Article

Explaining Legal Development: A Jurisprudential and Comparative Law Approach

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Abstract

Legal historians have observed that many legal norms have remained in force for a long time; yet the 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 thus enhance insights into the character of law and its relations to other normative domains. 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 an influential theoretical perspective elaborated by Professor Alan Watson, a leading comparatist and legal historian.

KEYWORDS: *comparative law, comparative method, legal history, legal transplants, legal change, law reform*

Introduction: comparative law and legal knowledge

Comparative law is concerned with the comparison of different systems of law with a view to obtaining knowledge that may be used for a variety of theoretical and practical puroses. At a time when world society is increasingly mobile and legal life is internationalized, the role of comparative law is gaining importance. While the growing interest in this field may well be attributed to the dramatic increase of international transactions, this empirical parameter accounts for only part of the explanation. The other part, at least equally important,

has to do with the expectation of gaining a deeper understanding of law as a social phenomenon and a fresh insight into the current state and future direction one's own legal system. Besides providing the jurist with a much broader knowledge of the possible range of solutions to legal problems than the study of a single legal order would present, comparative law gives the jurist an opportunity to fathom the interaction of different disciplines and to connect these to the development and operation of legal rules, for example, when one considers the interface between law and history.

Modern comparative law has progressed through different stages of evolution. Influenced by developments in biological sciences, linguistics and sociological theory during the nineteenth century, comparatists tended to focus, at that time, on the historical evolution of legal systems in the belief that there exist certain laws of social development common to all societies. In the late nineteenth century, a period of relative tranquillity in Europe, the French scholars Lambert and Saleilles, aspiring 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 comparatists 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 unravelling the patterns of legal development and concepts that were common to all nations. During the first half of the twentieth century, however, many comparative law scholars, most notably Gutteridge and 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. 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.

One might say that those who construe comparative law as a method and those who view it as a science look at it 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 socioeconomic and political structures, historical background and cultural patterns that underpin legal institutions and rules are taken into account, the comparative method begins to produce explanations based on interrelated variables – explanations which become progressively more scientific in nature.[1)] One might argue that a sharp dichotomy between science and method can be epistemologically dangerous, since there is no science without method. And what connects the two is the model whose aim is to relate the experience of the real world to an abstract scheme of elements and relations.[2)] In this respect, one might say that comparative law is part of legal science, using the term 'science' to describe a discourse that functions at one and the same time within 'facts' and within the conceptual elements that

make up 'science'. And the goal of legal comparison as a science is to bring to light the differences existing between legal models, and to contribute to the knowledge of these models.[3] Scientific comparative law is distinctive among the branches of legal science in that it depends primarily on the comparative method, whereas other branches may place greater emphasis on 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.[4]

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 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 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 legal norms 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.[5] 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.[6]

One might say that the universal and individual features of legal phenomena are *different* aspects of a uniform whole, although both aspects are *necessary* 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 on a different level, 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 historical settings. It is concerned with both the history of a single legal order and the legal history of many societies, the universal history of law. The role of the comparative method in this field is particularly important. As Frederic William Maitland pointed out, "history involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of legal history. … An isolated system cannot explain itself, still less explain its history."[7] By comparatively examining systems of law at different stages of development, legal historians attempt to trace the evolution of legal institutions on a broader level and the historical ties that may exist between legal orders. The comparative method is also utilized in connection with time-related or diachronic comparisons within one and the same legal order. A comparative perspective is as indispensable to the historical study of law as legal history is to the study and comparison of contemporary legal systems. Without the knowledge derived from historical-comparative studies it is impossible to investigate contemporary legal institutions, since these are to a great extent the product of historical conditions, borrowings and mutual influences of legal systems in the past.[8]

A comparative theory of legal development?

Legal historians have observed that many legal norms have remained in force for a long time; yet the degree of social change that has occurred 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. The following paragraphs consider the issue of legal change and legal stability from the viewpoint of what may be described as an idealistic theory: the legal change theory developed by Professor Alan Watson, a leading comparative lawyer and legal historian.

Legal transplants and 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.[9] In these works he iterates his belief that changes in a legal system are largely 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 occured 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.[10] 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.[11] 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,[12] or it pertains to the perceived quality and prestige of the adopted law).[13] 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 serve as a model for legal development in a very different society. However, one should keep in mind that an imported legal norm is occassionaly 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 presence of many more similarities than actually

exist.[14]

According to Watson, the nomadic character of rules proves that the idea of a close relationship between law and society is a fallacy.[15] Law is largely autonomous and develops by transplantation, not because some rule is the inevitable consequence of a change in the social structure, but because those who control law-making are aware of a foreign rule and recognize the apparent benefits that could derive from it.[16] 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.[17] 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 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.[18] On this basis one may identify the factors explaining the change or immutability of law.[19] Watson asserts that comparative law (which he distinguishes from a 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.[20]

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 (*Corpus Iuris Civilis*) was adopted and applied by most European countries during the later Middle Ages and the Renaissance; in wide 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 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.[21)]

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,[22)] in the sense that sociological influences on legal development are considered 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 resistant to change through foreign influence – contrary to the sociologically oriented argument that culturally rooted law is more difficult to change than merely instrumental law;[23)] 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.[24)] 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 and understanding of law and legal practice, 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.[25)]

Factors of legal development

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.[26] 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 asserts 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 the first case".[27] 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 forsee

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 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 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.[28] 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 occured 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 analysing 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 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.[29] According to him, legal culture pertains to the general outlook, practices, knowledge, values and traditions of the legal elite of a legal system.[30]

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".[31] 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 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.[32] 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 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 that now arises 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 inhibiting change and 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 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.[33] 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; 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, 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.

Concluding remarks

Scholars agree that comparative legal studies have performed valuable services in empirically testing the propositions of legal theory.[34] If theories about the nature and function of law are to claim any universal validity, they must be capable of encompassing many if not all systems of law; in turn, this suggests that a detailed study of at least a range of legal systems is a necessary prerequisite. As Paton 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.[35] The knowledge jurists depend on when seeking to devise tools for a proper construction of legal phenomena cannot be gained by an examination of a single legal system, since law transcends national boundaries, or without a comparison.

Comparative law allows the jurist additional perspectives towards a more complete understanding of law. It introduces concepts, styles, organizations and categorizations previously unknown, and opens unsuspected possibilities in the very notion of law thus enabling jurists to more effectively accomplish their tasks. Moreover, comparative law is a valuable source of knowledge for sociologists of law. The sociology of law goes beyond national frameworks and considers the social functions of law with a view to discovering the common and special social conditions existing in various legal systems. Special attention is paid to the role that social and economic conditions, political structures, cultural attitudes and geographic factors play in legal development. Comparative law helps sociologists of law to understand how different legal solutions to certain societal problems function in practice. Comparing different systems of law necessitates the crossing of linguistic borders, even when the same base language is used in more than one legal system. Each legal system uses language in its own ways; it has its own patterns of representation and communication, utilizing, for example, particular levels of abstraction, styles and values that favour certain kinds of arguments.

Comparative law is without doubt concerned with more matters than merely law, but its object is ultimately law. I think that the legal point of view must be emphasized in these

days of an omnipotent sociology, whose importance, of course, cannot be ovestated. 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, although important, is hardly sufficient. Nor does the existence of certain similar social relationships constitute a sufficient condition for comparison – comparative law is not merely comparative sociology. A conceptual framework is also needed.[36] Legal relations and the models of behaviour they express are based upon an experimental shaping of social relations. But this shaping is not purely empirical and cognitive. The relevant process involves a set of juristic forms, which are not incidental or particular to the case under examination: they stem from the history of legal doctrines and ideas. Whether we proceed from forms or from contents, the choices of subjects are not solely empirical; axiological and teleological choices must be considered and examined together with the doctrinal history of legal concepts and their systematical treatment. 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 progress of law – insights that cannot be acquired in any other way.

Notes

1) Among the leading scholars who advocated the instrinsic value of comparative law as a science and as an academic discipline was Ernst Rabel. According to him, "comparative law can release the kernel of legal phenomena from the shell of their formulae and superstructures and maintain the coherence of a common legal structure." Cited in Coing (1956: 670). On the view that comparative law constitutes both a science and a method consider Winterton (1975).

2) See on this Barreau (1995: 51).

3) Consider on this Sacco, (1991A: 8); Sacco (1991B: 24-25).

4) Contemporary comparatists acknowledge the important relationship between law, history and culture, and proceed from the assumption that every legal system is the product of several intertwining and interacting historical and socio-cultural factors. Thus, Alan Watson defines comparative law as "the study of the relationship between legal systems or between rules of more than one system … in the context of a historical relationship. [The study of] the nature of law and the nature of legal development." See Watson (1974: 6-7).

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

6) 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 regarded as the intermediate link between legal dogmatics and legal theory.

7) Maitland (1911: 488-489).

8) As commentators have observed, comparative legal history is 'vertical comparative law', while the comparison of modern systems is 'horizontal comparative law'. Consider on this Ewald (1995A: 1944).

9) See, e.g., Watson (1996); Watson (1978); Watson (1976); Watson (1977 and 2001A); Watson (1984); Watson (1991); Watson (2001B). And see Sacco (1991B).

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

11) Such as, for example, South Africa (Roman-Dutch and English influence), Québec (French and English influence) and Louisiana (French and American influence).
12) 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 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).
13) 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*. For a closer look see Mousourakis (2015A: 233-285); Mousourakis (2015B).
14) 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 (1995B).
15) On the view that law is the result of the social needs of a given society see in general Friedmann (1959); Damaska (1986); Friedman (1973: 595).
16) Watson (1978: 313-15).
17) 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.
18) Watson (1974: 6).
19) Watson (1974: 21). To illustrate the point, Watson mentions a set of rules concerned with matrimonial property, which travelled "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. The idea of legal transplants has been challenged by some scholars. See e.g. Legrand (1997) and (2001); Wise, (1990); Murdock (1990). Consider also Cotterrell (2001).

20) 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.
21) Legal relationships are to a large extent organized by forms derived from Roman law (such as *culpa*, *contractus* and *bona fides*). One might say that these forms constitute a kind of *pre-knowledge* for Western legal systems.
22) He speaks of an 'internal legal logic' or of 'the internal logic of the legal tradition' governing legal development. See Watson (1985: 21-22).
23) See on this Levy (1950).
24) Watson (1976: 80-81).
25) 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 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." Watson (1983: 1152-1153).
26) Watson (1978). Although these factors pertain primarily to the Western legal tradition, Watson believes that they are valid also outside this sphere of legal culture.
27) Watson (1978: 323).
28) 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.
29) 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 (2001: 264).
30) 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 Luhmann (1995); Teubner (1993); Priban & Nelken (2001). On the implications of the autopoiesis theory for comparative law see Teubner (1998).
31) Watson (1978: 330).
32) 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.

33) 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.

34) Lawson (1977: 59).

35) Paton (1972: 41).

36) Consider on this Pearce (1987: 188 & 194).

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Explaining Legal Development: A Jurisprudential and Comparative Law Approach（MOUSOURAKIS）

法的変容の分析：法学及び比較法学アプローチから

法的変化と法的安定性を理解し、説明するための理論的枠組みを構築できるでしょうか。さらに、このような枠組みを比較法学の観点から構築することは可能でしょうか。このような理論を構築するには比較法では不十分であると主張されるかもしれません。社会の一般的な分析も必要です。しかし、たとえ具体的な条件や因果関係が抽象的分析枠組みによって完全に説明できないとしても、そのような分析枠組みが関連する概念のいくつかを明らかにし、法の本質と他の規範的領域との関係の知見を深めると期待することは、少なくとも合理的です。本稿の第1部では、比較法学の性質と範囲について考察し、比較法学者が取り組んできた主題に対するさまざまなアプローチについて明らかにします。第2部では、比較法学及び歴史法学の第一人者であるAlan Watson教授が発展させてきた、影響力の大きい理論的視点から、法的変化の問題を論じます。

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