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Conceptualizing Legal Change: A Comparative Law Approach

Abstract. Legal historians have observed that many legal norms have remained in force for a long time; yet the great degree of social change would prima facie also entail legal innovations. But there have been fewer than expected. Can one construct a general theoretical framework for assessing explanations concerning legal change and legal stability? Further, can such a framework be constructed from the perspective of comparative law? It may perhaps be argued that comparative law is not sufficient for constructing such a theory; a general analysis of society is also needed. But even if concrete conditions, and cause and effect relations cannot be entirely explained by an abstract scheme, it is at least reasonable to hope that such a scheme may clarify some of the basic concepts at work and enhance insights into the nature and progress of law. The first part of this paper considers the nature and scope of comparative law and identifies different approaches to the subject adopted by contemporary comparatists. In the second part, the problem of legal change is discussed from the standpoint of a particular theoretical perspective represented by Professor Alan Watson, one of the most productive post-War comparatists and legal historians.

Keywords: comparative law, historical jurisprudence, legal transplants, factors of legal change

Defining the scope of comparative law

Theories on the nature and development of law can only gain universal validity if they are capable of encompassing many (if not all) systems of law and, in turn, this suggests the prerequisite for a detailed study of at least a range of legal systems. The knowledge jurists depend on when aspiring to devise tools for a proper understanding and construction of legal phenomena cannot be gained by an examination of a single legal system, since law transcends national boundaries, or without a comparison. Like legal history, legal sociology and legal philosophy, comparative law provides jurists with additional perspectives for a more complete understanding of law and, by enriching their intellectual repertory, enables them to better accomplish their tasks. It introduces concepts,

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styles, organizations and categorizations previously unknown, revealing unsuspected possibilities in the very notion of law and thus enabling jurists to more effectively address the legal, social and political issues that legal systems strive to resolve.

Modern comparative law has progressed through different stages of evolution. Influenced by developments in the biological sciences, linguistics and new theories of social evolution during the nineteenth century, comparatists tended to focus, at that time, upon the historical development of legal systems with a view to tracing broad patterns of legal development common to all societies. The idea of the organic evolution of law as a social phenomenon led jurists to search for basic structures, or a 'morphology', of law and other social institutions. They sought and constructed evolutionary patterns with a view to uncovering the essence of the 'idea of law'.¹ Of particular importance to the development of comparative and historical jurisprudence was Sir Henry Maine's work on the laws of ancient peoples. According to Maine, while comparative law, as opposed to the properly so-called jurisprudence, is concerned with the analysis of law at a certain point of time, historical-comparative jurisprudence focuses on the idea of *legal development* or the dynamics of law. But it was F. Pollock, Maine's disciple and successor in his scientific endeavours, who synthesized science and comparative law by drawing attention to the connection or interrelationship between the 'static' point of view of comparative law in a narrow sense and the 'dynamic' approach of historical jurisprudence. To him, jurisprudence itself must be both historical and comparative; in this respect, comparative law plays more than a merely secondary or supporting role, it has a distinct place in the system of legal sciences.² The position adopted at the First

¹ According to Franz Bernhöft, '[C]omparative law wants to teach how peoples of common heritage elaborate the inherited legal notions for themselves, how one people receives institutions from another one and modifies them according to their own views, and finally how legal systems of different nations evolve even without any factual interconnection according to the common laws of evolution. It searches, in a nut-shell, within the systems of law, the idea of law'. *Ueber Zweck und Mittel der vergleichenden Rechtswissenschaft*, 1.

² As Pollock remarked, "It makes no great difference whether we speak of historical jurisprudence or comparative jurisprudence, or, as the Germans seem inclined to do, of the general history of law." Pollock, F.: *The History of Comparative Jurisprudence*. *Journal of the Society of Comparative Legislation* 5 (1903) 74 at 76. The influence of this school of thought is reflected in more recent discussions of the nature and aims of the comparative study of laws. Thus, according to Rotondi, comparison is one of two methods (the other being the historical method) whose combination can give us a comprehensive knowledge of law as a universal social phenomenon. Legal science relies upon these methods in order

International Congress of Comparative Law, held in Paris in 1900, as to the nature and objectives of comparative law stressed both the independence of comparative law from other fields of scientific inquiry, and its long-term practical goal, namely the unification of the laws of peoples at similar stages of cultural and economic development through the elimination of the accidental differences between them. At that Congress, the famous French comparatist Raymond Saleilles asserted that the chief aim of comparative law is the discovery, through the study of different national laws, of concepts and principles common to all 'civilized' legal systems, i.e. universal concepts and principles that constitute a relatively ideal law—a kind of natural law with a changeable character.³ According to Édouard Lambert, a unity of general purpose can be detected in similar legislation from different states, in spite of the absence of such unity at the level of the rules embodied in the legislation. It is thus possible to discern a common basis of legal solutions and establish a 'common legislative law'. The unitary and universalistic mentality underpinning the approach to comparative law adopted in the Paris Congress reflects the influence of schools of thought that dominated European legal science in the nineteenth and early twentieth centuries. One of these schools was the German *Begriffsjurisprudenz* (jurisprudence of concepts). Favouring the construction of grand schemes of systematization, *Begriffsjurisprudenz* placed strong emphasis on the formulation of abstract, logically interconnected, conceptual categories

to detect and construe the (natural) laws governing the evolution of this phenomenon. In searching for relations between different legal systems, or families of legal systems, one seeks to discover, to the extent that this is possible, certain stable features in this evolutionary process that may allow one to foreshadow future developments concerning the character and orientation of legal systems and branches of law. *Technique du droit dogmatique et droit compare. Revue Internationale de Droit Comparé* (1968) 13. And see Herzog: *Les principes et les methods du droit pénal comparé. Revue Internationale de Droit Comparé* (1957) 350. And according to Yntema, comparative law, following the tradition of the *ius commune* (*droit commun*), as an expression of the deep-rooted humanist vision concerning the universality of justice, and based on the study of historical phenomena, seeks to discover and construe in a rational way (*en termes rationnels*) the common elements of human experience relating to law and justice. In the world today the primary task of comparative law is to elucidate the conditions under which economic and technological development can take place within the framework of the Rule of Law. *Le droit comparé et l' humanisme. Revue Internationale de Droit Comparé* (1958) 698.

³ Conception et objet de la science juridique du droit compare. In: *Procès verbaux des séances et documents du Congrès international de droit comparé 1900, 1905–1907, I*, 167 at 173.

as a means of constructing highly systematic bodies of positive law.⁴ By comparing conceptual forms the members of this school hoped to find concrete evidence of general, universally valid, legal systematics, and to reveal the common core or essence of basic juridical concepts, even if it was admitted that every legal order has a system of its own.

The works of nineteenth century scholars, which endeavoured to conceptualize legal phenomena on a historical-comparative plane, paved the way for the recognition of comparative law as a science and an academic discipline. During the twentieth century, however, many comparative law scholars, most notably Gutteridge and David, adopted the view that comparative law was no more than a *method* to be employed for diverse purposes in the study of law. According to this view, comparative law is no more than a means to an end and therefore the purposes for which the comparative method would be utilized should provide the basis for any definition of comparative law as a subject. This approach entailed a shift in emphasis from comparative law as a science to the uses of the comparative method in the study of law. By focusing on the uses, aims or purposes of comparative study, comparatists divided their activities into categories such as ‘descriptive comparative law’ or ‘comparative nomoscopy’, signifying the mere description of foreign law; ‘applied comparative law’ or ‘comparative legislation’, referring to the use of foreign law for the purpose of reforming one’s own legal system; ‘comparative nomothetics’, concerned with the evaluation of foreign law; ‘comparative nomogenetics’ or ‘comparative history of law’, focusing on the evolution of legal norms and institutions; and ‘abstract or speculative comparative law’ or ‘comparative jurisprudence’, with respect to which the comparative method was designed to assist sociologists and legal philosophers.⁵ However, the above divisions do not militate against the basic unity of comparative law as a scientific method. As Gutteridge points out, comparative law is not made up of a variety of independent inquiries related to each other only by virtue of the fact that they all involve the study of different legal systems. The basic feature of comparative law, as a method, is that it can be applied to all types and fields of legal inquiry.⁶

In general, a distinction may be drawn between three types of comparative legal inquiry: *idealistic*, *realistic* and *particularistic*. From the idealistic viewpoint, legal order is seen as a normative matter that is present in the factual legal

⁴ See e.g., Puchta, G. F.: *Cursus der Institutionen*. I, 1841. esp. 95–108; Windscheid: *Lehrbuch des Pandektenrechts*. 1891. I. 59–60.

⁵ See in general, Gutteridge, H. C.: *Le droit compare*. Paris, 1953. 20.

⁶ *Ibid.* at 28. And see Langrod, G.: Quelques réflexions méthodologiques sur la comparaison en science juridique. *Revue Internationale de Droit Comparé* (1957) 363.

order although it cannot be identified with it. The realistic perspective, on the other hand, is based upon an empirical view of legal order. Both the idealistic and realistic approaches are concerned with the problem of generalization. The study of legal orders brings to light innumerable differences and similarities. Idealistic universalism seeks to discover the *ideal of law*, which is present in all legal orders; realistic universalism seeks to reveal the *sociological laws* governing legal phenomena. In spite of their theoretical juxtaposition, both approaches have universalism in common: they are not content with a mere description as they want to *systematize*, to find out general means of explanation to account for legal phenomena irrespective of time and place. Those who follow a *particularistic* approach to comparative law, by contrast, claim that general schemes are too abstract to serve as goals of study. This approach, quite common in the contemporary practice of comparative law, tends to reduce comparative law to a detailed description of different legal orders. From this point of view, comparison is only a translation of valid legal orders into one language. In most cases, however, some kind of intermediate position between universalism and particularism is sought, as far as it is recognized that there are both general and particular features in every legal order.⁷ It might be said that the universal and individual features of legal phenomena are *different* aspects of a uniform whole, although both aspects are in order to grasp reality. The more general a description is, the more phenomena of concrete life it covers, and the better it is as a scientific description, but the less does it represent a particular form of life. The exact course of historical events is always individual and can be explained only by reference to its particular elements; but the broad outline of the events is subject to general socio-historical laws. Even though legal sociology might strive towards a universalist knowledge of law, as does legal philosophy in a different sense, comparative law is by its own nature forever bound to vacillate between the general and the particular. The comparative process may be described as dialectical, since it focuses upon the inter-connection between general principles and concrete observations made when these principles are applied in practice. Thus, the general explanatory background is concretized in particular cases; at the same time, a general historical outlook enables one to make certain generalizations from particular events within the framework of a general model of explanation.

The role of comparative analyses in the field of legal history deserves special attention. The history of law explores the sources of legal phenomena, and the evolution of legal systems and individual legal institutions in different

⁷ This reflects the Aristotelian view of legal order as a result partly of natural regularities and laws, and partly of human will.

historical contexts. It is concerned both with the history of a single legal order and the legal history of many societies, the universal history of law. By comparing different legal systems at different stages of development, legal historians attempt to trace the evolution of legal institutions and the historical ties that may exist between legal systems. Historical analyses of law utilizing the comparative method are essential for understanding the development of legal systems. Without the knowledge derived from historical-comparative legal studies it is impossible to investigate contemporary legal institutions, as these are to a great extent the products of historical conditions, borrowings and mutual influences of legal systems in the past.

Legal historians have observed that many legal norms have remained in force for a long time; yet the great degree of social change would prima facie also entail legal innovations. But there have been fewer than expected. How can the relative longevity of law be explained? One might say that there are social structures that have remained largely unchanged and that, accordingly, should be used to explain the longevity of some legal norms or institutions. But an obscure reference to some structure carries little weight as an explanation. The question is: can one construct a general theoretical framework for assessing explanations concerning legal change and legal stability? Further, can such a framework be constructed from the perspective of comparative law? It may perhaps be argued that comparative law is not sufficient for constructing such a theory; a general analysis of society is needed. But even if concrete conditions, and cause and effect relations cannot be entirely explained by an abstract scheme, such a scheme may clarify some of the basic concepts at work and enhance insights into the nature and progress of law.

The following paragraphs consider the questions of legal change and legal stability from the viewpoint of comparative law. The discussion will focus on aspects of the legal change theory developed by Professor Alan Watson, one of the most productive post-War comparatists and legal historians.

A comparative theory of legal change?

Since the publication of the first edition of his seminal book, *Legal Transplants: An Approach to Comparative Law* in 1974, Watson has produced many works on the relationship between law and society, and the factors accounting for legal change.⁸ In these works he iterates his belief that changes in a legal

⁸ See, e.g., Watson, A.: *Aspects of Reception of Law*. *American Journal of Comparative Law* 44 (1996) 335; *Comparative Law and Legal Change*. *Cambridge Law*

system are due to legal transplants: the transfer of legal rules and institutions from one legal system to another. 'Legal transplanting' involves a legal system incorporating a legal rule, institution or doctrine adopted from another legal system. It may also pertain to the reception of an entire legal system, which may occur in a centralist way, as displayed by the introduction of the Napoleonic Code in many European countries. However, in most cases foreign rules or doctrines are 'borrowed' in the context of legal practice itself, because they fill a gap or meet a particular need in the importing country. Until the nineteenth century legal transplanting mainly occurred within Europe. In the course of the nineteenth and twentieth centuries European laws were transplanted in many countries around the world either directly or through the adoption of European codes. During the same period, English Common law spread through the colonies of the British Empire in North America, Australia, New Zealand and parts of Asia and Africa. In the past few decades, many institutions of Anglo-American law have been adopted by countries of Continental Europe.⁹ Legal transplanting is also associated with the so-called 'hybrid' legal systems, i.e. systems whose development was influenced by two or more legal traditions.¹⁰ To understand the reception of foreign law phenomenon one must examine the reasons behind the introduction of foreign law in a particular case (e.g. whether it is the result of conquest, colonial expansion or the political influence of the state whose law is adopted,¹¹ or it pertains to the perceived quality and prestige

Journal (1978) 313; Legal Transplants and Law Reform. *Law Quarterly Review* (1976) 92; *Society and Legal Change*, Philadelphia, 1977; *Sources of Law, Legal Change, and Ambiguity*. Philadelphia, 1984; *Legal Origins and Legal Change*. London, 1991; *The Evolution of Western Private Law*. Baltimore, 2001. And see R. Sacco: Legal Formants: A Dynamic Approach to Comparative Law. *American Journal of Comparative Law* (1991).

⁹ An example is the concept of 'trust', originally an Anglo-American legal concept, which has been adopted by many Continental European legal systems.

¹⁰ Such as, for example, South Africa (Roman-Dutch and English influence), Québec (French and English influence) and Louisiana (French and American influence).

¹¹ Territorial expansion through military conquest (such as the Roman expansion in the Mediterranean world; the settlement of Germanic peoples in Europe; the expansion of Islam in Africa and Asia; and the Spanish conquests in Central and South America) did not always entail the imposition of the conquering peoples' laws on the subjugated populations (for example, in lands under Germanic and Islamic rule subject populations continued to be governed by their own systems of law under the so-called 'principle of the personality of law'). In some cases a direct imposition did in fact occur (consider, for example, the introduction of Spanish law in South America), while in others the law of the conquering nation was introduced in part or in an indirect fashion (for example, during the British and French colonial expansion there was a tendency to introduce into the colonies elements of

of the adopted law).¹² This analysis must also address the roles that legal science, legal education and the legal profession play in the reception process; the form of the imported law (whether it is a written, customary or judge-made law); and whether (or to what extent) the importing and exporting countries are compatible with respect to culture, socio-economic structure and level of development, as well as the outcomes of legal transplanting.

The destinies of legal transplants in different cultural, socio-economic and political contexts are important to examine for determining the desirability and applicability of such transplants for legislative and judicial practice. It may be true that ethno-cultural, political and socio-economic differences between the exporting and the importing countries do not preclude the successful transplantation of legal rules and institutions. Legal rules can be taken out of context and can serve as a model for legal development in a very different society. However, one should keep in mind that an imported legal norm is occasionally ascribed a different, local meaning, when it is rapidly indigenized on account of the host culture's inherent integrative capacity. It is not surprising that, very often, European legal concepts, institutions and rules imported by non-Western countries are understood in a way that is different from that in the donor countries. The absence of substantial differences in the wording of a statute law from the donor and the host countries does not imply that legal reality, or everyday legal and social practice in the two countries, should be identical or similar. The legal reality in the host country may be very different with respect to the way people (including judges and state officials) read, interpret and justify the relevant law and the court decisions based on it. Moreover, the role of statute law in the recipient country may be much weaker than it is in the exporting country and custom may be a predominant factor. Thus, in practice, social rules might effectively prevent people from initiating a legal claim or even using a court decision supporting such a claim. As this suggests, it is not good sense to use the perspective and framework of one's own legal culture when examining a law or legal concept in a legal system operating within the context of another culture. Such an approach carries the risk of implying the

the legal systems of the colonial powers or to develop systems of law adapted to local circumstances but largely reflecting the character of the metropolitan systems).

¹² Consider, for example, the reception of Roman law in Continental Europe. Many centuries after the demise of the Roman state, the jurists of Western Europe came to regard Roman law as intellectually superior to other systems of law. Seen as constituting an expression of natural reason, Roman law was received in Europe not by virtue of any theory concerning its continued validity as part of the positive law, but in consequence of its own inherent worth. In other words, its validity was accepted not *ratione auctoritatis*, but *auctoritate rationis*.

existence of many more similarities than there actually are.¹³ It would be impossible to understand the very idea of Western legal tradition without recognizing the enormous variety of legal norms and styles that are common within it, not only within the Civil law and the Common law domains, but also across the borders of these legal families.

According to Watson, the nomadic character of rules proves that the idea of a close relationship between law and society is a fallacy.¹⁴ Law is largely autonomous and develops by transplantation, not because some rule was the inevitable consequence of the social structure, but because those who control law-making were aware of the foreign rule and recognised the apparent benefits that could derive from it.¹⁵ Watson does not contemplate that rules are borrowed without alteration or modification; rather, he indicates that voluntary transplants would nearly always—always in the case of a major transplant—involve a change in the law largely unconnected with particular factors operating within society.¹⁶ Neither does Watson expect that a rule, once transplanted, will operate in exactly the same way it did in the country of its origin. Against this

¹³ As Watson has remarked, “except where the systems are closely related, the differences in legal values may be so extreme as to render virtually meaningless the discovery that systems have the same or a different rule”. *Legal Transplants*, 5. For example, consider the difficulties surrounding the interpretation of the concept of individual freedom, as found in international treaties on human rights. Individual freedom has a rather different meaning in China and other Asian countries, as compared to the Western view, not just because of a political ideology currently or formerly imposed by the rulers of those countries, but because of a more basic, culturally embedded ideology that originates from a very different, collectivist world view. For an elaboration of the theory of legal transplants see Ewald, W.: *Comparative Jurisprudence (II): The Logic of Legal Transplants*. *American Journal of Comparative Law* 43 (1995) 489.

¹⁴ *Legal Transplants*, 2nd ed. 1993. 108. On the view that law is the result of the social needs of a given society see in general Friedmann, W.: *Law in Changing Society*. 1959; Damaska, M.: *The Faces of Justice and State Authority* 1986; Friedman, L. M.: *A History of American Law* 18 (1973) 595.

¹⁵ Watson, A.: *Comparative Law and Legal Change*. *Cambridge Law Journal* 37 (1978) 313, 313–315 and 32.

¹⁶ Watson has identified a number of factors that determine which rules will be borrowed, including: (a) accessibility (this pertains to the question of whether the rule is in writing, in a form that is easily found and understood, and readily available); (b) habit (once a system is used as a quarry, it will be borrowed from again, and the more it is borrowed from, the more the right thing to do is to borrow from that system, even when the rule that is taken is not necessarily appropriate); (c) chance (e.g., a particular written source may be present in a particular library at a particular time, or lawyers from one country may train in, and become familiar with the law of another country); and (d) the authority and the prestige of the legal system from which rules are borrowed.

background, Watson argues that comparative law, construed as a distinct intellectual discipline, should be concerned with the study of the historical relationships between legal orders and the destinies of legal transplants in different countries.¹⁷ On this basis one may identify the factors explaining the change or immutability of law.¹⁸ Watson asserts that comparative law (which he distinguishes from knowledge of foreign law) can enable those engaged in law reform to better understand their historical role and tasks. It can provide them with a clearer perspective as to whether and to what extent it is reasonable to appropriate from other systems and which systems to select; and whether it is possible to accept foreign legal rules and institutions with or without modifications.¹⁹

Watson attempts to construct a comprehensive theory of legal change from ancient times to the modern era. He has the requisite qualifications: he is a distinguished Romanist. An important part of his work is concerned with the worldwide reception of Roman law and its admirable longevity as a system under different socio-economic conditions. The Roman law, as shaped by the compilers of the Justinianic codification in the sixth century AD, has been one of the strongest forces in the development of Western law. Although Justinian sought to produce, on the basis of the legal inheritance of the past, an authoritative statement of contemporary law, his system was adopted and applied by most European countries during the Middle Ages and the Renaissance; in wide

¹⁷ *Legal Transplants*, 6.

¹⁸ *Legal Transplants*, 21. To illustrate this, Watson mentions a set of rules concerned with matrimonial property, which traveled “from the Visigoths to become the law of the Iberian Peninsula in general, migrating then from Spain to California, [and] from California to other states in the western United States”. *Ibid.* at 108. He adds, that if one considers a range of legal systems over a long term “the picture that emerge[s] is of continual massive borrowing ... of rules”. *Ibid.* at 107. On this basis he concludes that the moving of a rule or a system of law from one country to another has now been shown to be the most fertile source of legal development, since “most changes in most systems are the result of borrowing”. *Ibid.* at 94. Watson’s theory of legal transplants has been challenged by some scholars. See e.g. Legrand, P.: The Impossibility of “Legal Transplants”. *Maastricht Journal of European and Comparative Law* 4 (1997) 111; What ‘Legal Transplant’? In: Nelken, D.–Feest, J. (eds): *Adapting Legal Cultures*. Oxford, 2001. 55; Wise, E. M.: The Transplant of Legal Patterns. *American Journal of Comparative Law*, 1990. 1; Murdock, G. P.: How Culture Changes. In: Shapiro, H. (ed.): *Man Culture and Society*. Oxford, 1990, 256. Consider also Cotterrell, R.: Is there a Logic of Legal Transplants? In: Nelken–Feest (eds): *op. cit.* 71.

¹⁹ Despite the rather far-reaching nature of some of his statements, it is important to observe that Watson has generally confined his studies, and the deriving theory of legal change, to the development of private law in Western countries.

areas of Germany and other European regions it remained an immediate source of law until the end of the nineteenth century. Roman private law was used in Catholic, Calvinist and Lutheran countries; it operated in countries where agriculture dominated economic life and it also applied in mercantile centres and later in countries undergoing the industrialization process. This law, first adopted in Europe, was directly or indirectly (through a European law code) transplanted in South America, Quebec, Louisiana and many countries in Asia and Africa. But why was Roman law adopted? The medieval reception of Roman law was partly due to the lack of centralized governments and developed formal legal systems that could compete with the comprehensive inheritance of Rome; and partly due to the fact that the lands formerly governed by the Romans were accustomed to this style of thought, and accorded it wisdom and authority. A third feature, deriving almost completely from the model of the *Corpus Iuris Civilis*, was the desire of most countries to codify their law and the aspirations of later jurists to conform their studies to this model. But Roman law was not adopted merely because it was admired, nor because its norms were particularly suitable for the social conditions in the early European nation-states. In fact, many norms of Roman law were entirely antiquated. Foremost, it was the perceived superiority of Roman law as a system that led to the adoption of its norms, even if this adoption was supported by a learned tradition that endured for centuries. Juridical norms and their systematic organization are more perennial than most rules of current law. This is, of course, partly due to the existence of common problems, but also partly due to historical tradition, the fact that Roman law has been an important common denominator of most Western legal experience. Thus the conceptual system of Roman law may be said to be an apt *tertium comparationis*, as it constitutes a common basis of the legally organized relationships of life in the West.²⁰

The experience of the legal historian underlies Watson's scepticism towards the view that law is directly derived from social conditions. According to him, history shows that legal change in European private law has occurred mainly by transplantation of legal rules and is not necessarily due to the impact of social structures. He sees legal change as an essentially 'internal' process,²¹ in the sense that sociological influences on legal development are considered

²⁰ Legal relationships are to a large extent organized by forms derived from Roman law. One might say that these forms constitute a kind of *pre-knowledge* for Western legal systems.

²¹ He speaks of an 'internal legal logic' or of 'the internal logic of the legal tradition' governing legal development. See Watson, A.: *The Evolution of Law*. Philadelphia, 1985, 21–22.

generally unimportant. The evidence to support this position is derived from history, which Watson claims to show: that the transplanting of legal rules between systems is socially easy even when there are great material and cultural differences between the donor and recipient societies; that no area of private law is very resistance to change through foreign influence—contrary to the sociologically oriented argument that culturally rooted law is more difficult to change than merely instrumental law;²² and that the recipient legal systems require no knowledge of the context of origin and development of the laws received by transplantation from another system.²³ Social, economic, and political factors affect the shape of the generated law only to the extent they are present in the consciousness of lawmakers, i.e. the group of lawyers and jurists who control the mechanisms of legal change. The lawmakers' awareness of these factors may be heightened by pressure from other parts of society, but even then, the lawmakers' response will be conditioned by the legal tradition: by their learning, expertise and knowledge of law, domestic and foreign. Societal pressure may engender a change in the law, but the resulting legal rule will usually be adopted from a system known to the lawmaker and often modified without always a full consideration of the local conditions. Watson stresses that law is, to a considerable extent, a phenomenon operating at the level of ideology; it is an autonomous discipline largely resistant to influences beyond the law itself. From this point of view, he argues that the law itself provides the impetus for change. At the same time, he recognizes that there is a necessary relationship between law and society, notwithstanding that a considerable disharmony tends to exist between the best rule that the society envisages for itself and the rule that it actually has. The task of legal theory with comparative law as the starting-point is to shed light on this relationship and, in particular, to elucidate the inconsistencies between the law actually in force and the ideal law, i.e. the law that would correspond to the demands of society or its dominant strata. As this suggests, Watson's theory is basically idealistic.²⁴

²² See on this Levy, E.: The Reception of Highly Developed Legal Systems by Peoples of Different Cultures. *Washington Law Review* 25 (1950) 233.

²³ A. Watson: Legal Transplants and Law Reform. *Law Quarterly Review* 92 (1976) 79, 80–81.

²⁴ According to Watson, "It should be obvious that law exists and flourishes at the level of idea, and is part of culture. As culture it operates in at least three spheres of differing size, one within another. ... The spheres are: the population at large, lawyers and lawmakers. By 'lawmakers' I mean the members of that elite group who in a particular society have their hands on the levers of legal change, whether as legislators, judges, or jurists. ... For a rule to become law it must be institutionalized. It must go through the stages

In an article published a few years after *Legal Transplants*, Watson delineated the factors that control the relationship between legal rules and the society in which they operate.²⁵ Consideration of these factors is crucial to understanding the phenomenon of legal change. Whilst Watson admits that it is extremely difficult to determine the relative weight or impact of each factor, he specifies that their interaction should a priori be assessed as more important than the relative evaluation of the individual factors. In this respect, his model may be described as holistic. The factors are the following:

- Source of law
- Pressure force
- Opposition force
- Transplant bias
- Law-shaping lawyers
- Discretion factor
- Generality factor
- Inertia
- Felt needs

Watson recognizes that there may be some common elements in these factors. Indeed, it could even be maintained that some factors are only different aspects of the same problem, at least when applied to concrete contexts of legal change. This again is due to the inevitable interconnections between the matters considered. Even though one might question whether Watson's scheme is the optimal method for presenting a comparative theory of legal change, one cannot deny the relevance of the observations he presents under the heading of 'factors'. Therefore, I shall proffer a short account of the factors and the way they operate.

According to Watson, the development of a legal system is influenced by the nature of the predominant source or *sources of law*, whether this is custom, statute, code, judicial precedent or juristic doctrine. Precedent-based law develops more slowly than statutory law because such law "must always wait upon events, and, at that, on litigated events"; "there is no way of defining precisely the *ratio decidendi* of a particular case", for "only when there is a line of cases does it become possible to discover the principle underlying even

required for achieving the status of law. ... Because lawyers and lawmakers are involved in all those processes a rule cannot become law without being subject to legal culture." *Legal Change: Sources of Law and Legal Culture*, *University of Pennsylvania Law Review* (1983) 1121, 1152–1153.

²⁵ *Comparative Law and Legal Change*. *Cambridge Law Journal* 37 (1978) 313–336. Although these factors pertain primarily to the Western legal tradition, Watson believes that they are valid also outside this sphere of legal culture.

the first case”.²⁶ Thus, precedent-based law is always retrospective, whereas statutory law looks forward. While law based on precedent is slow to change, statutory law, which is more systematic and broader in scope, can be relied upon to introduce drastic and swift reforms. Moreover, development by statute with its more adequate theoretical basis can point the way to further reform. Watson also draws attention to the historical roots of the sources-of-law doctrine in different legal orders. It should be noted, however, that in many cases it is only legal change that determines the character of the sources-of-law doctrine and not vice versa. If social, economic, political or ideological change generates a need for revision of the law, the bonds with the sources of law (whether precedents or statutes) are loosened. Further, one should not over-emphasize the capacity of a statute-law system to foresee problems. If there is a ‘gap’ in written law, a court will often find it difficult to engage in the same sort of creative activity as its counterpart can in a seemingly ‘retrospective’ *stare decisis* system.

The term *pressure force* refers to the organized group or groups of persons who believe that they would derive a benefit from a practicable change in the law. Watson says that the power wielded by a group to effect legal change varies in accordance with the social and economic position of its members and its capacity to act on a particular source of law. Pressure forces of different constitutions have varying effects upon individual sources of law, and different sources respond to pressure in different ways. In general, development by legislation is more affected by pressure forces than development by precedent. Watson stresses the independence of judges in precedent-based systems. As judges are not elected and their role is not seen as primarily political, they cannot be subject to direct pressure by organized groups, nor can they easily be swayed by general policy issues. He adds that juristic doctrine, as a source of law, is also mainly immune from pressure forces, except where a pressure force has great power and authority (e.g., not only an established Church, or the ruling party in a totalitarian state can directly and indirectly influence juristic doctrine but the doctrine itself can gain strength because of its connection with the dominant ideology). I think that Watson over-emphasizes the immunity of judges and jurists from external pressure. He says, for example, that a jurist’s opinions would lose authority if a pressure force directly influenced him. But this pertains only to the pressure forces motivated by a newly-invented idea or need. Usually there is a system of permanent pressure forces in society, and most lawyers belong to that system. It is important to consider whether or to

²⁶ *Ibid.* at 323.

what extent judges and jurists are susceptible to political arguments, and the degree of participation in politics they are permitted in different systems.

Opposition force is the converse of a pressure force and embodies the organized group or groups of persons who believe that harm will result from a proposed change in the law. For an opposition force to exist, it is required that the group that would be adversely affected by the change is adequately organized. Watson remarks that although the persons who will be adversely affected by a proposed change in the law may be more numerous than those who will benefit, the change will most likely be executed if the anticipated gains of each member within the latter group is extensive, whereas the perceived harm to each member of the former group is small. The absence of an organized opposition force in such a case explains why legislation that is overall harmful and generally considered unpopular is occasionally passed without much resistance.

Transplant bias harsid is an essential element of Watson's theory that legal change primarily occurs through the appropriation or imitation of norms. It refers to a system's receptivity to a particular foreign law as a matter distinct from acceptance based on a thorough assessment of all possible alternatives.²⁷ This receptivity varies from system to system and its extent depends on factors such as the linguistic tradition shared with a potential donor system; the general prestige of the possible donor system; and the educational background and experience of the legal professionals in the recipient system. Watson also draws attention to the interaction of the factors determining legal development, pointing out that transplant bias interacts particularly with the sources of law. The adoption of an entire foreign legal code is probably the clearest manifestation of transplant bias. Juristic doctrine is also very susceptible to foreign influence. This is evidenced by the fact that the reception of Roman law in Continental Europe first occurred in the field of legal science. Precedent, on the other hand, seems to be least affected by transplant bias. When judges borrow from foreign legal systems, the value of the foreign rule for the judge's own system is often carefully considered and evaluated. In analyzing transplant bias one must bear in mind that, according to Watson, law develops principally through the adoption of rules and structures from elsewhere. The nature of this factor has an authoritative argument form such as: norm N is a Roman law norm—Roman law is superior—therefore, norm N should be accepted. Behind the *minor* premise of this inference there is no general appraisal of all norms of Roman law, but rather an opinion based upon the *systematical coherence* of

²⁷ Transplant bias may be used to denote, for example, a system's readiness to accept a Roman law norm *because* the norm is derived from Roman law.

the relevant norm. The assertion, 'Roman law is superior', is neither deductive (i.e. based upon an axiom concerning the superiority of Roman law) nor inductive (where one should present reasons for considering the particular norm N good); rather it is quasi-inductive and systematical.

Law-shaping lawyers are the legal elite that shape the law and whose knowledge, imagination, training and experience of the world and legal ideas strongly influence the end product of any change in the law. Watson notes that lawyers are well-placed to act as pressure or opposition forces. Their knowledge of how the legal system actually works means that they are fully aware of how the current law or its change affects their well-being. Besides this, legal professionals mould the law, in developed legal systems at least, in many ways: as members of parliamentary or governmental committees they are directly involved in the drafting of legislation; as judges they determine the shape and form of judicial precedents; and as jurists they contribute to the development of juristic doctrine and its recognition as a source of law. Watson observes that law-shaping lawyers are a factor one could remove as their functions are adequately covered by the notions of source of law and transplant bias, but they contribute such a particular flavour that their role deserves specific attention. In his more recent work, however, Watson places greater emphasis on the role of legal culture in shaping law's internal development.²⁸ According to him, legal culture pertains to the general outlook, practices, knowledge, values and traditions of the legal elite of a legal system.²⁹

²⁸ As Watson points out, "[l]egal change comes about through the culture of the legal elite, the lawmakers, and it is above all determined by that culture". Watson, A.: *The Evolution of Western Private Law*. Baltimore, 2001, 264.

²⁹ From the viewpoint of the autopoiesis theory, G. Teubner criticizes Watson for placing too much emphasis on the lawyers' professional practices as such. Teubner argues that these practices are not, in themselves, the motor of legal change but rather the necessary outcome of law's character as a distinctive discourse concerned chiefly with producing decisions that define what is legal. Because what is legal is law's essential focus as an independent discourse, law cannot be governed by social developments of the kind sociologists are concerned with. It may react to these developments but it always does so in its own normative terms. Thus, what Watson sees as the autonomous law development by legal elites, proponents of autopoiesis theory regard as the working out of law's independent evolution as a highly specialized and functionally distinctive communication system. For a closer look see in general Luhmann, N.: *Social Systems*, 1995; Teubner, G.: *Law as an Autopoietic System*. Cambridge, 1993; Priban, J.–Nelken, D. (eds): *Law's New Boundaries: The Consequences of Legal Autopoiesis*. London, 2001. On the implications of the autopoiesis theory for comparative law see Teubner, G.: Legal Irritants: Good Fath in British Law or How Unifying Law Ends Up in New Divergences. *Modern Law Review* 61 (1998) 11.

The *discretion factor* refers to the implicit or explicit discretion that exists either to enforce or not enforce the law, or to press or not press one's legal rights. In Watson's words, the discretion factor is concerned with "the extent to which the rules permit variations, or can be evaded ... or need not or will not be invoked".³⁰ He observes that some degree of discretion is an inevitable element in any developed legal system. This discretion may be possessed by individual parties, judges, the executive or actually be built into the legal rules themselves. By providing choice the discretion factor tends to mitigate the apparent undesirable requirements or consequences of legal norms, thus prompting an easier acceptance of these norms. However, Watson does not fail to note that an abuse of discretion will entail an adverse reaction. It is true that discretion creates choice, but the use of choice depends on certain other factors. It might be the case, for example, that a controversial parliamentary bill is passed as law after the most questionable paragraphs have been recast in such a way as to enable the judiciary or the executive to exercise discretion (e.g. open wording, general clauses or flexible criteria are used). However, this transfers the problem to another level of decision-making. At that level of *micro* decision-making, the principle pertaining to the equal treatment of the subjects of law plays a more important part than at the level of law-making, where the criteria of formal justice are introduced. From a comparative point of view, it should be stressed that a mere statement of discretion is rarely sufficient, as discretion is exercised according to some *criteria* and not at random. To understand how the discretion factor influences the state and development of the law, one should identify both the factual and the evaluative criteria of discretion.

The *generality factor* denotes the extent to which legal rules regulate more than one recognizable group of people, or more than one transaction or factual situation. Watson points out that the greater the generality of law, the more difficult it is to find a rule that precisely fits the situation of each group, or transaction or factual situation being regulated. He adds that the greater the generality of a proposed change in the law, the greater the difficulty of securing agreement on the appropriate rule or rules, and hence the greater the difficulty of bringing about legal change. The generality factor interacts to a considerable extent with the pressure or opposition forces. If the scope of the proposed change in the law is too narrow, the pressure force supporting it may have little influence. If, on the other hand, the scope of the proposed change is too broad, it is likely to produce an opposition force as such a change is unlikely to satisfy all the groups concerned. A connection also exists between the generality factor

³⁰ Comparative Law and Legal Change. 330.

and the sources of law: to carry out a legislative change a degree of generality is needed. In comparative studies it is useful to draw a distinction between *abstract* generality and *actual* generality.³¹ There may be norms addressed ‘to whom it may concern’, i.e. to anyone. For example, drug trafficking may be a criminal offence and prohibited to everyone. Despite the abstract character of the relevant norm, the prohibition it produces, in reality, concerns a relatively small number of people. On the other hand, there may be norms addressed to a particular group of people that is so large in number that the norms are practically general.

Inertia is defined by Watson as the general absence of a sustained interest of society and its ruling elite to struggle for the most ‘satisfactory’ rule. For law to be changed there must exist a sufficiently strong impulse directed through a *pressure force* operating on a *source of law*. This impulse must be strong enough to overcome the inertia. But how can inertia be explained? Watson notes that society’s essential stake in law is order, and to maintain order there cannot be a consuming interest in the precise nature of the particular rules and their reform. There is a *normal desire for stability* and society, particularly the dominant elite, have a generalized interest in maintaining the status quo. This reflects an abstract interest in stability, which is linked to the fact that many legal norms have no direct impact on the lives of most citizens. According to Watson, besides the mystique surrounding law, practical considerations may obstruct legal change. Legal professionals may oppose legal reforms because they would have to learn new rules and juristic techniques. Moreover, as every legal reform entails a considerable cost, priorities must be assessed with regard to limited resources. Perhaps the case is that anticipated long-term benefits are not sufficient to justify a reform if the costs are not outweighed by the short-term benefits. Watson argues that inertia as a factor in the relationship between law and society is not accorded the attention it deserves. He remarks that, as a matter of fact, societies often tolerate much law that has no correspondence with what is ‘needed’ or regarded as efficient. To understand the rationale one must consider the phenomenon of legal inertia and the various elements of its composition. Legal inertia has, I think, two aspects. First, it renders a ‘static’ justification of law sufficient: law is justified by past behaviour and behaviour by norms. This kind of inertia is inherent in all legal decision-making that strives to maintain regularity and predictability in the practice of law. Besides this aspect of inertia, inertia also relates to the structure and function of law in

³¹ Abstract generality is a typical feature of legislation. As stated by the classical Roman jurist Ulpian: “*iura non in singulas personas, sed generaliter constituuntur*”. Digest 1, 3, 8.

society. There are two kinds of structural matters for consideration: (a) law is to a certain extent *resistant* to certain social change, and society to certain legal change, and (b) there is a 'relative resistance' to change pertaining to the *time-lag* between different functionally interdependent changes.

Felt needs are the purposes known to, and regarded as appropriate by, a pressure force (not the ruling elite or society as a whole) that operates on a source of law. Watson recognizes that elucidating the nature of felt needs is not always easy. He declares that these are discoverable through an examination of words, deeds and effects: what the pressure force says is needed; how its constituent elements act both before and after the legal change is effected; and how the change actually impacts upon the interests of the pressure force. There are also needs that may be general, well-recognized and enduring in time. But unless these are supported by an active pressure force they are not 'felt needs' as understood by Watson, even though consideration of these 'other needs' is important for anyone interested in understanding the relationship between law and society.

The question posited is how should Watson's nine 'factors' be used? He declares that, by relying upon these factors, one may devise models for legal development and the relationship between law and society. At the same time, by considering the interaction of these factors one can find answers to many perplexing questions concerning legal development. There are balances between the factors supporting change and the factors opposing change. According to Watson, the relationship between a society and its legal rules could be generally expressed as a mathematical equation: a legal rule will be stable when felt needs, weakened by the discretion factor, activating a pressure force as affected by the generality factor, to work on the relevant source of law, are less potent than inertia and opposition force combined; on the other hand, some legal change will occur when the force of felt needs, weakened by the discretion factor, activating a pressure force as affected by the generality factor, to work on a source of law, all as modified by the transplant bias and law-shaping lawyers, is greater than the force of inertia plus the opposition force. In other words, the precise relationship between legal norms and the society in which they operate can be expressed as the balance between two opposing sets of factors; the first inhibits change and the second supports change. A legal change occurs when the force of the second set of factors is greater than the force of the first set of factors, although the nature of the change is determined by the balance and relative weight of the various factors. In Watson's model one cannot locate a direct reference to concepts and elements that are commonplace in modern analyses of society. Neither society at large nor its dominant strata are regarded as factors. Legal change is triggered by pressure forces, not by society as a

whole, or its ruling elite. As he says, the pressure force and the society, or the pressure force and the ruling elite, are often co-extensive. Further, in a non-democratic political system the ruling elite operates directly on the principal sources of law, enjoying a kind of monopoly with respect to legal change. In any country, the extent to which the pressure force and the society or its ruling elite are the same must be determined by a specific inquiry, although one must recall that, even if society at large or its ruling elite operate as the pressure force, legal rules are not necessarily the most efficient means of using social power to initiate reforms.

Watson claims that his model is useful for elucidating certain difficult issues pertaining to legal development.³² But the model is *not deterministic*. He elaborates that, although existing elements in a society may determine the options that are known or knowable, and hence available, they do not predetermine the necessary outcome. In my view, this suggests that Watson's factors can only furnish the basis for a method of presenting relevant aspects of legal change in a generally valid manner. No objections of principle could be raised against such a method. The objections are, rather, of a practical nature. One might argue, for example, that Watson's *felt needs* and *pressure forces* do not direct enough attention to the fact that there are not only supporters and opponents of a proposed legal change. Often there is at least a degree of unanimity concerning the necessity for legal reform, but there are differing opinions as to the content of the planned legislation. In this case, the pressure forces and relevant interests cannot be seen as diametrically opposite. Interests can be construed as vectors which in concrete situations have a certain direction and strength (when compared to other social vectors). It is difficult to state that the law in question is a result of the goals of one interest group if this law is more allied to its interests than those of another group. This view excludes the immediate authority of conflicting background interests and statements of goals. But this does not mean that it is incorrect to refer to the social impact of different decision-alternatives;

³² For example, it is often said that there is a close connection between commerce and law, especially the law of contract, and that economic growth engenders legal change. But the Scots law of contract developed rapidly between the years 1633 and 1665 (it was during this period that the main forms of contract and the general principles of contract law were recognized), even though, as is well known, this period was characterized by economic stagnation. By contrast, in England, which was much more developed economically and commercially, there could scarcely be said that a general law of contract or general principles of contract existed before the nineteenth century. To understand this one must consider the interaction of the factors relevant to legal change in the relevant historical context.

and one is *compelled* to evaluate these alternatives, taking some axiological system as the starting point, even if no one can say that there exists one and only one consequent value-system of the legal order. Furthermore, the intentions of groups should not be defined in such a manner that one only considers those goals embodied in the historical sources. Constructed, hypothetical models are also needed, otherwise one may lose sight of probable motives of action which are not explicitly alluded to in the sources.

Let us now return to our earlier question: is it possible to construct a general theory of legal change? Watson declares that, even if an examination of the various factors reveals such a diversity of possibilities that a general theory could not be developed regarding the growth of law in the West (except perhaps on such an obvious, banal level), a theory should be admissible so far as it is accepted that it is possible to trace a *pattern of development*. Consider, for example, the phenomenon of codification. Since the eighteenth century codification has emerged as almost an inevitability in Civil law countries, but it has been a relative rarity in the Common law world. According to Watson, this pattern cannot be explained on the basis of unrelated facts existing in the different countries. Elucidating codification (why it occurred at all and in a particular country at a specific time and not earlier; why the code was either a new creation or adopted from elsewhere; and, if the latter, why the particular model was chosen), or its absence in certain systems, would presuppose consideration of the general factors at work when legal change occurs. It is important to note that a general theory of legal change would be *inductive*: if all situations of legal change are considered, then some general conclusions may be drawn. But such a theory would only be *nominally* general: in reality, it would include several different relations of events. However, there are some generally valid interconnections between different matters. The expression of these interconnections may be facilitated by 'historical laws', but these laws are not obligatory. They are only 'topical norms' in the form of: 'if N exists then F will happen, unless...'. One should distinguish between questions of form and questions of content. It is possible to construct a set of forms with the purpose of explaining a matter. If the validity of the theory is defined in such a manner that it depends on the relevance of the forms, it is possible to construct a theory of legal change. But this is primarily a conceptual exercise: it has nothing or very little to say about the contents of the concepts. The bulk of the theory would then consist of statements concerning *possible interactions* between the conceptually arranged matters and statements concerning working hypotheses on these relationships of interaction.

Conclusion

The uses of comparative law may be manifold, but its connection with legal theory is also important. Propositions of legal theory can be tested on the grounds of comparative material, for there exists a dialectical relationship between theory and practice that extends beyond the narrow limits of a single legal order—indeed, most legal theorists seem to assume a deductive universality of analysis. This process involves consideration of juristic forms that are not incidental or particular to the relevant case: they stem from the history of legal doctrines and ideas. We may assert that whether we proceed from forms or from contents, the choices of subjects are not purely empirical; axiological and teleological choices must be considered and examined together with the doctrinal history of legal concepts and their systematical treatment. We can thus declare that comparative law proceeds from the following two assumptions: (a) law is not only a manifestation of free will but is also socially established; one cannot compare legal regulations on a purely formal basis; (b) law stems from social relations, but it cannot be entirely reduced to them; otherwise, one should not compare law at all but only the basic factors the law expresses. The existence of certain similar social relationships does not constitute a sufficient condition for comparison—comparative law is not merely comparative sociology. A conceptual framework is also needed. If the reductionistic standpoint is rejected, one is justified in seeking the development of general idealistic theories of legal change. It is at least reasonable to hope that such theories will enhance insights into the nature and development of law—insights that cannot be acquired in any other way.