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Legal effectiveness: Theoretical Developments Concerning Legal Transplants

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ABSTRACT

The dominating view of legal efficacy is based on the idea of a gap between what the law states, or commands, and how the population acts. When behaviour is not in accordance with law, the legal system or a norm is not considered effective. This idea is challenged in this article. Previous research on legal transplantation is used as reference for an analysis of legal application and legal effectiveness from a sociological and systems theoretical perspective. It is well known that imported laws function less well than internally developed laws, but explanations differ. According to the currently known effectiveness concept the poorly functioning imported law is a paradox. In this article a new effectiveness concept is developed. It is shown how the poor functioning legal transplants can be explained using our new approach to legal application and legal effectiveness.

1. Introduction

Some evidence seems to support that countries developing effective laws on the books have stronger economic development than other countries. Therefore many countries changing from socialism to market economies have attempted to enact new corporate codes or revive legislation from the period before socialism. The idea to rapidly develop transition economies or developing countries more effectively has been applied also by American legal assistance to for example African countries, where American legislation has been transplanted with the purpose of improving economical parameters as well as moral justice. In the American assistance case it has been discovered during the 1970’s that the legal aid did not lead to expected outcomes. Instead of economic development, even distribution of wealth and power, the countries receiving legal

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assistance often suffered serious adversaries. Investments in legal education, designed to change the orientation and role of the lawyer, have yielded little change in economic performance or social relations. Transplantation in developing countries often means that more formalized, or complex, procedure and thinking is mounted in a legal system not accustomed to it. The legalization of areas of social life and increased formalization of the legal process increases the costs of protest. The social structure and economic interests of the legal profession may cause natural alliances between lawyers and powerful groups, possibly to prevent fundamental changes in developing countries or transition economies. From the auditing profession this type of problem is a well known, but debated, theme – auditors issuing of new auditing standards has been understood as more of symbolic that substantial action. Thus issuing new rules may be a way to complicate a subject, to cause a layman’s understanding of it to decrease and to increase the gap between public knowledge and professional knowledge. Countries transplanting modern law have experienced a rising gap between public and professionals, law in the books and law in action, in terms of lower degrees of involvement among the population in political processes creating legal change in turn causing domestic legal development to halt. Norms are not internalised and the responsibility of the state to provide official enforcement action to compensate becomes an impossible task.

Despite negative experiences from legal transplantation, theory and practice has not managed to change perspective on the role of law in social processes. A search for new ideas that can explain anomalies seen in the failures of legal transplantation should be useful not only for the future designs of transplantation projects, but also for the understanding of western, domestic legal systems. When we, time and time again, note that legal rules of whatever level of abstraction or formalization, when promulgated in processes that have little contact between the end users of these rules result in low degrees of utilization of rules, we should take care to re-appraise our understanding of what legal effectiveness should mean and how it can be attained. Traditional ideas about the relationship between strong law enforcement and norm compliance is questionable. The strong focus among scholars of legal transplants on professional aspects and legal institutions is due for a review as well. The reasons are that these approaches target only a fraction of the legal system, and regrettably the parts that are not frequently involved in the social processes where law is applied in everyday life.

A current problem for our understanding of the processes affecting success and failure of legal transplantations, mostly concerning transition economies and developing countries but not necessarily restricted to them, is that the conventional concept of legal effectiveness builds on assumptions about the relationships between law and its environment that lay too strong emphasis on the professional and institutional aspects of law. Thus when we discuss problems concerning legal effectiveness we are already applying the ideas that underlie this type of thinking: (1) The idea of society is based on Hobbes – society is made of its individuals and consequently the legal system of a nation state is also defined as a person-based concept. We tend to assume that law is the result of the activities of a profession. (2) Law is a teleological tool, used by the state with the purpose to control the persons who live in the territory of the state. The form of control is primarily coercive, which means that the state coerces those who violate law and refuses aid to those who fail to comply with requested conditions. (3) The positivistic idea that law is the will of the people. We tend to assume that law is a set of norms, and that norms can be designed through a pluralistic political process where intermediate groups aggregate individual interests. Thus, rules are seen as the realisation of individual interests of the population of the state. (4) The division of power. Promulgation and

5In auditing this gap, the auditing expectations gap, is of primary importance. It is interpreted as a sign of a serious problem since it may cause erosion of the public’s trust in auditing. Frequently auditors have to take the blame for economic scandals in which they actually play minor roles.
change is typically performed by legislatures, but courts and other executive authorities perform application and interpretation.

In this paper the assumptions of the person-based idea of law are critically analysed in order to determine what it may sensibly mean to say that a legal order and a legal norm in it is effective. Conventional conceptions of effectiveness are shown to rely too heavily on a too narrow definition of law in order to contribute to an extended understanding of the relationship between law and its environment. A new definition of legal effectiveness is suggested which is not restricted to the assumptions mentioned above, but can include a wide array of norm types and functions of law. Legal transplantation, the import of foreign law to a legal system as a means to speed up legal change, is discussed as an example on which the new effectiveness concept is applied with beneficial results.

**Theoretical assumptions**

The argumentation of this paper is based on three closely related assumptions regarding how legal application occurs in non-professional contexts. The first assumption considers the role of trust as facilitator and regulator of legal application. Here it is argued that trust functions as gatekeeper for a layman’s choice to adopt law as his/her means to communicate a matter and therefore as a facilitator of or hinder for law’s contact with the socio-economic reality.\(^6\) Trust is most frequently defined as reliance on something one cannot control and on which one is dependent.\(^7\) In this paper we adopt the conventional view in order to understand what makes law effective and how effectiveness should be defined. Legal effectiveness from a sociological perspective should not be restricted to the effects of the professionally supplied services of lawyers and officials. Instead it should be concerned with a broad concept of law and the actual use of law by laymen in the streets including the married couple discussing family relationships, directors in a boardroom debating possible strategies, as well as the purchase of a car. The supply of professional services in this view becomes only a special form of legal application. I have chosen to make a distinction between primary (by laymen) and secondary (by professionals) legal application for the purpose of emphasising the focus on a broad perspective on legal effectiveness. Phenomena concerning trust are most relevant for primary legal application. For reasons explained later in this paper primary legal application takes place with insufficient knowledge of law and therefore the consequences of applying it in real situations are often relatively diffuse for those who apply law.\(^8\) The end user of law is only occasionally a professional lawyer, why we should assume that the user must live with significant levels of ambiguity when choosing to debate a matter in legal terms. The user of law will tend to choose law as system’s reference only if he/she feels confidence in his/her ability to do so successfully. Trust in subjects’ ability to deal with ambiguous situations should therefore be a concern for the analysis of primary legal application.

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\(^6\) Such concepts as socio-economic reality are admittedly diffuse, and highly questionable but are employed here for the purpose of simplifying an otherwise burdening discussion which is beyond the scope of this paper.


\(^8\) The legislator often has insufficient knowledge too of the consequences of legal application according to Means, R. C. (1980) *Underdevelopment and the development of law*. Chapel Hill: University of North Carolina Press. Means found that Spain and Colombia have promulgated laws that did not fit the economic conditions of the countries and therefore were not used. Legal development in these countries therefore took place without much contact between law and economy.
A focus on the activities of laymen has merits. The question of how law is actually applied by ordinary people in ordinary experiences can be reformulated as the question regarding how law is in contact with society. Causal models where law is assumed to cause occurrences in the environment are oversimplifications and misappropriations of the relationship between law and society. Law seldom by itself causes action, but interplays with other motivational factors and contributes to shifted distributions of probabilities for diverse forms of action. Furthermore, there are forms of law that can persuade and define rather than command, why a model of law’s contact with society cannot be a causal chain. If we chose to understand law as a structure or backbone of society, as most legal philosophers and legal sociologists do in normative perspectives on law, we are inspired to ask instead how law can function as an institution or as a system of meaning and thus in more indirect ways affect the behavioural premises of man. A perspective and theory of law that offers many degrees of freedom at this point is Luhmann’s theory of law as a systems reference – a difference between law and its environment that can, but does not have to, be referred to in communication between people in everyday life. Thus law may be assumed to be a system of meanings that can be referred to, voluntarily or coercively. It is important to note that law does not have to be used. It may be used, but there are other means to communicate and law may bring about consequences, which are too burdening or too costly in some instances. One could say then that a person with the option to use legal meanings for communication does not feel content with the expected consequences of referring to legal figures for defining a situation. The discontent may be related to undesired effects of using law. A person may expect to loose a trial, why the person should refrain from litigation. A person may be negative to the prospect of looking at a relationship as a contract, why the person chooses to be silent rather than to speak and refer to a presumed contract. Therefore motivation for interpreting and defining relationships in legal terminology will typically emerge, and we recognize from our own experience that references to law, direct or more indirect, are very common. Many aspects of life cannot even be communicated without referring to the legal system. Marriage and partnerships as well as owning property are meaningless without the legal system.

If the motivation for referring to legal terminology and even legal provisions vary between parties and from time to time depending on some estimation of cost and benefit another aspect that is not evened out between parties must also be taken into account. A person who calculates costs and benefit from referring to law must include in the calculation his ability to interact not only with a counterpart but also with the communication system referred to – law. Therefore we use the combined idea that trust in the system and trust in the ability of oneself to use the system are preconditions for legal application. For the professional jurist only the first condition is normally relevant. The jurist will apply law if he/she believes it fruitful to do so. But for the layman it is different. The layman should find it attractive to refer to law only if both conditions are fulfilled. Only if law could be expected by the person to be advantageous should law be referred to, but even in a favourable calculation the person could be deterred. If the layman feels uneasy about his ability to discuss his relationship in legal terminology the calculation of the effects of defining the relationship in legal terms may not even happen. The choice to abstain from legal wording is intuitive and possibly unconscious. The person who feels low degree of confidence in his ability to define and argue a relationship with reference to law will tend to choose not to do so.

The choice whether to apply or not apply law as a means for communication should be governed by some expectation (rational or emotional) of the consequences of doing so. Here it is argued that the estimation however accomplished should even out between parties, so the positive prospects of one side should compensate for negative expectations on the other. A systematic reluctance to adopt law for defining situations and relations should be independent of this type of economic causes. Instead it is argued here that, if there is a choice at all, law tends to be used by persons who trust their ability to use legal communication for relating to their environment. Therefore the argumentation for an extended effectiveness concept will focus on aspects of trust concerning application of law in ordinary, frequently occurring situations where legal experts are not available.

The second assumption concerns how the main part of legal application happens. A national legal system can be described at many levels of complexity and from many perspectives. Legal application must be one of these descriptions, since applying law is a form of knowing law, being aware of its boundaries, and filtering unacceptable from acceptable legal argumentation. The conventional view of legal application defines it as application of the knowledge normally in the possession of professional jurists. Even if professional jurists are not referred to in definitions of legal application the kind of argument brought forth implies that a precondition for legal application in the sense of the conventional view must be professional knowledge of the legal system. However, the idea of legal application, or legal argumentation, seems to be a theoretical construct with little basis in reality. Legal application in concrete legal conflicts is less methodical and less determined by general principles than literature has suggested. It varies from situation to situation and between persons. Typical legal argumentation runs from part to part rather than from system to part. Conclusions are derived from examples rather than from systematic deduction. Parties to legal conflicts are morally free to disregard the possible systematic consequences of their reasoning, while judges must bear in mind not only the case at hand but also future cases and general principles relating cases to each other. Litigants and defendants may twist and bend the binding method of interpretation and creatively read legal texts in favour of their interests, but judges must be more neutral. Thus, the style of legal application or legal argumentation varies between roles in a legal system.

The most marked difference, however, runs between laymen and professional jurists, regardless of role or position. Legal application is to a large extent an information problem, and knowledge of the juristic method of interpretation is a precondition for a legal application in the conventional lawyers' law sense. How the information problem is handled divides legal application in two layers, between primary and secondary legal application. Only in a secondary sense does legal application correspond to lawyers' conception of law.

If the assumption is accepted that people in general do not possess the specialized professional knowledge of law that jurists have and therefore that people cannot base their expectations and actions on this knowledge a revised idea of legal application should be developed. Let us propose that legal application in the streets is something quite different from legal application in the courts although related. Paradoxically the conceptual apparatus available to laymen is similar to the tools developed and used by legal scientists. Analytical jurisprudence operates with definitions: What is law? What is a state? What is a right? What is real estate? What is possession? Laymen operate with definitions as well, but they do not possess the expertise necessary for

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12 Institutionalists would argue that the extent of the choice is minor, but no rational calculation is supposed here why the choice suggested can be imagined to take place regardless of school of thought concerning choice in terms of decision-making.
understanding the sharper distinctions between concepts. Instead laymen use concepts incompletely understood. The situation is similar to how rules of thumb replace the search for optimum in organizational decision-making.16 Organizational decision makers follow heuristics according to a logic of appropriateness rather than optimisation when they decide matters concerning the organization. But even for analytical jurisprudence conceptual definitions have great ambiguity.17 Regardless of philosophical perspective, basic legal concepts are at least useful tools for understanding the system of norms that we call law. Our questions, both as laymen and as philosophers of law, regarding the exact meaning of the concepts have therefore a function beyond clarity for its own sake. When we think that we owe tax to the state it is useful for us to know what the state is, and consequently what the word ‘state’ stands for. When we follow the rules for calculating our annual income in order to determine how much tax we ought to pay this year we almost never refer directly to legal provisions, unless we are legal professionals. Instead it is common to use brochures from the tax authorities and oral instructions. The state as particular corporate body is taken for granted as an overarching societal body that represents the common sector on which we all are dependent. The basis for our conception is far from clear for us when we use them and difficult philosophical problems may be hidden in them, but they do not concern the function of basic legal concepts for the kind of primitive legal application that laymen indulge into in everyday life. Ambiguous meanings are not a problem for legal application, but a solution to the information problem that laymen experience when attempting to relate to law without expert assistance. They do it by referring to diffuse ideas of rights and obligations in a search for certain but not perfectly specified meaning. What they want cannot be got out of a dictionary but is part of a particular language game.18 When a layman says that I have a right it does not mean that we can look up in a dictionary and understand the meaning of the phrase. However when the addressee of his communication is trying to decipher his intended meaning and determine what and if to answer it will be shown that there is no object in the world corresponding to the word ‘right’. Any attempt at a definition once and for all in the form ‘a right is a set of expectations’ is either too general for any clarification of meaning or moves the target again when referring back to law which is an equally elusive concepts as a right. The layman refers to his right but is not able to generally define what he means. He simply refers intuitively to a pattern of interpretations called law that he presumes will back his demand for ‘a right’.

The use of basic legal concepts that takes place in the layman when he tries to communicate referring to law has been dealt with for a long time in legal philosophy. Their conceptual use is very different from that of the layman but philosophers are struck too by the complexity of entangling the meaning of basic legal concepts. Efforts to define have divided philosophers in schools of thought or paradigms. American realists have claimed that the term right simply signifies that one should expect that a court would rule in a certain direction. The probable behaviour of courts or officials gives meaning to a concept. Scandinavian realism has taken a further step to think that a right corresponds to nothing real at all, but is an ideal, fictitious, or imaginary power. The theory summarized by the name natural law and criticized by all realist or positivist theories assumed that rights and obligations were some sort of things. But the less reflected idea that rights are things in themselves and the fierce criticism of it shares a problematic relationship to how such words as rights and obligations are to be understood in legal terminology. When asking for the facts to which a right corresponds one could indulge into diverse reductions of legal interpretation so as to define law in terms external to law. Thus it is an attempt to describe what law says without using the terms of law. It appears from attempts at defining legal concepts in non-legal language has failed precisely because the meaning of the words such as right or corporation is to be understood contextually, as references to legal

18 Wittgenstein, L. Von (?) Filosofiska undersökningar.
interpretations rather than imports of images or meanings from the world of facts. Any attempt to define a right or a corporation in other than legal language is impossible. A translation of legal phrases to factual meanings is impossible.\footnote{Hart, H. L. A. (1983) Essays in jurisprudence and philosophy, Oxford: Clarendon Press.}

When legal concepts are analysed it is assumed that definitions can be made stating the exact meaning of words. Legal dogmatic does not search for definitions of legal terms in extra legal language, but is a quite legal affair. Legal terms are defined with the aid of other legal terms, but when the legal scientist goes about interpreting and defining it is a different task from that of the layman. It is not only a difference in degree of complexity of the tasks but also a difference in scope. While the professional legal scientist defines legal problems so as to be able to spot paradoxes in the system of concepts the layman sets an interpretation in motion. When the layman utters ‘I have this right’ it means that the layman claims a legal position as he/she understands it according to legal consciousness (Rechtsbewusstsein). When the legal scientists see legal persons as analogies with physical persons and suggest that legal persons should be able to acquire rights and obligations according to the same principles as do physical persons laymen imagine their corporation as a separate, independent body in order to understand a set of legal rules already in operation. For laymen basic legal concepts serve the purpose of enabling legal claims without detailed knowledge of specific rules. Basic legal concepts reduce complexity sufficiently to enable a primary application of legal rules. By primary application of legal rules we understand the relatively unspecific legal claims made by laymen when attempting to advocate law as means for defining the relationships with other entities, whether physical or other persons.

We immediately recognize the importance of this observation. The large majority of legal application should be of this simple kind. They do not involve any advanced knowledge of law. This form of legal application is the simplest of legal argumentations. It involves the claim ‘I have a right’ and a justification ‘because the situation is this’. It does only distantly relate to the textual self-description of law as a system of interrelated texts. Instead it states relatively without context that the right is a fact in the case. Contrary to most discourse of legal application the primary legal application takes place on the level of basic legal concepts. In conventional ideas of legal application it is frequently assumed that legal application is, if not informed on the level of a legal scientist, at least uses a concept of law as a number of relevant texts, which is essentially what is taught to students of law in common introductions to law.

The third assumption of this paper concerns the concept of law. Critics have noted that the concept of law as it appears in law and society studies is based on, but often moderated, on the idea of commands backed by threat.\footnote{Feeley, M. (1994) “The concept of laws in social science: A critique and notes on an expanded view”, in Rokumoto, K. (ed.), Sociological Theories of Law, Aldershot: Dartmouth Publishing Company, p. 498.} For our purposes, which are to find a definition of legal effectiveness that allows for more precision in the description and empirical investigation of how legal systems develop and cooperate with society, another aspect of the common approach to legal effectiveness is even more important. We must depart from a view of law that overemphasizes the individual, group or professional aspects of law. It does not suffice for our purposes to suppose that laymen, who according to the person-based or professional approach to law and society are external to law, do not apply law when they claim for example ‘I have a right’. We need a concept of law that is truly societal, relevant and present in all circumstances where law in some sense is in contact with other parts of society as well as with persons. We need a concept of law that can reduce the apparent technical character of law without loosing the peculiar features of this system. For these reasons law may be defined as a system of
communications in Luhmann’s sense. As a system of communications law we can understand how law is applied as much in the layman’s words as in the courts of law and other official institutions. The conventional understanding of law is that it consists of norms. What norms consist of is often bypassed in sociological approaches to law and society and the question of how norms are upheld is directly approached instead. The consequence of this type of reasoning is that norms are held to be some sort of thing – often a text, a provision, or more abstractly a command or directive. But norms are not necessarily the exclusive property of law. Norms can be observed in moral, ethical, and religious conditions where law is totally irrelevant. As sociologist one should, and this lies behind the peculiar definition of law as a system of communications, be able to ask how norms can exist in such different conditions and yet share some features that make us call them norms. This study of law as a system of norms describes law as a normative system among other normative systems. Norms are described as statements that imply some cause for behaviour according to them. An ought to statement which implies that if it is not followed something pleasant or unpleasant could happen. It can be learnt from von Wright that norms cannot be reduced to imperatives alone as a type of language phenomenon. There are norms that do not take the form of imperatives why the special character of legal norms are sought elsewhere. At this point different theories depart and it is not possible to discuss here the advantages and disadvantages with the multitude of different approaches, or schools of thought, attempted at explaining the special nature of legal norms. Here we must contend with a description of a concept of law that allows treatment also of the non-professional legal activities that should, in an intuitive sense, be part of what we call the legal system when describing its contacts with other parts or society. This treatment can be accomplished if we look at norms as an example of a more general phenomenon – expectations or communications. As expectations, structure, the possibility to repeat and predict communications, legal norms form a basis for institutionalisation. Many things can be taken for granted thanks to law. The ordering of social and economic relationships can proceed without securing and negotiating everything. Parties can rely on that some expectations remain the same, regardless of the dispositions chosen in a particular case. Other expectations must be formed by experience (learning) and they constantly change as new observations are made. There is a difference, then, between cognitive (learning) and normative (non-learning) expectations and we can use it to explain how the expanded concept of law will provide a stronger basis for a new view on legal effectiveness.

Cognitive and normative expectations, first conceptually developed by Galtung, helps relate the behavioural aspects of law and a theory of legal validity. While a dentist changes his opinion of his sick patient if he observes other patients recover from the same disease by proper treatment, we remain firm in our judgement of the criminal regardless how many times we see the same criminal act. Normative and cognitive expectations are two different orientations towards experience – you either learn or remain the same. Law is typically normative expectations, or ‘contrafactually’ stabilised expectations, which means that when expectations are disappointed it is the experience and not the expectation, which is dealt with. From the perspective of the layman the legal system consists of presumed static norms. Law is applied when the layman uses legal communication to provide legal meaning to a situation. The

application is limited to what the layman understands and feels comfortable with. This sense of legal application is related to a theory of legal validity, which is the core of legal theory and the hart of law, through the expectations platform. We can understand the peculiarity of legal norms by the ways legal norms are made valid. They are expectations, which cannot be controlled by the single individual referring to them. Legal application involves recognising that law is normative expectation. In turn this means recognising that law is established through procedures, which is outside the individual’s control. No individual, but a set of institutions – the legislator, the courts of law, legal doctrine, and possibly custom determine what law says and which law applies. The circumstances, under which law can or should change, are determined by the same institutions. In this sense law is a set of expectations, or a factual repetition of a code legal/illegal that separates legal communications from other communications so that one can see law in a sense as a hermetically closed system of autopoietic (self-produced) operations. The closed aspect of law concerns only the production of validity of legal communications, and does not exclude extensive contact with non-legal systems or persons.

Thus it is assumed here that law is a system of legal communications that includes not only the traditional sources of law, but also the method of interpretation and method of deduction of a legally valid answer to a problem. Compared with Kelsen’s pure concept of law it contains the notion of basic norm in the systems theoretical autopoiesis-concept. Law is necessarily a self-positing system and the idea of the final element on which it is built is therefore logically impossible, why Kelsen had to propose the basic norm as an endless regression where Luhmann and others could instead use systems theory for handling the circularity of systems formation. Without diving any deeper into these discussions, we may note that law is not a system of norms in the traditional sense, not a typology of norms, but a continuously processed difference between law and environment. We do not assume as did Hart in his The Concept of Law, that there is a given hierarchy of norms according to which we may classify law as consisting of them. Instead law is processed as operations, however they look and function, that must address again and again, by carrying with them a sense of legal validity, the difference between law and environment. It is at this point where the theory of legal validity coincides with the layman’s application of norms. The processing of the difference that constitutes law cannot be the exclusive property of any person, group, or profession, but must be distributed among any persons who are able to communicate. Legal application must be understood as the reproduction of validity by recognition of the differences between law and environment, which in practice means some knowledge of the legal sources and basic legal concepts. Law is valid because it is produced through certain symbolic procedures (Legalität durch Verfahren), not because it is enforced or complied with, and the recognition of the procedures can be distributed among the population.

As background to an extended idea of legal effectiveness this frame of reference has the following to offer: Legal application is, if interpreted very broadly, the single occasion

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28 The self-positing or self-referential systems concept was first developed by Maturana and Varela in a classical essay about life and cognition, see Maturana, H., och Varela, F., 1980, “Autopoiesis and Cognition: The Realization of the Living”, Boston: D. Reidel.


when law may have any effects on society, however defined, why legal application is the key concept for a definition of legal effectiveness. The restricted, compliance-oriented, effectiveness concept builds on the professional services view of law. But it can easily be shown that law is applied even before professional services are provided. Even before a person goes to court with a dispute the person has used the legal system for understanding his/her situation from legal perspective. The person has recognized that the courts have peculiar meaning for solving legal conflicts and the person has therefore conducted a legal analysis. This could not have been done without legal application, for it is for example a matter of legal application to decide which forum is the proper for a certain case. When deciding to see a relationship as a legal conflict, which must have taken place before seeking legal aid, the parties have also indulged in legal analysis. Without applying legal norms the description of a relationship as a legal conflict is meaningless.

Legal application as it occurs in the streets and the basic reasons for the existence of valid legal norms are therefore intimately intertwined. The accomplishment of a legal system that is in contact with the surrounding society and co-develops with it must be a question for the distributed legal application, taking place among laymen, not solely the more intricate legal problem solving you may find among professional jurists.

Behavioural aspects on effectiveness

In legal sociology the effectiveness of law is defined with an explicit purpose of explaining how law can be used as a regulatory device for governmental control. A law and society tradition has emerged, which attempts to explain not only the development and meaning of formal legal doctrine or the behavioural aspects of judicial decision-making, but the broader question of the effects of law on society at large. There are differences among approaches but most of them treat law as independent variable and its consequences as dependent variables. These approaches have attempted to measure the effectiveness of laws and measurements are typically intended to register the gap between the law as a normative ideal and actual behaviour in society as deviations from the law. Measurements of legal effectiveness tries to establish what features laws must possess and the social conditions that must be present if a law should affect behaviour according to intentions. Typical questions for this type of research are: What determines law’s effects on behavioural changes or attitude changes? Which factors determine the deterrent function of law?

When addressing these questions and others this branch of legal sociology has often defined law according to the Austinian concept of commands supported by sanctions. According to this view, law is a command to do or refrain from doing some specified acts, and is distinguished from other norms by the threat of physical coercion attached to the order. The idea has been that the legislator intends to control peoples’ behaviour by issuing certain norms, why the intention of a norm should be the measuring stick for us to judge when the essence of a norm has been accomplished. Compliance with norms becomes the sought effect and legal effectiveness is equated with the compliance to governmental commands under diverse forms of treats.


Other effectiveness concepts may rely on other ideas of law, but share the focus on norm compliance. Navarro and Moreso for example related legal effectiveness with the applicability of legal norms, and “we shall therefore say that a legal norm is effective when it is observed by its addressees.” Applicability and compliance are common assumptions, which relate to a definition of the legal system as a set of norms defined by the professional activities of jurists – courts, legislators, advocates, prosecutors etc. The legal system is perceived as a system with input and output whose function it is to mediate conflicting interest or solve conflicts.

But compliance is a problematic concept as the basis for the effectiveness concept. It may be intuitively appealing to define the effects of law in terms of behaviour that complies with law and most definitions presuppose compliance as prerequisite for legal effectiveness. According to the conventional approach law is effective when it is complied with. It is ineffective when it is breached. The law and society school has often defined compliance as a question of coercion. Law is complied with if there is effective law enforcement. Thus effective law and law enforcement has been identified as practically the same thing. Even when voluntary compliance is suggested as an expanded view of effectiveness the idea of compliance is the core concept. However, as noted by Feeley, the idea of compliance as basis for the legal effectiveness concept is limited and far from satisfactory as the basis for sociological analysis of the effects of law on society. Let us analyse the possibility to define legal effectiveness in terms of compliance by referring partly to but partly departing from Feeley’s criticism.

(1) The idea of prescribed behaviours: According to the standard legal effectiveness approach, law is posited as the goal or ideal to which behaviour is supposed to comply. Thus a prohibition of loans to shareholders in limited liabilities companies implies a purpose to prevent such loans. If loans occur in a case, the law has not been effective in that particular case. Sometimes goals can be extracted immediately from the letter of the law, or implicitly as the spirit of the law. But the interpretation of goals or ideals expressed by legal norms is not without degrees of freedom. The language of the law is frequently so vague that determination of the exact behaviour prescribed or forbidden must be extracted by using a certain method of interpretation. Often laws must be interpreted autoritatively by an appellate court in order to determine what the law says about a certain behaviour. However, all actions can be judged as legal or illegal per definition, and even if legal texts can be general and vague it does not give us a cause for Feeley’s claim that legal norms as commands are not uniquely determined. Norms state that in certain conditions certain legal effects ought to happen. It does not mean that if certain conditions are met, certain effects will follow. Therefore norms are a form of expectations that calculate the possibility of disappointment. Expectations are disappointed when behaviour is illegal. The environment reacts with irritation and frustration, but the deviation from legality is not understood as a paradox. It is a consequence of the normative form of expectations.

We assume that norms are expectations, which earn their particular meaning, their normativity, in the processes that establishes them as legally binding (legalität durch Verfahren). This means that

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the validity of norms is caused by the symbolic conditions through which they are formed, not by an inherent relationship to a class of actions existing independently of law. Our conceptual distinction is significant when compared with the idea of compliance normally put forth. According to the compliance-definition of effectiveness law is not effective when illegal behaviour occurs. As determinant of behaviour law is nullified when deviations from legal behaviour occur. Illegal behaviour is equated with failure of the legal system.

The idea of a law as commands, and the analysis of legal effectiveness as the difference between law in theory and law in practice does not account for the particular meaning of legal norms. When effectiveness is defined as compliance, and consequently ineffectiveness as deviation or gap between law and action, law is treated as though it consisted of factual statements about reality – statements of how something is, not normative expectations – statements about how something ought to be. When law is not effective if deviations from it occurs and ineffectiveness is considered as a form of non-functionality, law is supposed to have no effect if people deviate from it. The command and compliance idea of legal effectiveness thus presupposes that law has only one significant side – law exists as long as it is complied with.

(2) Determinants of action. If law as command backed by threat is effective it means that behaviour is caused by law, and when it is ineffective that behaviour is independent of law. Behaviour is the dependent variable and law is the independent variable. This idea as well stems from the command perspective on law. As long as law is understood as a set of directives it is reasonable to assume that law can cause behaviour, and as we have seen under (1) its ability to cause behaviour is used by the state and government to control citizen’s behaviour. The assumption gives an incomplete picture of the relationship between the legal system and individuals’ behaviour. Only a small fragment, if any, of an individual’s behaviour is exclusively determined by legal commands. Instead an act can often be interpreted as the effect of many social systems at once. Pacta sunt servandadoes not necessarily evoke an automatic compliance in all human souls, but may in many persons be mediated through a calculation of the economic costs of breaching the contract. The utility of the legal concept real estate or property is determined not only by the means of legal enforcement available but also the economic value of using the rules summarized by the concept. Any application of law presupposes motivation and only part of that motivation can be supplied relatively directly from law and law enforcement. Compliance is not necessarily a measure of effectiveness of the legal system as an isolated phenomenon. It should be combined with the economy, morals, politics, religion etc. in order to give the full picture of what causes compliance in a given situation. The effectiveness concept is consequently not even defined for the legal system alone, but for a combination of societal subsystems or for society at large.41

(3) Diverse forms of law. As noted under (2) law is only one of several types of expectations (structures) motivating or post factum rationalizing action. Thus, we cannot except for a few assumptions assume that law deters from undesired actions simply with the aid of threats. Penal law is the most obvious area where threats of punishment is relatively effective, but even there law interferes with peoples’ choices of actions in innumerable other ways. According to Swedish law real estate must be bought with written contracts. Unless the purchase has the correct legal form no purchase has taken place. The only sanction supplied for non-compliance is nullity – and nothing is hardly a punishment. But if a person wants to give legal meaning to his action, then he must in a sense comply with the definitions of legal concepts. It is possible that the person uses the legal definition of a concept and even adapts to the image of an object projected by the concept, but still chooses to behave illegally. In a sense partial compliance and partial deviation

41 For a definition of society detached from both political images as the concept of the state as well as from Hobbes’ heritage referring to a conclusive contract between citizens see Luhmann, N., (1998), Die Gesellschaft der Gesellschaft, Frankfurt am Main: Suhrkamp.
appears in this case. The traditional idea of legal effectiveness would conclude, however, that law in this case has been ineffective.

The legal definition is not the single instance when phenomena appear that could be considered for an improved definition of legal effectiveness. Laws may confer abilities and status to a subject, without demanding any particular behaviour of anyone and without any threats of law enforcement. Such norms extend or withhold officially recognized status to designated classes of persons. The most striking example is public officials. Status-conferring laws define what communal or state organs should be allowed to allocate public benefits and deprivations. Specifically juridical tasks are exclusively conferred to courts, and provisions carefully distribute cases among courts dedicated only to special legal areas. But norms also confer legal capacity to fictive persons – for example legal personality. Limited liabilities companies are the most economically significant among them.

Finally, when modern government can only catch a small fraction of all citizens in the act, and thus commanding them to do or refrain from doing something, government must use indirect modes of control. The recent debate of deregulation has pointed at this regulative crisis and posited diverse solutions and concepts such as post-interventionist law, proceduralized law, neo-corporatist law, ecological law, medial law, and reflexive law. The point here is not to discuss these conceptual developments, but to point at the significance of the social problems they address. The reduced perspectives on direct control of citizens by government activity indicates that our idea of legal effectiveness as compliance with legal norms in terms of obedience is a radical overkill of an idea that is not strong enough for the regulation of modern society. However, norms that distribute incentives rather than directives can modify the picture. The use of incentives is an important aspect of modern policymaking. It marginally influences activities most frequently in the private sector, without determining exactly how action should be accomplished. The most conspicuous examples of incentive creating norms are taxes and subsidies. Taxes can have other ends than fiscal. Subsidies and grants have explicit ends in terms of equalized income distribution or migration between social classes. Such norms determine to some extent how individuals and corporations invest and consume without having to deal with the complexities of the processes of investment and consumption. For incentive creating norms...


the compliance definition of legal effectiveness is practically useless. It does not account for the behavioural implications of this type of norm at all.

These considerations show that the effectiveness concept of most legal sociology and legal philosophy could benefit from a revision. The shortcomings encountered here give hints about how a reformulation could be made that covers several effects of law on society. Demands of such a concept are high. It must allow observations of how several types of legal norms give rise to or cooperate with other societal subsystems in causing social phenomena of diverse nature. It must be compatible with and derived from legal theory of enough complexity and enough compatibility with theories of society.

The effectiveness of law should be related to a theory of action and consequently to a theory of social phenomena. We need to combine perspectives from legal philosophy with sociological theories of action in order to find a combination of ideas that can carry the complexity of the problem of relating law to its environment. The point of departure must be a definition of law. What we mean with legal effectiveness is directly dependent on what law is and thus what society is which law is suppose to affect more or less effectively. For a jurist, the question about a legal definition can be answered simply by a practical enumeration of legal sources. For the jurist it suffices often to say that law consists of legal provisions, authoritative court decisions, doctrine, and custom. But from the perspective of the legal philosopher or the legal sociologist the juridical perspective is insufficient. They cannot take the concept of legal sources for granted, but must enquire of the nature of legal sources. Paradoxically the enquiry about the validity of legal norms halts either at a description of the procedures for creating or interpreting legal norms or with the concept we are looking for – legal effectiveness. For example, Hart postulated a hierarchy of norms in order to describe the legal order as law made from law in positivistic sense. Kelsen proposed the basic norm as logical necessity (infinite regress) if valid norms should be derived from valid norms. The basic norm defined as the infinite continuation of the search for a higher norm. This type of internal calculation of validity is the alternative of the legal scientist or legal philosopher. The sociologist normally asks why legal norms, however they derive their formal validity, actually as an empirical object become binding for people. Sociologists enquire how law affects society – or how it can be effective. The questions concerning legal validity, then, can be approached in two ways. Either we presuppose that norms are complied with – legal effectiveness, or we explain how it can happen – legal effectiveness. Conventional approaches for the definition of a legal system end up with the concept of legal effectiveness even before they have the chance to define it. Legal systems are effective because they are effective.

The compliance approach can however be abandoned in favour of a communications based concept of effectiveness, where compliance is not a precondition of effective law. The idea of compliance is related to the professional or conflict-resolution definition of law. According to it law consists of services delivered as conflict resolution to laymen. Government, courts, jurists help society provide better conditions for peaceful coexistence by helping individuals to resolve inherent conflicts of interest. But law is applied also before the courts have been approached and before jurists are consulted for advice. When two or more persons identify their relationship in legal terms they have already applied law to their situation. They have defined their cooperation for example as a legal person and they have understood the concept according to the national provisions regulating legal personality. If a conflict arises it is legally defined in terms of legally protected rights and obligations. If there is an extra-legal conflict independently of law, it is transformed to fit the possibilities of legal language. Furthermore, when a conflict is so advanced or infected that it must be resolved by a court of law, again legal norms are applied spontaneously by the conflicting parties. The correct forum is determined according to national rules or international conventions, costs of litigation are estimated according to norms regarding the distribution of costs between conflicting parties, often depending on who won and who lost. Therefore legal interpretations, decisions, and communications are applied even before
negotiations in court. The professional services then are only the termination of a legal process of application of legal norms that takes place outside the legal institutions.

The revised legal effectiveness concept

We have seen so far that the conventional approach to legal effectiveness builds almost entirely on legal compliance. But legal compliance presupposes something that the communication systems approach makes possible to reveal but which is hidden for the conventional approach. It presupposes that law is actually applied, that legal meaning is referred to and accepted as such, even though its content may be rejected and not complied with. Legal effectiveness as legal compliance is related only to the level of legal application that takes place when law is already referred to and possibly understood. It misses to see the basic processes at the social and communicative level of legal application that should be the sociological contribution to the understanding of legal effectiveness. Legal compliance fails to see the element of choice in legal application.

Some parts of law force themselves on legal subjects. It is compulsory to not only comply with penal law, but also to have knowledge of it and reference to penal law is implicit in all actions. One does not have to be sued by a private citizen in order to be punished or blamed according to penal law, for it is mostly the task of a public prosecutor and the police to investigate and pursue crimes. But even penal law has an element of voluntaryness over it in the sense that a person may choose, illegally of course, to disregard penal law not as non-compliance but as point of reference for action at all. Non-compliance may be combined, and probably most frequently is combined, with some knowledge and some level of acceptance of the validity of the penal law which is breached. The non-compliance is not frequently an element of wholesale rejection of legal validity, but a choice to depart from the expectations of penal law. However, the voluntary aspect and the aspect of choice are more apparent in other legal areas. Most obvious it appears perhaps in private law, which to a large extent concerns economic and other less than necessary matters. There a person is free to establish a contract, to form a legal person as basis for a community, to purchase real estate etc. But the person is also free to abstain from these acts. He may choose other means of furthering the same needs. The person may deliver onerous services and hope for payback from a friend based on thankfulness rather than a contract. The person may form a community without any intention of ever forming a legal entity as its basis. The person may instead of purchasing real estate benefit from the property due to friendly ties. The voluntary aspect, obvious in private law, less obvious in penal law and other public law (for example taxes), makes it possible to tell two levels of legal rejection apart. At the second level a legal communication, explicit or implicit, is accepted as legally valid meaning, but what the law contends is dismissed. If a person knows that a contract exists and recognizes its meaning but breaches it anyway a case of pure non-compliance is at hand. However, a more primitive rejection of legal communication can be observed. When a person rejects, not only the terms of a contract or the fact that there is a contract, but also the legal communication in total - referring to a contract, one observes a the more fundamental form of rejection that sometimes may be improperly called non-compliance but is based on another social phenomenon. Non-compliance – the rejection of the content of a legal meaning such as the terms of a contract or the neglect of a, possibly consciously observed, command by the state in terms of penal law, means that legal glasses are used for the observation of the actions performed and for the judgement of their morality. The breaching part may feel guilty of the breach. The counterpart is disappointed and angry. The reactions are caused by the fact that the breach is observed from a point of view inside the legal system. The communicative operations are parts of the legal system.
Luhmann once developed a distinction in his theory of social systems where he similarly separated levels of rejection of communications. A communication is often or always given physical form, for example either as a text or as a bodily motion. But the physical form may be faulty interpreted by an observer as a bodily motion or as a piece of paper with some colour on the pages. Perhaps the observer is not familiar with the custom of gestures and reading. Perhaps the observer is obstinate and decides to reject the communicative effort wholesale for other reasons. Anyway the communication will not continue along the lines suggested by the first attempt. The communication will not cause coupling of operations to operations. It will not grow to become for example the theme of a conversation or the focus of analytical reading. Thus communications involve the hopes or demands of continuation, but this cannot be guaranteed. No one can totally control a counterpart. Not even law can be sure of attention in this respect. The essential point to note here is that if the legal voice is not heard it cannot lead to compliance either.

From this basic sociological perspective the question of legal effectiveness has taken new contours. Law has effects on society if and only if legal communication (implicit or explicit) is accepted as such. Here it is claimed that the voluntary aspects of legal application is as important as the effects observed by the legal compliance paradigm. Effectiveness should be connected primarily to the extent law is used in communication as much as to the extent law is complied with. The extent that law is actually referred to should depend, not only on the availability of courts and other law enforcement or the internalisation of norms, but also on familiarity with law among the people who conduct the primary legal application defined above. It is the layman’s application of law we are looking for. Prior to any calculation of cost and benefit of using law as means for defining and regulating situations there is the choice whether or not to accept or reject the idea of communicating through legal terms at all. Thus, before it is possible to judge who is going to win or loose from discussing a matter in terms of rights and obligations the parties have the options to proceed legally or to abstain from that route totally. Their choice at this primary level is guided not by a calculation of costs and benefits but by a judgement of the sensibleness and usefulness of law as means for communication about a matter. Our assumptions of the role of trust in choices to apply or not apply law leads to the following conclusion: Legal application by a layman will tend to occur if and only if the layman feels confidence in his ability to apply law in relation to a counterpart and in that his communication will be accepted as a valid legal communication by the counterpart. The confidence will typically be concerned with basic legal concepts, since a layman has no knowledge about details in single laws, or provisions. In this sense the type of legal application here encountered is a diffuse, ambiguous calculus of trust. If legal effectiveness is connected with this primary legal application and with the choice to accept or reject a communication as a legal valid statement legal effectiveness is defined as: A legal norm is effective in a population of users to the extent that users feel confident in their ability to use legal terminology and in the acceptance of the communication as law. Compared with Hirschman’s classic definition of customer loyalty as a function of individuals’ judgement of their ability to communicate with a certain supplier, be understood and accepted, legal effectiveness is surprisingly similar. Hirschman’s framework made possible a separation of the loyalty concept from actual customer duration or recurrent purchase and the social process where the probability is moulded. Hirschman had managed to show that companies who fostered customers with a high degree of confidence in their ability to communicate with their supplier could benefit from frequent repeated purchases while suppliers which where more difficult to communicate with tended to loose their customers quicker.

Now it can be explained why seemingly effective legal design is not necessarily the way to truly effective law. That design of law is not as intimately related to legal effectiveness, however defined, as we might have thought has been shown by Berkowitz et al. (2003) in a
comparison of effects on effectiveness between the design of law transplanted and the manner in which the transplantation took place. Thus a poorly designed law may be more effective than a, on paper, good design. The reason is supposed to be that law must be made meaningful in the context in which it is applied so citizens feel motivated to use the law. Institutions (courts and authorities) must be able to increase the quality of law in response to local demand. Other pieces of evidence support these statements. According to Rodrik (2000) a well-designed strategy for institution building should take into account local knowledge rather than emphasize best practice from international comparison. The claim from this stream of research is that law is effective when it is in contact with society. We see through our effectiveness concept how these pieces of evidence fit the picture. When law functions not as a gathering of texts, but as a system of concepts, familiarity with concepts among the population is a necessary requisite to avoid a vacuum between law and the rest of society. Law, which is in contact with society, is typically preferable to law, which on paper is a good design. The contact points between law and society are the basic legal concepts applied by non-professionals. If these points are not given appropriate consideration when designing new laws individuals risk loosing faith in their ability to apply law and they will consequently be less prone to do so.

These new discoveries actualise new interpretations of legal effectiveness. It seems as though it is not enough to assume that legal norms are effective if they are applicable or valid. Jurists’ descriptions of law may assume that the norms that make up the system are applicable and effective. To assume that law is effective when it is observed (Navarro and Moreso, 1997) simply translates to behavioural compliance and the gap model between law and society assuming perfect knowledge about legal norms regardless of abstraction level and accessibility. But in practice only a few persons in a society have any direct access to legal text, and even fewer actually read them. Law is communicated among the population in a form of oral tradition where metaphoric images serve as carriers of messages. When we conclude as do the students of law and society that law has been complied with or observed or otherwise law has affected behaviour of people, we consequently have to define the difference between the ideal of the law in the books and the actual behaviour in practice taking into account a behavioural definition of law. When gauging the effectiveness of law the jurists’ view of it is a minority conception, however important, and the effects of law on large parts of the population is caused by a metaphorical and ambiguous understanding of law rather than the exact phrasing of provisions, the guides in travaux préparatoires, the fine tuning distinctions in stare decisis. If the layman has distinct knowledge of any of the sources of law it may be the parts that are regulated by custom. Otherwise a reasonable prediction should be that the application of law by the layman differs widely from the application by the professional jurist. Only limited knowledge of the legal method can be assumed, and even if the layman would know how to derive legal norms from legal sources they would not be available to him/her without considerable effort, an effort seldom expanded without particular cause.

If law is applied according to what could be called a logic of appropriateness rather than a calculative, juristic legal rationality a shift of focus when investigating the gap between what the law says and what people do is necessary. One should suspect that what the law says in a particular sociological sense has hitherto not been appropriately defined and therefore possibly led the theory of law and society to false conclusions regarding the effectiveness of law. With a more realistic understanding of how law is applied in laymen situations legal effectiveness should also be defined appropriately. We preliminarily conclude that a concrete expression of a legal norm is effective when there is a connection between it and basic legal concepts. The basic legal concepts are used in ordinary language by laymen to communicate about legal expectations. The possibility of their

50 The concept was developed for the explanation of organizational decision making by March, J. G. (1999) The Pursuit of Organizational Intelligence, Malden, Mass.:Blackwell.
efficient use in common experiences determines the extent to which concrete and complex sets of norms are appealed to. If a gap emerges not between the behaviour of people and the norms of a legal system but between the technical and professionally defined meaning of basic legal concepts and the understanding of them by laymen, a deterioration of laymen’s trust in their ability to employ law as meaning reference.

The effectiveness of legal transplants

An example of how the revised effectiveness concept can provide a potentially improved understanding of the processes that inflict upon how law is connected to its surrounding society is the legal transplant. Legal transplantation, as explained above, takes place when one country imports law from another country. Sometimes the import occurs within the same legal family, where legal systems are conceptually related, sometimes without close relationship between donor and receptor. Many empirical studies have observed that countries receiving law from abroad tends to function less effectively than countries that have developed the corresponding set of norms internally. It has also been observed that while there is a gap between formal law on the books and law in action in all countries, as maintained by the dominating approach to law and society, larger gaps are found in legal transplants, i.e. countries receiving considerable amounts of law from abroad. Thus in legal transplants many norms find no application at all or are applied in a sense that was not intended by the legislator.

A series of large quantitative empirical investigations has been conducted in order to shed light on this phenomenon. The findings can be summarized as follows: The way in which the law was initially transplanted determines effectiveness more than the choice of legal family from which to transplant. Assumptions have been that for law to be effective it must be meaningful in the context in which it is applied so citizens have an incentive to employ it, and that judges and lawyers as well as other intermediaries must be able to develop law in a way that is responsive to demand for effectiveness. Thus it has been assumed from the beginning that local adaptation in some sense is important for effective law. Law, which is not suited for local conditions, could be expected to be less effective than the locally produced or adapted law would be. The assumptions have been confirmed by data. There is a strong relationship between what has been defined in these studies as legal effectiveness and the way transplants are carried out. There is no corresponding relationship between the legal effectiveness and the legal family from which law has been transplanted. Thus it seems as though the manner of import is more important than the quality of the goods.

This result is paradoxical for the conventional idea of legal application and interpretation. According to it one may assume that the user has knowledge of law sufficiently to make the necessary legal interpretations. Thus knowledge of the valid legal method and professional insight into legal rationality and the redundancies on which legal argumentation builds is assumed. The observations on the problematic of legal transplants however point in another direction. When law in the books differs from law in action, and transplantations from closely related legal systems does not result in higher effectiveness, however defined, than legal transplants from distant legal systems the connection between law and its surrounding society

must be put in question. The conventional law and society framework would define the kind of deviations from law in the books found in many transition economies borrowing law from western countries as illegal deviations. Behaviour would be described as deviating from the norms defined by the official legal order. Even if this characterization is formally correct it neglects the social processes that form the interplay between law and its environment. The traditional description overemphasises the importance of institutions and the professional services of a legal system. A conventional approach to measurement of legal effectiveness concerning economic regulation would consist of an amalgamation of legal properties such as efficiency of the judiciary, rule of law, absence of corruption, risk for expropriation, and risk of contract repudiation. This combination of risk measures and institutional variables reveals that, though the explanation offered in the speculative parts of these studies have more dimensions the data is related to a more strictly institutional perspective on legal application emphasising the formalized aspects of the subject. The social process where law is supposed to transform into action, via norm compliance, appears to be treated as a black box. Mention is given of the knowledge aspects of legal application: “The fact that formal legal orders have put the key elements of the legal order in writing tends to disguise the fact that the effectiveness of these rules also rests on knowledge and understanding of these rules and their underlying values by social actors.” However, this quote and other evidence support the effectiveness concepts developed here. The gap between law in the books and law in action will be greatest where basic legal concepts are not adapted to the specifics of individual rules in provisions due to the fact that laymen tend to apply law as it appears in the basic legal concepts to which he is accustomed while professional jurists apply law as it appears in relatively technically written provisions seldom practically accessible to laymen. When basic legal concepts according to generally dispersed knowledge, or myth, are reminiscent of a legal system which has been replaced with a transplanted set of rules, a reinterpretation of the basic legal concepts may be necessary in order to avoid that new, often modern and western, rules are misunderstood or interpreted in a vulgar way. There is ample evidence that misinterpretations often occur, if not among professional lawyers then the more frequently among laymen. In a large empirical study which well summarizes typical findings in this area Hendley et al. showed how Russian enterprises systematically managed to avoid the possibilities of the new civil code implemented after the fall of the Soviet regime. According to their results Russian enterprises make little use of law and legal institutions in structuring their economic relationships. A sign of this state is that lawyers are often peripheral actors in enterprises. When formal contracts are used they are constructed as they were in during the Soviet era, which means that contracts do not make use of the degrees of freedom in the nowadays modern, and transplanted, Russian civil code. Thus it appears that the legal system has little significance for business strategy. It is not understood among practitioners as an effective tool for organising relationships with for example suppliers, customers, and personnel. It was also found that the knowledge of the new civil code was extremely poor, even among professional jurists employed at the law departments of the companies investigated. Company officials often had good knowledge about such laws that were in accordance with previous Soviet laws but were not properly informed about changes that meant updating Russian law to modern western standards.

The inertia observed in Russia and the observation that the manner in which transplants are done is more important than the transplanted rule both support the proposed definition of legal effectiveness in this paper. When legal change is initiated that is not connected with the basic legal concepts of the country, there is a gap between the basic legal concepts and

the transplanted laws. When law is applied by laymen, and by insufficiently educated professionals, basic legal concepts are kept, why a conservative idea of law as an instrument for organizing situations and relations results. Furthermore, if people are aware of that legal change has occurred but are unaware of the exact meaning of the change, a widening gap between law in the books and law in action can be expected because people feel low degree of trust in their ability to employ the legal system as meaningful communication instrument. The discussion of matters in legal terms on the level of basic concepts will be staggering and bothering for both parties if they know that the law expressed by the concepts has been changed in unknown directions. The change itself introduces decreased levels of trust in communicating through legal conceptual channels, why law tends to be seen as less valuable.

When people judge that their ability to communicate with legal terminology, be understood and accepted by a counterpart is low legal effectiveness is low by definition. Law will not affect the organization of relationships between people whether of economic, family, or national character. The problem of insufficient trust in one’s own and one’s counterpart’s ability to use law for purposes of fruitful communication and forming valid expectations of future actions cannot necessarily be solved by a combination of better law enforcement, more efficient legal institutions or modernized legal provisions which has been commonly assumed by the law and development school.\(^{55}\) It has been proposed that legal transplantation not adapted to the local social and economic conditions decreases the need for the transplanted law and thus weakens the interest to apply law.\(^{56}\) For example, while many firms in China used the label limited liability company they remained unincorporated family owned business. Where the corporate form was used the external capital was marginal and kinship was the most important financial resource.\(^{57}\) Demand, or desire, cannot be seen in isolation from trust as defined here. If there is no trust in the legal system and in one’s own capability to communicate through law with desired effects there is typically no demand for law. Furthermore, if trust somehow can be accomplished, and legal rules are not designed so that they serve economic or social functions, for example provide means for incorporation of large industrial enterprises in new industrialised economies,

**Conclusions and implications**

Transplanted laws are less effective than internally developed laws according to solid empirical evidence. However, it has not been clear why this effect occurs. Frustrated policy makers refuse to give up the idea to accelerate legal evolution in developing countries and transition economies by using laws from economic ideals such as Germany or the United States in large legal reformations. The results are frequently that a gap opens between the technically advanced laws and the activities of the people. Surprisingly, the imported law tends to be used less frequently than internally developed law and the internal development begins to stagger. A conclusion would be that legal effectiveness decreases with the import of laws. The question, however, is how legal effectiveness should be defined in order to further our understanding of the so-called transplant effect.

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The purpose of this article has been an investigation of the legal effectiveness concept. It was noted that the presently used concept did not contribute to our explanation of the transplant effect and we reviewed our others’ criticism that supported our attempts to develop a different effectiveness concept. A previous analysis of legal effectiveness, by Ingram, in this journal emphasized the importance of obedience and conformity in common understanding of legal effectiveness. Ingram suggested that effectiveness should be defined as the ration of application to non-application of law in order to avoid measurement problems. Our analysis leads to a more radical approach to effectiveness. By using the system theory of Luhmann we suggest that effectiveness should not be understood as a matter of obedience, conformity, or application in the sense put forth by most thinking in this area. Conventional ideas assume that laws are tools for regulating society, and therefore that the gap between what laws express and people do is a problem. Here, this idea is not rejected, but another level of analysis is introduced when it is recognised that people can reject not only the content of the legal message, but also the type of message (legal). Understood as a form of legal communication, legal references are voluntary. People may refer to them, or choose some other form of expressing the functionally equivalent effect. When other than legal communications are used, the legal system does not affect, or affects only through its ineffectiveness, the choice of behaviour.

When the layman applies law, it is without the detailed knowledge of the professional. The exact phrasing of provisions is not available to him. Instead, the layman uses his legal consciousness, or a basic conceptual understanding of what law says on an issue. For example, the layman may claim that a corporation cannot lend money to its shareholders because it would be counterintuitive to the idea of a corporation as a separate entity and violate creditor rights. The exact formulation of this rule and the boundaries for its application, however, is unknown to the layman. Therefore, the application of law by the layman differs remarkably from the professional activities of jurists. We suggest in this article that a difference between primary and secondary application should mark the difference between these levels of legal application. Our analysis reveals many of the most decisive social processes for determining legal effectiveness lies in the primary application of law that takes place among laymen. Due to narrow definitions of law and legal effectiveness, this level of analysis has not previously been addresses in terms of legal effectiveness.

Laymen are, according to our analysis, the appropriate level of research on the effectiveness of legal systems. Professionals are involved only after a conflict has been identified and interpreted in legal terms. The preliminary interpretation, the primary application of law, should determine what areas of law are used and what areas lie fallow. Effective norms should be such that can be applied by laymen, applied in its broadest sense. When a house is bought and paid for, property rights and obligations are referred to implicitly or explicitly. When a house is protected only by muscle strength of the occupying persons, no reference, implicit or explicit, is made and law is not applied. There are innumerable circumstances that impact on the decision to apply or not to apply law in particular situations, but our analysis has concluded that many of them will rule each other out, leaving self confidence or trust in ones own capability to deal with legal concepts as a key determining factor. The extent that law is actually referred to should depend not only on the availability of courts and other law enforcement agencies or the internalisation of norms, but also on the familiarity with law among the people who conduct who conduct primary application. Before any calculation of costs and benefits of appealing to law there is a choice whether not to accept or reject the idea of communicating through legal concepts at all. This decision is the focus for our definition of legal effectiveness. A legal norm is effective in a population of users if users feel confident in their ability to use legal terminology with relevance for the norm, and feel confident that their communication will be accepted as law. This definition relates effective laws to the their functionality as communication tools rather than as commands and obedience or conformity. Thus effective laws become a matter of designing laws that relate to a tradition of conceptual use as much as, or more than improving efficiency of courts , expanding the police,
and otherwise improving institutions. If the conceptual tradition, or legal consciousness, is not in tune with legal reform, research on legal transplants has shown that the gap, between the technical construction of laws and the understanding of basic legal thinking by the population is increased, ineffective laws end up, at worst, in a societal vacuum.

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