulatory schemes. Harmonisation of laws within the EU may thus be seen as a co-operative process of creating a quasi-federal European legal system, which contributes, in turn, to the positive integration of the Internal Market and consequently to socio-political integration.[3] As European integration developed and deepened, the adoption of the *acquis* became increasingly challenging. This is particularly true with regard to the countries acceding to the EU, which have had to accept the *acquis* as a *fait accompli*.

The adoption of the *acquis* is, however, a phenomenon that is not confined to the EU Member States. Numerous non-EU Member States, including non-European countries, have aligned their legislation and regulatory regimes with EU laws, either as an outcome of interaction with the EU, or as an autonomous move.[4]

The extensive reach and usage of the *acquis* by the EU in its external relations has been widely researched, mainly from the perspective of integration theory[5] and from the Multi-Level Governance approach.[6] The weight, however, given in the literature to the impact of EU foreign policy and its export of laws and norms, whether in Multi-Level Governance or in integration theories, has diverted much-needed attention from the recipient side of EU *acquis*.

It is restoring this focus that serves as this special Volume's focal point. The eight contributions presented in this Volume are aimed at bridging several gaps in scholarship, addressing in particular the motivations of individual non-EU countries and institutions to approximate to the EU *acquis*, the role played by the *acquis* in these countries, the measurement and determinants of successful legislative transplants, the economic benefits that may stem from such a process

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See also D. Leebron, *Claims for Harmonization: A Theoretical Framework*, 27 Canadian Business Law Journal 63 (1996).

[2] M. Boodman, *The Myth of Harmonization of Laws*, 39 American Journal of Comparative Law 699, at 703 (1991).

[3] D. M. Walker, The Oxford Companion to Law 72 (1980).

[4] M. Knodt, *International Embeddedness of European Multi-Level Governance*, 11(4) Journal of European Public Policy, 701 (2004).

[5] B. Rosamond, Theories of European Integration (2000); E. B. Haas, The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957 (1968); S. Hoffmann, *Obstinate or Obsolete: The Fate of the Nation State and the Case of Western Europe*, 95(3) Daedalus: Proceedings of the American Academy of Arts and Sciences 862 (1966); A. S. Milward, G. Brennan, *et al.*, The European Rescue of the Nation-State (1992); A. Moravcsik The Choice for Europe: Social Purpose and State Power from Messina to Maastricht (1998).

[6] L. Hooghe & G. Marks, Multi-level Governance and European Integration (2001); F. Schimmelfennig & W. Wagner, *Preface: External Governance in the European Union*, 11(4) Journal of European Public Policy, 657 (2004); E. M. Smith, *Toward a Theory of EU Foreign Policymaking: Multi-Level Governance, Domestic Politics, and National Adaptation to Europe's Common Foreign and Security Policy*, 11(4) Journal of European Public Policy, 740 (2004).

and the costs entailed in terms of loss of sovereignty, as well as in national identity and legitimacy. Thus by directing the focus of enquiry to the role played by the *acquis* in non-EU countries, this Volume does not seek to detach itself from past research, but rather to explain the multifaceted, two-way role played by the *acquis*.

The first two contributions are devoted to theoretical investigation. *Amichai Magen* unpacks the very notion of the *acquis communautaire* to expose its *Janus*-like face of two very different and sometimes competing logics, namely the crucial internal mechanism, and the *acquis* as an important foreign policy tool for exporting governance and transforming non-EU states. As part of this deconstruction process, Magen goes beyond traditional bottom-up and top-down analysis of Europeanization theory to develop what he calls a 'top-out' prism that probes whether and how EU institutions, rules and policy-making processes impact the laws, institutions, and identities of third countries beyond Europe.

Recent scholarship in this field examines the EU external activities mainly through the prism of Liberal and Constructivists theories of International Relations. The Liberal School of Thought focuses on the normative, value-based aspects of such EU activity, while Constructivist literature views the legislative exportation by the EU as an endogenous, identity-forming process that may lead to transnational convergence of collective values and interests of the neighbouring countries along the identities and interests of the EU, while formulating and reinforcing the EU's own identity and legitimacy.[7] The purpose of the contribution by *Guy Harpaz* is to expand the existing literature, by focusing on a different perspective of such an EU agenda, namely the more rational, self-interest, security-based and hegemony-motivated EU activity. Harpaz's examination of legislative approximation is conducted from the perspective of the EU, through the prism of the theory of Realism, while focusing on EU-Israeli relations.

The second part of the Volume is comprised of five case-studies relating to the adoption of the *acquis*, providing the readers with geographical and thematic diversity, as well as an interdisciplinary approach, combining the perspectives of law, political science, economics and international relations. The first case-study, conducted by *Jan Hagemejer* and *Jan Michalek*, examines the impact of EU law and regulation on the acceding countries (adoption of EU standards by Poland), through the prism of economics, exploring the winners and losers of such *acquis* adoption.

Titus van Stiphout focuses on the adoption of the *acquis* by the EFTA states under the EEA agreement, and analyses the intriguing interface between the need for these states to maintain homogeneity with EC legislation, and their desire to safeguard autonomy in decision-making.

The article by *René Schwok* examines the unique and pragmatic model of *acquis* approximation adopted by Switzerland, focusing on the advantages of a tailor-made model of approximation of laws, as opposed to an *en bloc* legislative model.

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[7] *See, for example*, I. Manners, *Normative Power Europe: A Contradiction in Terms?*, 40/2 JCMS 235 (2002); R. Youngs, *Normative Dynamics and Strategic Interests in the EU's External Identity*, 42/2 JCMS 415 (2004).

Michal Gal examines the adoption of EU provisions on abuse of dominance in market competition by Israel. Through her dynamic analysis of the costs and benefits of such a legislative transplant, Gal sheds light on the prerequisites for successful legal transplantation, while arguing that the importation of legal norms may at times have a critical role in constituting culture without necessarily undermining existing socio-economic structures.

Alfred Tovias introduces the notion of spontaneous approximation and contrasts it with the notion of legal approximation. He argues that Israel's spontaneous, socio-economic Europeanization has created adequate conditions for the adoption of EU laws and standards.

Andreas Herdina of the EC Commission concludes the Issue with an altogether different perspective, namely that of the EC Commission. As opposed to most contributors, Herdina sees approximation of laws as a cooperative, selective and partnership-for-reform process.

It is to be hoped that when combined, the eight contributions will broaden the analytical horizon of existing scholarship on EU exportation, and non-EU countries' importation of the *acquis*.