Towards a Comparative Theory of Legal Change

George MOUSOURAKIS *

Introduction: Some Comments on the Nature of Comparative-Legal Inquiries

In the last few decades there has been an increasing tendency among lawyers and jurists to look beyond their own fences. While the growing interest in foreign legal systems may well be attributed to the dramatic increase of international transactions, this empirical parameter to the growth of comparative legal studies accounts only for part of the explanation. The other part, at least equally important, has to do with the expectation of obtaining a deeper understanding of one's own legal system through the study and comparison of legal norms, institutions and principles found in foreign systems. Comparative law enables one to perceive the new features and trends of development of modern legal systems in connection with scientific-technical progress, integration processes and the growing role of transnational and international law. Where forms of social control or organization are in question, values, pragmatic considerations, and ethical views provide perspectives in light of which meaningful similarities and differences between societies can be identified and their effects upon each society's legal order assessed.

Modern comparative law has gone through three main stages of development. Influenced by developments in the biological sciences, linguistics and new theories of social evolution during the nineteenth century, comparativists tended to focus, during that time, upon the historical development of legal systems in the belief that there exist certain laws of social development common to all societies. Towards the end of the nineteenth century, a period of relative tranquility in Europe, the French scholars Lambert and Saleilles, motivated by a desire for the world unification of law, advocated the search for what they referred to as the 'common stock of legal solutions' from amongst all the legal systems of the civilized world. It was quite natural for many comparativists of that time to perceive comparative law as a substantive subject, a substantive science with a distinct and self-contained subject-matter. As such, comparative law was mainly concerned with unraveling the patterns of legal development and concepts which were common to all nations. During the early years

* Senior Lecturer, University of Auckland; Research Fellow, Max Planck Institute and the University of Heidelberg (2005). The author would like to record his thanks to Dr E. MacIntosh for his helpful comments on an early draft of this paper.

of the twentieth century, however, many comparative law scholars, most notably H.C. Gutteridge and René David, put forward the view that comparative law was no more than a *method* to be employed for diverse purposes in the study of law. On this view, comparative law is no more than a means to an end and it was therefore the purposes for which the comparative method was to be utilized that should provide the basis of any definition of comparative law as a subject. This approach entailed a shift in emphasis from comparative law as a science to the uses to which the comparative method could be put in the study of law.[1)]

It seems to me that those who view comparative law as a method and those who regard it as a science look at comparative law from different angles. When speaking of 'laws' and 'rules', the former have in mind normative 'laws' and 'rules' – the things that lawyers commonly work with. The latter, on the other hand, tend to perceive law primarily as a social phenomenon, and the relationship between law and society as being governed by 'laws' or 'rules', which transcend any one particular legal system. At its simplest level, that of the description of differences and similarities between legal systems, the comparative method allows us to acquire a better understanding of the characteristic features of particular institutions or rules. But as the comparative method becomes more sophisticated, for example, where the socio-economic and political structures, historical background and cultural patterns which underpin the institutions or rules are taken into account, the comparative method begins to produce explanations based on interrelated variables – explanations which become progressively more scientific in nature. Scientific comparative law is distinctive among the branches of legal science in that it depends primarily upon the comparative method, whereas other branches may place greater emphasis on the many other methods of cognition available, such as empirical induction or *a priori* speculation. Thus, although comparative law is sometimes identified with legal sociology, it is really more confined. Naturally it does, however, support the other branches of legal science and is itself supported by them.

Now, a distinction may be drawn between three types of comparative-legal inquiry:

---

1) By focusing on the uses, aims or purposes of the comparative study, comparativists 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 be of assistance to sociologists and legal philosophers. See in general, Gutteridge, *Le droit comparé*, Paris 1953, 20. The above divisions do not militate against the basic unity of comparative law as a scientific method, however. 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. *Le droit comparé*, 1953, 28. And see Langrod, "Quelques réflexions méthodologiques sur la comparaison en science juridique", *RIDComp.* 1957, 363.

idealistic, *realistic* and *particularistic*. According to the idealistic approach, legal order is a normative matter, which is present in the factual legal order although it cannot be identified with it. The realistic approach, on the other hand, is based upon an empirical view of legal order. Both the idealistic and realistic perspectives are concerned with the problem of *generalization*. The study of legal orders brings to light innumerable differences and similarities. Should a comparativist strive to arrive at generalizations capable of being applied to different legal orders? 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 perspectives have universalism in common: the are not content with a mere description but they want to *systematize*, to find out general means of explanation in order to account for legal phenomena irrespective of time and place. Those who follow a *particularistic* approach to comparative law, by contrast, claim that general principles are too abstract as to serve as goals of study. This approach, quite common in the practice of comparative law, tends to reduce comparative law to a detailed description of different legal orders. From this point of view, in other words, 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, in so far as it is recognised that there are in every legal order both general and particular features.[2] It might also be said that the task of legal dogmatics, the study of contemporary national law, is to examine particular legal orders at a quite concrete level, whereas the level of comparison represents a higher step.[3] According to Wittgenstein, a presupposition of definibility is a *common characteristic*. As applied to legal order, this entails perhaps the conception that single legal orders are language games and that some of them have such a 'family resemblance' that certain common features can be found. This view is rather similar to that of comparative law scholars, according to whom for a comparison to be meaningful, the objects of the comparison must share certain common features, which can serve as the common denominator (*tertium comparationis*). One might thus say that universal and individual features of legal phenomena are *different* aspects of a uniform whole, although both aspects are *necessary* in order to grasp reality.

Contemporary comparativists often employ seemingly contradictory approaches, combining particularistic with universalistic perspectives. 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

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

3) The generalizations of comparative law have a wider scope than those of positive law, but a narrower scope than those of a general theory of law. In this respect, comparative law can be said to be the intermediate link between legal dogmatics and legal theory.

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. Comparative law has to deal with very complex phenomena: wide social, cultural and religious diversities, not to mention the impact of particular individuals, produce distinctive legal systems, each of which must be studied and understood on their own, even if some or all systems manifest similar traits. In other words, knowledge of the particular, as opposed to knowledge of the general, is crucial to the understanding of law and legal institutions. And although 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, as it focuses upon the inter-connection between general principles and concrete observations made when these principles have been 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.

Scholars agree that comparative legal studies have performed valuable services in empirically testing the propositions of legal theory.[4] As Paton has pointed out, it is impossible to comprehend jurisprudence without comparative law, since all schools of jurisprudence, whether historical, philosophical, sociological or analytical, rely on the comparative method.[5] The knowledge which jurists depend on when they seek to devise tools for a proper construction of legal phenomena can be gained neither by an examination of a single legal system, since law transcends national boundaries, nor without comparison. Comparative law allows the jurist additional perspectives towards a more complete understanding of law as a social phenomenon and, by enriching his intellectual repertory, enables him to better accomplish his tasks. Reference should also be made in this connection to the use of

4) Lawson, F. H., *The Comparison, Selected Essays*, Oxford 1977, II, 59.

5) *A Textbook of Jurisprudence*, 1972, 41. It should be noted here that in civil law thinking there is no real equivalent as such to jurisprudence, as the term is generally understood in common law countries, i.e. the study of theories concerning the nature of law and legal phenomena (in French the word *jurisprudence* denotes case law). Civil law jurists draw a distinction between legal philosophy, concerned with the values underpinning legal institutions and rules, and general theory of law, focusing on the basic concepts, methods, classification schemes and instruments of the law. In the words of Bergel, 'general theory of law starts out from the observation of legal systems, from the research into their permanent elements, from their intellectual articulations, so as to extract concepts, techniques, main intellectual constructions and so on;' the philosophy of law, on the other hand 'is more concerned with philosophy than law' for 'it tends to strip law of its technical covering under the pretext of better reaching the essence so as to discover the meta-legal signification, the values that it has to pursue, the sense in relation to a total vision of man and the world'. J.-L. Bergel, *Théorie générale du droit*, 2nd edn, 1989, 4. In addition, legal science (*scientia juris*) is understood to encompass positive law organized in such a way that it rationalizes, scientifically, both law as an empirical object and legal science itself. See on this P. Oeianne, *Apprendre le droit: Eléments pour une pédagogie juridique*, 1990, 73 ff.

comparative analyses in the field of legal history. The history of law studies the sources of legal phenomena and the evolution of legal systems and individual legal institutions in different 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 means of comparisons between different systems of law at different stages of development legal historians attempt to trace the evolution of legal institutions as well as the historical ties that may exist between legal systems. Historical legal analyses utilizing the comparative method are essential for the understanding and further development of the law. Without the knowledge derived from historical-comparative legal studies it is impossible to investigate contemporary legal institutions, as these are in significant measure the product of historical conditions, borrowings and mutual influences of legal systems in the past.

A Comparative Theory of Legal Change?

Comparative law analyses are connected with the theoretical and historical study of law and at the same time, by their very nature, are concerned with the phenomenon of legal change. In the following paragraphs problems of legal change and legal stability will be considered from the point of view of comparative law. The discussion will focus on aspects of the theory of legal change developed by Professor Alan Watson, one of the most productive post-war legal historians. Since the publication of the first edition of his seminal book *Legal Transpants: An Approach to Comparative Law* in 1974, Watson has produced a large number of works on the relationship between law and society and the factors that account for legal change. [6] In these he has repeatedly stated his belief that changes in a legal system are due to legal transplants: the transfer of legal rules and institutions from one legal system to another. The nomadic character or rules proves, according to Watson, that the 'idea of a close relationship between law and society' is a fallacy.[7] Law is largely autonomous and develops by transplanting, not because some rule was the inevitable consequence of the social structure, but because the foreign rule was known to those who control law-making and who have recognised the apparent benefits that could be derived from it.[8] It should be noted here that Watson does not contemplate that rules are borrowed without alteration or modification; rather, he indicates that voluntary transplants would almost always – always in the case of a major transplant – involve a change in the law largely unconnected with

6) See e.g. A. Watson, 'Aspects of Reception of Law', *American Journal of Comparative Law* 44,1996, 335; "Comparative Law and Legal Change", *Cambridge Law Journal*, 1978, 313; 'Legal Transplants and Law Reform', *Law Quarterly Review* 92, 1976; *Society and Legal Change*, Philadelphia 1977, 2nd edn 2001; *Sources of Law, Legal Change, and Ambiguity*, Philadelphia 1984; *Legal Origins and Legal Change*, London 1991; *The Evolution of Western Private Law,* Johns Hopkins University Press, 2001.

7) *Legal Transplants*, 2nd edn, Athens and London 1993, 108.

8) "Comparative Law and Legal Change", 37 *Cambridg e L.J.* 1978, 313, 313-15 and 321.

particular factors operating within society.[9] Neither does Watson expect that a rule, once transplanted, will operate in exactly the same way in which it operated in the country of its origin. Against this background, Watson argues that comparative law, understood as a distinct intellectual discipline, should be concerned with 'the study of the relationship of one legal system and its rules with another'.[10] Comparative legal studies, in other words, should be mainly about 'legal transplants'. Watson asserts that comparative law (which he distinguishes from a knowledge of foreign law) can enable those actively concerned with law reform to understand their historical role and their task better. It makes it possible for them to see more clearly whether and how far it is reasonable to borrow from other systems and from which systems, and whether it is possible to accept foreign legal rules and institutions with modifications or without modifications. Despite the rather far-reaching nature of some of his statements, it is important to observe here that Watson has generally confined his studies, and the theory of legal change that they have produced, to the development of private law in Western countries.

Watson attempts to construct a comprehensive theory of legal change from ancient times to the modern era. He has the qualifications needed: 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. Roman law, as shaped out by the compilers of the Justinianic codification in the sixth century AD, has been one of the strongest forces in the development of Western legal systems. Although Justinian sought to produce, on the basis of the legal inheritance of the past, an authoritative statement of the law of his own day, his system was adopted and applied by most European countries during the Middle Ages and the Renaissance, and in wide areas of Germany and other parts of Europe it remained an immediate source of law until the close of the nineteenth century. Roman private law was used in Catholic, Calvinist and Lutheran countries. It was used in countries whose economic life was dominated by agriculture, but was also applied in mercantile centres and, in later years, in countries undergoing a process of industrialization. This law, first adopted in Europe, was directly or indirectly, through a European code, transplanted in South America, Quebec, Louisiana and a large number of countries in Asia and Africa. By why was Roman law adopted? The medieval reception of Roman law was in part due to the lack of centralized governments and developed formal legal systems that

9) 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 becomes 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.

10) *Legal Transplants*, supra note 7 at 6.

could compete with the comprehensive inheritance of Rome, and in part due to the fact that the lands that once were Roman were used to this style of thought and accorded it wisdom and authority. A third feature due almost completely to the example of Rome and the *Corpus Iuris Civilis* was the desire on the part of most countries to codify their law and the desire of later jurists to conform their studies to this example. But Roman law was not adopted merely because it was admired, nor because its norms may have been particularly suitable for the social conditions in the early European nation-states. In fact many norms of Roman law were entirely antiquated. It was, first and foremost, the perceived superiority of Roman law as a system that led to the adoption of its norms, even if this adoption was backed by a learned tradition that had lasted for centuries.[11] As has already been noted, according to Watson, comparative law is concerned with the historical relationships between legal orders and the destinies of 'legal transplants' in different countries. It is on this basis that one may identify the factors explaining the change or immutability of law.[12] Watson draws attention here to the historical dimension of comparative law. Problems, juridical norms and their systematic organization are older than (most of) the norms of current law. General doctrines are relevant as they furnish the framework of comparative inquiries. This is, of course, partly due to the existence of common problems, but also partly due to historical tradition, to the fact that Roman law has been an important common denominator of much of the Western legal experience. The conceptual system of Roman law is thus an apt *tertium comparationis*, as it constitutes a common basis of the legally organized relationships of life in the West.[13]

It has been the experience of the legal historian that underlies Watson's scepticism towards the view that law is directly derived from social conditions. According to him,

---

11) The common law of England presents an unusual case: once part of the Roman Empire, it nevertheless retained a legal system largely independent of the continental Reception. According to Watson, this was due to the fact that, although the English jurists were not completely isolated from the Roman influence, the legal structure in England was so different from the rest of Europe as to make wholesale borrowing unlikely. This factor, combined with several others drawn attention to by Watson, such as the early rise of a legal profession trained in the national law and having a common interest with the courts in preserving and promoting that law, explain why Roman law had little effect on the development of English law. Some elements of Roman law were introduced in England through the ecclesiastical and admiralty courts, and through the Court of the Chancery, which owed its origin to the increasing rigidity displayed by the common law.

12) *Legal Transplants*, supra note 7 at 21. By way of illustration, 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.

13) Legal relationships are to a large extent organized by forms derived from Roman law (such as *culpa*, *contractus*, *bona fides* etc). One might say that these forms constitute a kind of *pre-knowledge* for Western legal systems.

history shows that, because of the nature of the legal profession, legal change in European private law has taken place largely by transplantation of legal rules, without this being necessarily due to the impact of social structure. Social, economic, and political factors affect the shape of the law that is produced only to the extent that 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' consciousness 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 bring about a change in the law, but the resulting legal rule will usually be borrowed from a system known to the lawmaker, often with modifications, but not always after full consideration of local conditions. Watson stresses that law is to a considerable extend a phenomenon operating at the level of ideology; it is an autonomous discipline largely resistant to cultural influences beyond the law itself. From this point of view, he argues that it is the law itself that provides the impetus for change. At the same time he recognizes that, notwithstanding the fact that a considerable disharmony tends to exist between the best rule that the society envisages for itself and the rule that it actually has, there is a necessary relationship between law and society. The task of legal theory whose starting-point is comparative law is to shed light on this relationship and, in particular, to elucidate the inconsistencies between the law actually in force and 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.

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.[14] 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 of these factors, he points out that their interaction should *a priori* be assessed as much more important than the relative weighing 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

14) 'Comparative Law and Legal Change', *Cambridge Law Journal* 37 (2), 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.

- Inertia
- Felt needs

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

a. According to Watson, the course of development of a system of law is influenced by the nature of the predominant *source or sources of law*, whether 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 the first case'.[15] Thus, precedent-based law is always retrospective, whereas statutory law looks forward. While law based on precedent is slow to change, statutory law, being more systematic and broader in scope, can be relied upon to introduce drastic and speedy reforms. Moreover, development by statute, as having a 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 here, however, that in many cases it is just legal change that determines the character of the sources-of-law doctrine and not *vice versa*. If social, economic, political or ideological change gives rise to a need for a revision of the law, the bonds with the sources of law (whether precedents or statutes) are loosened. One should not over-emphasize the foreseeability of problems in a statute-law system either. If there is a 'gap' in written law, a court will often find it difficult to engage in the sort of creative activity its counterpart can engage in a seemingly 'retrospective' *stare decisis* system.

b. The term *pressure force* refers to the organized group or groups of persons who believe that a benefit would result for them from a practicable change in the law. Watson says that the power to effect legal change that a group wields 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 constitution have varying effects upon

15) Ibid at 323.

individual sources of law, and different sources respond to pressure in different ways. Development by legislation is much more affected by pressure forces than development by precedent. Watson stresses here 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 very largely immune from pressure forces, except where a pressure force has great power and authority (not only, e.g., 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 he were directly influenced by a pressure force. But this pertains only to pressure forces which are 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 what extent judges and jurists are susceptible to political arguments and the degree of participation in politics allowed to them in different systems.

c. *Opposition force* is the converse of a pressure force and consists of 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 suggested change in the law may be far more numerous than those who will benefit, the change will most likely be carried out if the anticipated gains of each member of 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 which is overall harmful and is generally considered unpopular is sometimes passed without much resistance.

d. *Transplant bias*, an essential element of Watson's theory that legal change primarily occurs through borrowing, 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.[16] This receptivity varies from system to system and its extent depends on factors such as the linguistic tradition shared with a possible donor system, the general prestige which the possible donor system enjoys, the educational background and experience of the legal professionals in the recipient system etc. Watson also draws

16) 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.

attention here to the interaction of the factors determining legal development, pointing out that transplant bias interacts in particular with the sources of law. The wholesale adoption of a 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 took place first 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 frequently carefully considered and weighed. In analysing transplant bias one must bear in mind that, according to Watson, law develops principally through the borrowing of rules and structures from elsewhere. The nature of this factor is that of an authoritative argument of the type: 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 the norm in question. The assertion 'Roman law is superior' is neither deductive (i.e. based upon an axiom concerning the superiority of Roman law) nor inductive (then one should give the reasons for considering the particular norm N good), but rather quasi-inductive and systematical.

e. *Law-shaping lawyers* are the legal elite that shapes 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 law currently in force or a change in it affects their well-being. But apart from that, legal professionals shape the law, in developed legal systems at least, in a number of 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; as jurists they contribute to the development of juristic doctrine and its recognition as a source of law. Watson observes that although law-shaping lawyers is a factor which one could leave out, as their functions are adequately covered by the notions of source of law and transplant bias, they give law such a particular flavour that their role deserves to be drawn attention to. In his more recent work, Watson places much greater emphasis on the role of legal culture in shaping legal change. [17]

f. The *Discretion factor* refers to the implicit or explicit discretion that exists either to

17) As Watson points out, "legal change comes about through the culture of the legal elite, the lawmakers, and it is above all determined by that culture". *The Evolution of Western Private Law,* Johns Hopkins University Press, 2001, 264.

enforce or not to enforce the law, or to press or not to press one's legal rights. In Watson's words, the discretion factor has to do with 'the extent to which the rules permit variations, or can be evaded ... or need not or will not be invoked.'[18] Watson observes that some degree of discretion is an inevitable element in any developed legal system. This discretion may be of individual parties, of judges, of the executive or actually built into the legal rules themselves. By providing choice the discretion factor tends to mitigate the seemingly undesirable requirements or consequences of legal norms, thus making the acceptance of these norms easier. Watson does not fail to note, however, that if discretion is abused, an adverse reaction may ensue. It is of course true that discretion makes choice possible, 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 that would enable the judiciary or the executive to exercise discretion (e.g. open wording, general clauses or flexible criteria are used). This, however, 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 much 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, for 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 be able to identify both the factual and the evaluative criteria of discretion.

g. The *generality factor* has to do with 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, 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. Here attention must be drawn to the interaction of the factors relevant to 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 be of little influence. If, on the other hand, the scope of the proposed change is too broad, it is likely to call an opposition force into being, as such a change is unlikely to satisfy all the groups concerned. There is also a connection between the generality factor 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*

18) 'Comparative Law and Legal Change', supra note 13, at 330.

generality and *actual* generality. There may be norms addressed 'to whom it may concern', i.e. to anyone. Drug trafficking, e.g., may be a criminal offence and prohibited to everyone. In spite of the abstract character of the relevant norm, however, the prohibition to which it gives rise in reality concerns a relatively small number of people. On the other hand, there may be norms addressed to a particular group of people which is so large that the norms are practically general.

h. *Inertia* is defined by Watson as the general absence of a sustained interest on the part of society and its ruling elite to struggle for the most 'satisfactory' rule. For law to be changed there must be 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 if order is to be maintained there can be no consuming interest in the precise nature of the particular rules and their reform. There is a *normal desire for stability* and society and, in particular, the dominant elite have a generalized interest in maintaining the existing order of things. 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 of the citizens. According to Watson, besides the mystique surrounding law, there may be practical considerations standing in the way of 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 have to be assessed with regard to limited resources. It might be the case that anticipated long-term benefits may not be sufficient to justify a reform if short-term benefits do not outweigh the costs. Watson argues that as a factor in the relationship between law and society, inertia has not been given the attention it deserves. He remarks that, as a matter of fact, societies often tolerate much law that does not correspond to what is 'needed' or regarded as efficient. To understand why this is so one needs to consider the phenomenon of legal inertia and the various elements by which it is composed. Legal inertia has, I think, two aspects. First, it makes a 'static' justification of law appear sufficient: law is justified by past behaviour and behaviour by norms. This kind of inertia is inherent in all legal decision making which strives to maintain regularity and predictability in the practice of law. But apart from this aspect of inertia, one may speak about inertia as relating to the structure and function of law in society. There are two kinds of structural matters to be taken into 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 which pertains to the *time lag* between different functionally interdependent changes.

i. *Felt needs* are the purposes which are known to, and regarded as appropriate by, a pressure force (not by the ruling elite or by society as a whole) that operates on a

source of law. Watson recognizes that elucidating what the felt needs are is not always easy. He says 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 which may be general, well-recognized and existing for a long 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. It is submitted that one should not define the intentions of groups in such a manner that only those goals are taken into consideration which are laid down in the historical sources. Constructed, hypothetical models, are also needed, otherwise one may lose sight of probable motives of action which are not explicitly referred to in the sources.

Now, how are Watson's nine 'factors' to be used? He says that, by relying upon these factors, one may be able to 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 some of the most perplexing questions concerning legal development. There are balances between factors supporting change and factors opposing change. According to Watson, the relationship between a society and its legal rules could be roughly 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 inhibiting change, the second supporting 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 can find no 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 off by pressure forces, not by society as a whole, or its ruling elite. Of course, the pressure force and the society, or the pressure force and the ruling elite are often coextensive, as he says, and in a non-democratic political system the ruling elite operates very directly on the principal sources of law, enjoying a kind of monopoly with respect to legal change. The extent to which in any country the pressure force and the society or its ruling elite are the same must be determined by a specific inquiry, even though one must

keep in mind that, even if it is society at large or its ruling elite that operates as the pressure force, legal rules are not necessarily the most efficient means of using social power in order to bring about reforms.

Watson claims that his model can be useful in elucidating certain difficult issues pertaining to legal development.[19] But the model is *not deterministic*. He points out 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 of a method of presenting relevant aspects of legal change in a generally valid manner. There are no objections of principle that 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 pay 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 of legal reform, but there are differing opinions concerning the content of the planned legislation. In this case the pressure forces and relevant interests cannot be seen as diametrically opposite and it is thus difficult to say that the law in question would be a result of the goals of one interest group if it is somewhat nearer its interests than those of another interest group.

Is a general theory of legal change possible? Watson says that, even if an examination of the various factors would show such diversity of possibilities that no general theory could be developed of the growth of law in the West, except perhaps on such an obvious level as to be nothing but banal, such a theory should be admissible in 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 come to be almost an inevitability in civil law countries, but has been a relative rarity in the common law world. According to Watson, this pattern cannot be accounted for on the basis of unrelated facts existing in the different countries. Explaining codification (why it occurred at all, why it occurred in a particular country at the time it did and not earlier, why the code was either a new creation or was borrowed from elsewhere and, if the latter, why the particular model was chosen), or the absence of it in certain systems, would presuppose consideration of the general factors at work when legal change takes place. It is important to note here that a general theory of legal change would be *inductive*: if all situations of legal change have been considered, then

19) 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 to be a general law of contract or general principles of contract before the nineteenth century. To understand this one needs to consider the interaction of the factors relevant to legal change in the relevant historical context.

some general conclusions may be drawn. But such a theory would only be *nominally* general: in reality it would include a number of different relations of events. However, there are some generally valid interconnections between different matters. These interconnections may be expressed with the help of 'historical laws', but these laws are not obligatory. They are only 'topical norms' of the type: 'if N then F will happen, unless...' One should distinguish here between questions of form and questions of content. It is possible to construct a set of forms with the purpose of explaining something. If the validity of the theory is defined in such a manner that it depends on the relevance of the forms, one can say that 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 interaction* between the conceptually arranged matters and of statements concerning working hypotheses upon these relationships of interaction. An all-embracing theoretical umbrella cannot be constructed, for if the basic constituents of law are taken into consideration, the resulting 'atomistic' theory would no longer be a theory of law.

Concluding Note

Comparative law is concerned with many more things than merely law, but its object is ultimately law. I think that the legal point of view needs to be stressed in these days of an omnipotent sociology, which, of course, has its uses. Now, the theoretical questions of comparative law cannot be answered only at the level of *language* – the questions are not purely semiotic. A successful translation of legal terms, important though it may be, is hardly sufficient.[20] Nor does the existence of certain similar social relationships constitute a sufficient condition for comparison, either. A conceptual framework is also needed. In other words, although for a meaningful comparison there must be sufficient similarity of content (social relationships), some kind of *conceptual commensurability* is also necessary.[21] It is submitted that it is possible to compare *laws* and not only the structures, beliefs, interests etc. behind them. If the reductionistic standpoint is rejected, one is justified in seeking to develop general idealistic models of legal development. It is at least reasonable to hope that a theory of legal change based on comparative law will further insights into the growth and progress of law that can be acquired in no other way. In my view, the 'factor analysis' proposed by Watson provides for an interesting starting-point.

---

20) On the problem of legal translation see, e.g., P. Witt, Die Uber Übersetzung von Rechtsbegriffen, *Studia et Documenta Historiae et Iuris* XXXVII, 1971; M.H. Hoeflich, 'Translation and the Reception of Foreign Law in the Antebellum United States', *The American Journal of Comparative Law*, 50, 2002, 753; L. Rayar, 'Translating Legal Texts: A Methodology', Conference Paper, Euroforum, April 1993.

21) Consider on this D. Pearce, *Roads to Commensurability*, 1987, 188, 194.