LEGAL FAMILIES, CULTURAL TRADITIONS AND THE PROBLEM OF TRANSPLANTABILITY OF LEGAL RULES

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Introductory

Systems of law[1] are concerned with relations between agents (human, legal, unincorporated and otherwise) at a variety of levels. At an international level, public international law governs relations between sovereign states and sets the limits for the exercise of state power in the light of generally recognized norms. At an international or transnational level also operate human rights law, refugee law, international environmental law, the so-called *lex mercatoria*, transnational arbitration and other systems. Functioning at a territorial state level are the legal systems of nation-states and sub-national (e.g. the legal systems of the

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1 The term 'legal system' is used to highlight the fact that law is comprised of many interconnected elements, which should be examined in the light of their functional interdependence. Related to the term 'legal system' is the term 'legal order' (*Rechtsordnung, ordre juridique*). When the latter term is used emphasis is placed on the creative role of the human agency in the formation and modification of the law.

individual states within federal states) or sub-state jurisdictions (e.g. the bye-laws of counties or municipalities and the laws of ethnic communities within states which enjoy a degree of autonomy). It is important to note that very few legal orders or systems of rules are complete, self-contained or impervious. Co-existing legal orders interact in complex ways: they may compete or conflict; sustain or reinforce each other; and often they influence each other through interaction, imposition, imitation and transplantation. National legal systems have become interconnected through the operation of international and transnational regimes in a variety of ways. They are subject to, and modified by, international conventions and treaties, trade regulations and various inter-state agreements. Some countries harmonize their laws, coordinate their fiscal policies, and agree to recognize each other's judgments or cooperate in antitrust enforcement. Of course, not all laws and legal practice have developed in this direction and large areas of the law are untouched by internationalizing trends. The national legal systems still retain vital importance, notwithstanding the increasingly important role of international and transnational regimes, and the relative curtailment of the sovereignty of nation-states. Indeed, the conception of law as an expression of the authoritative power of the nation-state marks the beginning of the development of modern comparative law as an academic discipline.

The starting-point of comparative law is often the appearance of common social problems in different legal orders. The question is whether there are common features or, conversely, differences in their legal regulation within these diverse legal orders. How should these similarities or differences be explained? But the existence of a common social problem is not a sufficient starting-point for comparative law. For

a meaningful legal comparison to exist, there must also be some form that is sufficiently similar. As Watson notes, some common features of legal culture are essential; a relationship is required to render comparative law possible.[2] This relationship can be actual and historical or also 'inner', an undeniable similarity between the peoples whose legal systems are compared. Elucidating the relationship between legal systems, i.e. identifying and accounting for their common elements and differences, presupposes an examination of the factors that influence the structure, development and substantive contents of legal systems. These factors include physical and geographical conditions;[3] economic structure and level of economic development; political system;[4] ideology; religion; culture; and historical circumstances. It is impossible to draw a complete list of all the factors at work, as many factors may be unknown or entirely incidental. Moreover, the various factors are not independent of each other but rather are interrelated or interdependent. Law may be

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2 Watson, *Legal Transplants* (2nd edn, University of Georgia Press, Athens, Georgia, 1993).

3 For example, the discovery of new energy sources, such as oil or natural gas, necessitates the introduction of legal rules to regulate their exploitation. See B. Grossfeld, *The Strength and Weakness of Comparative Law*, (Oxford University Press, New York, 1990) 75 ff; R. Rodière, *Introduction au droit comparé*, (Dalloz, Paris, 1979) 8. Consider also E. Wahl, 'Influences climatiques sur l'évolution du droit en Orient et en Occident. Contribution au régionalisme en droit comparé', (1973) 25 (2) *Revue internationale de droit comparé*, 261-276.

4 From this point of view one may explain differences between the legal systems of non-democratic and democratic states, especially in the fields of constitutional, criminal and administrative law. See on this W. Friedmann, *Law in a Changing Society*, (2nd edn, Penguin Books, Harmondsworth, 1972) 22-23.

construed as the product of a synthesis both of exogenous factors, such as economic structure, culture and political system, and endogenous elements, such as the operation of the legislative organs. The effects of such factors are not the same everywhere, but can vary considerably from case to case.[5]

This paper revisits and critically comments on three central and interrelated concepts in comparative law, those of legal tradition, legal family and legal transplanting. It is hoped that, by providing a timely investigation of the main theoretical assumptions underpinning these concepts, the paper will open a door to understanding some of the challenges which comparative law scholarship faces in a rapidly changing legal world of unexpected connections.

The Concept of Legal Tradition

Many comparatists today advocate broader approaches to the study

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5 As early as the mid-eighteenth century, the age of the Enlightenment, the French philosopher Montesquieu observed that the laws of a nation were necessarily formed relative to the physical features of a country: to a hot, mild or cold climate; to the quality, situation and scale of formation of the terrain; and to the life-style of the inhabitants as determined by these conditions. He also argued that laws were related with several other factors, such as the degree of liberty that physical conditions made possible; the population's religious beliefs and cultural attitudes; relative wealth; density of the population; modes of commerce; and customs and manners. What Montesquieu refers to as *l'ésprit des lois*, the underlying spirit that shapes any set of laws, is the result of the combined influences of all these factors. Charles de Secondat Montesquieu, *De l'Esprit des lois*, (1748), Book I, Chapter 3.

of legal systems – approaches that extend beyond the traditional 'law as rules' approach, which is concerned mainly with the description and ordering of statutory enactments and court decisions while ignoring all contexts that do not have a strictly legal nature. They argue that law and the understanding of law involves much more than the description and analysis of statutes and judicial decisions. Law cannot be fully understood unless it is placed in a broad historical, socio-economic, political, psychological and ideological context and, in this respect, concepts such as 'legal tradition' and 'legal culture' play a key part.

A legal tradition is not simply a body of rules governing social life; it is, as Merryman declares, a "deeply rooted, historically conditioned attitudes about the nature of law … the role of law in … society and the polity, the proper organization and operation of a legal system, and about the way law is, or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective".[6] There are national legal traditions, each with its characteristic attitudes to law that according to their more general features may be classified into broader, transnational traditions, such as Civil law, Common law, socialist law and Islamic law. However, the major legal traditions of the world do not exist in isolation from one another, but often contribute to one another through the exchange of information, ideas and models. The more intense and pervasive forms of communication today have engendered more permeable boundaries of the legal traditions than at any time in the past. Moreover, if the major legal traditions of the world

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6 *The Civil Law Tradition: an Introduction to the Legal Systems of Western Europe and Latin America*, (2nd edn, Stanford University Press, Stanford, Calif., 1985), 2

are inevitably open to external influence, they are also capable of accommodating internal diversity. Indeed, it is only through reconciliation of considerable internal diversity that the major legal traditions have succeeded in exercising the influence they have displayed around the world. The reconciliation of diversity and contradiction within the framework of each tradition is one of the major tasks that each tradition must address, and all the great traditions have developed doctrines for dealing with inner differences pertaining to legal doctrine, modes of legal thought and attitude.[7]

The theme of legal tradition invites consideration of an essential aspect of law: its traditionality. Whether one is examining a European legal system rooted in Roman law, whether one is describing the law of a country influenced by English common law, or whether the legal system being studied is based on custom or religious doctrine, analysis of the law presupposes an understanding of how the past has authority for the present. Law is traditional not simply in the sense that it comprises traditional forms and rituals. Further than this, law embodies three

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7 For example, the Islamic tradition recognizes the doctrine of *ikhtilaf*, or diversity of doctrine ('the tree of many branches'). In the Common law the terms Anglo-American law, Anglo-Canadian law, Anglo-Indian law and such are used to bridge national variations, and to remind lawyers and scholars working in the relevant systems that they participate in a larger enterprise. In the Civil law the same purpose is served by the notion of the Romano-Germanic legal tradition. Similarly, the Asian legal tradition is underpinned by the philosophical doctrine of the interconnection and interdependence of all things – a doctrine fundamental to Buddhism and implicit in most Confucian thinking. See H. P. Glenn, "Are Legal Traditions Incommensurable?" (2001) 49 *American Journal of Comparative Law*, 133 at 142.

important elements that are central to its identity and functioning.[8] These are: ***origins in the past, present authority*** and ***inter-generational transmission.***

Traditions cannot be created. It is only with the benefit of hindsight that sometimes one may be able to see that in some occurrence, at some particular time and place, a tradition emerged. Similar to other complex traditions, law embraces and sustains a vast body of assumptions, attitudes, practices and materials that have been accumulated over a considerable period of time.[9] Of course, law is not in its entirety the product of distant times and generational transmission. National legislatures create novel legal rules by the hundreds and thousands each year. Much of the law that is applied by the courts is statutory law of relatively recent origin. Yet, even this newly created law is an extension or alteration of the preceding body of law that has been built up over years and centuries. Furthermore, when judges and jurists are construing a newly enacted statute, they read it with the help of the past. In other words, they bring to the reading of it interpretative traditions going back centuries, as well as long-held beliefs about law and legal behaviour.[10]

The second characteristic of a tradition is that it has a present authority and significance for those individuals who participate in it. In law, the past is not simply made use of to understand the present. It is institutionalized. Nowhere is this more apparent than in relation to legal

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8 See on this M. Krygier, "Law as Tradition", 5 *Law and Philosophy* (1986), 237 at 240-251.

9 See Krygier, ibid at 241.

10 Consider on this M. Krygier, "The Traditionality of Statutes", (1988) 1 *Ratio Juris*, 20.

reasoning. Legal reasoning involves a process of justifying arguments for or against a particular legal position or outcome by reference to established interpretations of historical legal materials, principally statutory enactments and cases. Similar to religious traditions, in which authority rests on various inherited texts as interpreted by certain designated individuals, legal traditions ascribe authority to particular texts and have both long-established rules of interpretation and, with respect to the judiciary, an authoritative community of interpretation.[11] One should bear in mind, of course, that the role of the past in the process of legal reasoning is a complex one. Notwithstanding the stress on trans-generational continuity and the reliance on the past as a basis for the legitimization of decisions in the present, law is in a perpetual state of evolution and transformation. Law responds to, and is affected by, developments in the society of which it is an integral part. As society changes, the legal system must, to a greater or lesser degree, keep pace. Often the relevant change is subtle with judges amending the law to adapt it to contemporary needs while declaring that the decision stands in historic continuity with the past. Sometimes the change is effected more openly. One might say that, in the legal sphere, the past is a fount of ongoing authority, guidance and reference, but it is construed through the eyes of the present. In this respect, a parallel may be drawn between the study of law and the study of history, as history also involves a process of interpreting the past through the eyes of the present.[12] Yet

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11 For a comparative analysis of law and religion see H. Berman, *The Interaction of Law and Religion*, (SCM Press, London, 1974).

12 See, e.g., E. H. Carr, *What is History?*, (Penguin Books, Harmondsworth, 1964) 29-30.

law differs from history in that it is not concerned with historical accuracy but with the meaning ascribed to that past by later generations. What matters in law is not so much what the law was in the past, but what it has been taken to be by previous authoritative interpreters. In addition to that, the past is often reinterpreted to conform to the needs of the present. Thus, not infrequently, judges refer to the ongoing authority of an old precedent, while distinguishing it so that it is regarded as inapplicable to the instant case. One might say that legal traditions are dynamic rather than static, for the continuities between past and present do not exclude evolution and change. As a commentator has remarked, traditions are characterized by "a dialectical interplay between inherited layers which pervade and mould the present, and the constant renewals and reshaping of these inheritances, in which authorized interpreters and guardians of the tradition and lay participants indulge, and must indulge."[13]

The third characteristic of legal tradition is that it has been transmitted through generations. It is a hallmark of a tradition that there is a strong pressure to conformity with certain values, principles and interpretive rules and methods. Acceptance in the higher echelons of the legal profession is dependent upon adherence to the tradition's cultural norms, language, forms of reasoning, practices, rituals and codes of conduct, whether written or unwritten. In this way, the tradition is both preserved and passed on to successive generations of acolytes. Legal traditions evolve in pursuance of efficiency, social order and societal consensus and, as the values and circumstances of society change, legal

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13 M. Krygier, "Thinking Like a Lawyer", in W. Sadurski (ed), *Ethical Dimensions of Legal Theory*, (Rodopi, Amsterdam, 1991) 68.

norms will tend to adapt accordingly. In view of current socio-economic conditions and needs, certain past norms may seem inadequate or out of place. However, it is intrinsic to the nature of a tradition that the change is piecemeal: traditions evolve and progress occurs continually over generations, with each generation building upon the heritage of previous generations.[14] If core values and principles are jettisoned, and discontinuity with the past becomes the dominant pattern, then there will come a point at which the tradition itself dies out. If such a dramatic change occurs, it may be a very long time before a new tradition is formed and becomes part of society's fabric.

Because traditions have their origins in the past, they are likely to be influenced, for good or for ill, by the values of the past. They necessarily reflect the values and culture of the generations in which they developed, and need to be reviewed critically in the light of changes in the conditions, needs and values of contemporary society. Legal traditions which have developed in a male-dominated world may reflect male perspectives, consciously or otherwise. They may likewise have been shaped by the needs of those who have most wealth and education, with the result that the law tends to be inaccessible to the population as a whole. Thus, a legal tradition must constantly undergo adaptation and renewal in order to meet the changing needs of society, especially in view of the fact that the legitimacy which the tradition provides to the political order depends upon its acceptance as belonging to the people. In many countries today the challenge is to encourage the sense that the legal tradition is one which belongs to all parts of the community. This

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14 See H. Berman, *Law and Revolution*, (Harvard University Press, Cambridge, Mass., 1983) 5.

involves the adaptation of the law to the needs of a multi-cultural society. It also involves recognizing where the application of the law has a discriminatory impact on certain categories of people (women, children, various ethnic groups). A continual concern is that all sections of the community should have access to affordable justice. It is through this process of continual re-examination that the legal tradition is adapted in each generation to the needs and values of the community. An important issue is how to effect these changes while maintaining continuities within legal tradition. Not every pressure group can be accommodated, not everyone's values and lifestyles in a pluralistic society can be equally respected. In dealing with the tension between tradition and change it is essential to identify and hold onto those central values, principles and beliefs which are at the heart of the tradition. These are moral, political and procedural principles which together give content to a society's fundamental ideas about justice, democracy and civil order. A mono-cultural tradition may successfully adapt itself to cultural pluralism only if it avoids lapsing into moral relativism.

Legal Culture

The term 'legal tradition' is sometimes used interchangeably with the term 'legal culture', although the two notions do not entirely overlap. 'Legal culture' is a multi-dimensional term, which is employed in sociological and anthropological studies of law. Several definitions of legal culture are found in the relevant literature. Blankenburg and Bruinsma, for example, define legal culture in terms of the interplay of all four levels of legal phenomena: law in the books; the institutional infrastructure (judicial system and legal profession); patterns of legally

relevant behaviour (e.g. legal transactions); and legal consciousness.[15] According to Friedman, legal culture consists of the “attitudes, values and opinions held in society relating to legal system or legal processes”.[16] Bell defines legal culture as “a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts”.[17] Moreover, legal culture may be seen as embodying two aspects: an ‘external’ (lay) and an ‘internal’ (professional).[18] Legal culture, like societal culture in general, is a result of historical evolution. The current state of a legal culture is always between tradition and innovation.

Viewing law as culture implies that law is more than simply a body of rules or institutions; it is also a social practice within a legal community. It is this social practice that shapes the actual meaning of the rules and institutions, their relative weight, and the way they are implemented and operate in society. But law is not an isolated social practice; it is an aspect of the broader culture to which it belongs.[19]

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15 E. Blankenburg & F. Bruinsma, *Dutch Legal Culture*, (Kluwer Publishers, Deventer, Boston, 1991) 8-9.

16 L. M. Friedman, *Law and Society: An Introduction*, (Prentice-Hall, Englewood Cliffs, N. J., 1977) 103. Elsewhere Friedman refers to legal culture as the “ideas, values, expectations and attitudes towards law and legal institutions which some public or some part of the public holds”. “The Concept of Legal Culture: a Reply”, in Nelken (ed.), *Comparing Legal Cultures*, (Dartmouth, Brookfield, Vt., 1997).

17 J. Bell, “English Law and French Law – Not So Different?”, (1995) 48 *Current Legal Problems*, 70.

18 See Friedman, *Law and Society: An Introduction*, supra note 16, 76.

19 According to one definition, culture is a system of symbolic meaning with features distinctive to a society or a social group, that forms the basic, common model for the beliefs, values and opinions held by its members.

Understanding law presupposes knowledge of the social practice of the legal community and this, in turn, implies familiarity with the general culture of the society in which the legal community is a part. The relationship between law and culture is characterized by continual interaction and interdependence.[20] One might say that law is an element of the culture of a society that both impacts upon culture and is permeated by it.

Grouping Legal Systems and Traditions into Legal Families

Comparative legal scholarship has an extensive tradition of categorizing systems of law into legal families of kinship and descent. The classification of legal systems into broader families is primarily a pedagogical instrument, which is designed to facilitate the comparative

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Each society, based on the historical experience of the people in question, chooses a set of meanings especially significant and fundamental for it and systematizes them, thus producing its culture. This symbolic system forms a basic framework for cognition and evaluation for the society's members, and is preserved and transmitted through the processes of socialization. Members of society internalize this framework and then gradually develop their own values, attitudes, beliefs and opinions based on it. In the sphere of law, culture manifests itself in the concept of law, and more generally in the notion of social order prevalent in a society. See G. Jaeger and P. Selznick, "A Normative Theory of Culture", (1964) 29 *American Sociological Review*. 653.

20 See on this M. E. Mayer, *Rechtsnormen und Kulturnormen*, (Schletter, Breslau, 1903) 24; K. H. Fezer, *Teilhabe und Verantwortung*, (Beck, Munich, 1986) 22.

study of laws by providing scholars with a general overview of the bewildering diversity of the legal systems of the world. The starting-point of such classification is the observation that while national systems of law differ considerably with respect to the contents of specific rules and forms of procedure, their differences appear to diminish when examined from the perspective of their broader societal culture; historical origins and development; legal ideology; mental attitudes and modes of legal thinking; legal terminology; and the hierarchy and interpretation of legal sources.[21] The division of legal systems into families fosters the comparative study of law as it allows one to examine legal systems from the viewpoint of their general characteristics, style or orientation. Apart from its practical importance, the division of legal systems into broader families has great value to legal theory, as it requires a more spherical or comprehensive knowledge of law as a general social phenomenon. Not only is comparative law a method of legal research but it can also be considered as an independent branch of legal science largely because it also addresses the theoretical problems surrounding the categorization of the world's legal systems. The problem of classifying legal systems into families has been the subject of discussion among scholars from as early as the beginning of the twentieth century. Although the proposed classifications were revised in light of developments in Russia and other Eastern European nations in recent years, the traditional conceptual framework of legal families remains relevant for describing legal reality in the world today.

Although some scholars sought to base the classification of legal

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21 See G. Winterton, "Comparative Law Teaching", (1975) 23 *American Journal of Comparative Law*, 69.

systems on a single criterion (e.g. historical origins, political and economic ideology), most comparatists today recognize that a useful classification should involve several different criteria.[22] Thus, according to Constantinesco, several 'determinant factors' should be used together when allocating legal systems to groups or families. Among these factors he includes the concept and role of law; the predominant ideology; socio-economic and political realities and their relation to legal norms; the economic environment; the concept and role of the state; the fundamental rights of the citizen; the sources of law and their hierarchy; legal interpretations; the status and role of judges; and, finally, legal concepts and basic categories of law.[23] One should note that even when a single, broad criterion is proposed, such as a system's general 'style', this criterion would usually require the consideration of many interrelated factors. Depending on the nature and purposes of the comparative

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22 A classification drawing upon a single criterion, such as political and economic ideology, may be meaningful but is not particularly useful as it places within the same group legal systems that are markedly different in many respects. Thus a classification relying on political and economic ideology as the decisive criterion would place in the same broader family both the Continental European civil law and the common law systems, despite the structural and other differences between the two systems.

23 L. J. Constantinesco, ***Rechtsvergleichung*** I, (Heymanns, Köln & Berlin, 1971) 262-265.
Constantinesco suggests, moreover, that several legal families can together form a broader family (***Rechtskreis***). The latter constitutes an expression of one of the cultural civilizations (***Kulturkreis***) in which human societies may be divided. "Die Kulturkreise als Grundlage der Rechtskreise", (1981) ***Zeitschrift für Rechtsvergleichung***, 161-178; "Über den Stil der 'Stiltheorie' in der Rechtsvergleichung", (1979) 78 ***Zeitschrift für vergleichende Rechtswissenschaft***, 154-172.

inquiry, the relevant criteria may also include language and geography and the people's general attitude towards the law.

According to a theory of classification proposed by Arminjon, Nolde and Wolff,[24] there exist in the world certain 'model' or 'core' systems whose legal rules and institutional structures were directly transplanted (often through military conquest or colonization) or adopted (by virtue of their perceived quality and prestige) in many countries around the world. For these authors, the crucial criterion for the classification of legal systems is the substantive content of laws; and this requires attention to originality, derivation, and common elements, rather than to external factors, such as race or geography. From this point of view, seven 'core' systems and respective legal families are identified: the French, German, Scandinavian, English, Russian, Islamic and Hindu.[25] According to critics, the above approach overlooks the existence of systems that incorporate elements from two or more of the so-called 'core' systems. It has been argued, moreover, that the legal systems of European origin share so many common characteristics that they should be regarded as forming a single group comprising not only the systems of Continental Europe, but also the Common law and Latin American systems.[26]

David has offered another approach to the classification of legal

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24 P. Arminjon, B. Nolde and M. Wolff, *Traité de droit comparé*, vol. 1, (LGDJ, Paris, 1950) 47 ff.

25 But the authors point out that their division is based on, and therefore valid only, for private law. Ibid at 63.

26 See A. Malmström, "The System of Legal Systems, Notes on a Problem of Classification in Comparative Law", (1969) 13 *Scandinavian Studies in Law*, 127. See also K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, (2nd edn, Clarendon Press, Oxford, 1987) 65.

systems into families. According to his theory proposed in 1950, the decisive criterion for classification is 'ideology', which he considered as a product of religion, philosophy, and political, social and economic structures.[27] On this basis, David proposed the division of the legal systems of the world at that time into five groups or families: a) the Western legal family, established upon Christian religious doctrine, liberal ideology and capitalist economic theory; b) the Socialist legal family, based on Marxist-Leninist political and economic theory and ideology; c) the Islamic legal family, founded on the teachings of the Koran and the Muslim religious tradition; d) the Hindu family, based on the religious, philosophical and social system of Hinduism; and e) the Chinese family, underpinned by the religious and moral philosophy of Confucianism. Moreover, David proposed a division of the systems of the Western family into two sub-groups, the French and the English. A further criterion proposed by David for the classification of legal systems (especially in relation to the sub-division of the Western legal family) is 'legal technique'. This pertains to the internal structure of legal systems, legal terminology and the hierarchy of legal sources. In this respect, one must consider whether a lawyer educated in a particular legal system should be able to work without great difficulty within another legal system. If the answer is affirmative, one should conclude that the two systems probably belong to the same broader family. According to David, this criterion is complementary, even though it is subordinate to the ideological criterion. Despite their similarities with respect to legal technique, two or more systems cannot be regarded as belonging to the

27 R. David, *Traité élémentaire de droit civil comparé*, (Pichon et Durand-Auzias, Paris, 1950).

same family if they are based on markedly different socio-political and economic ideologies.

In 1964, David proceeded to modify his original classification in response to criticisms levelled at aspects of his earlier theory (especially by German scholars objecting to his suggestion that the German system should be included in the French sub-group). He reclassified the legal systems of the world into four broad families: the Roman-Germanic family (commonly referred to as the 'Civil law family'); the Anglo-American or Common law family; the socialist family; and the family of legal systems based on religious and traditional grounds. Within this last group he included Islamic law, Hindu law, and the legal systems of Eastern Asia and Africa.[28] Malmström adopted David's original distinction between the Western and socialist legal families. He proceeded to partition Western law into four sub-groups: the Continental European; the Latin American; the Nordic or Scandinavian; and the Common law families.[29]

Another well-known theory of classification has been advanced by Zweigert. Zweigert's proposed criterion for the grouping of legal systems

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28 R. David, ***Les grands systèmes de droit contemporains***, (Dalloz, Paris, 1964). And see R. David and J. Brierley, ***Major Legal Systems in the World Today***, (3rd edn, Stevens, London, 1985). The Czech comparativist V. Knapp argues that, in view of the decline and probable disappearance of the socialist legal family, one could refer to three major legal families in the world today, namely the Continental European or Civil law family, the Anglo-American family and the Islamic family. According to him, the Eastern European legal systems presently belong to the Continental European group. ***Základy srovnávací právni vedy***, (Aleko, Praha, 1991) 52-53, 58.

29 A. Malmström, "The System of Legal Systems, Notes on a Problem of Classification in Comparative Law", (1969) 13 ***Scandinavian Studies in Law***, 127 ff.

into families is 'style' (Rechtsstil), a multi-faceted or multi-dimensional criterion shaped by the interaction of the following factors: a) the historical background and development of a particular system; b) its predominant and characteristic mode of legal thinking; c) its distinctive legal institutions; d) the hierarchy and interpretation of its legal sources; and e) the ideological background of the system. On this basis he divided the legal systems of the world into eight groups or families: the Romanistic; the Germanic; the Nordic; the English; the socialist; the Far Eastern; the Islamic; and the Hindu.[30]

The various classifications of legal systems into families proposed by comparative law scholars cannot be regarded as strict or exhaustive. Further one cannot discern a single answer to the question as to which criterion (or criteria) ought to be used for grouping legal systems into families. As the classification of legal systems is mainly a device to facilitate comparative study, much depends upon the nature, purpose and scope of each particular study. For instance, if the comparative study aims to explore the influence of religious factors on law and society, one would focus on religion as the basic criterion for classification and thus may distinguish between Islamic, Hindu and Jewish law, and the law of the Western secular societies. If, on the other hand, the aim of the study is to examine indigenous or native legal systems, it is useful to contrast the legal systems composed of customary or unwritten law with those that rely upon written law. One must keep in mind, in other words, that

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30 K. Zweigert, "Zur Lehre von den Rechtskreisen", *20th Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema*, (Sythoff, Leyden, 1961) 45 ff; see also K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, (2nd edn, Clarendon Press, Oxford, 1987), 68-75.

the grouping of legal systems into families of law is not an end in itself. It is connected with a particular purpose or purposes and a classification that is suitable for one purpose may not be helpful in another connection.[31]

Moreover, it should be mentioned that the borderlines between the various sub-groups or families identified by some scholars are ill-defined or vague, and thus it is often difficult to identify with certainty which sub-group a legal system belongs to. Special difficulties are presented by the classification of the so-called 'mixed' or 'hybrid' legal systems, that is, systems whose development has been influenced by two or more legal families. This category embodies, as already noted, the legal systems of Québec (French and English influence);[32] Louisiana (French and American influence);[33] and South Africa (Dutch and American influence).[34] Moreover, the legal systems of many countries in Asia and Africa constitute a mixture of traditional local law, religious elements and the law imported from European countries during the colonial period or in more recent times.[35] Interesting classification problems also arise in connection with the legal systems of Russia and other Eastern European countries, currently in a period of transition, as well as in view of the legal convergence occurring in the context of the European Union. These

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31 See M. Bogdan, *Comparative Law*, (Deventer, Stockholm, 1994) 85; R. B. Schlesinger, *Comparative Law. Cases – texts – materials*, (3rd edn, Mineola, New York, 1970) 252.

32 See K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, (2nd edn, Clarendon Press, Oxford, 1987), 121-122.

33 Zweigert and Kötz, ibid, 119-121.

34 Zweigert and Kötz, ibid, 240-244.

35 See F. Reyntjens, "Note sur l'utilité d'introduire un système juridique 'pluraliste' dans la macro-comparison des droits", (1991) 68 *Revue de Droit Internationale et Droit Comparé*, 41-50.

developments make it clear that the members of any legal family are themselves subject to evolution, a fact that is not always contemplated by the various approaches to the notion of legal family as a classification device. As the discussion of the various classification theories makes clear, the classification technique does not lead to unanimous results, and consigning a legal system to a particular legal family can lead to serious misconceptions rather than an understanding of the system.

Questions have arisen, for example, as to whether East Asian legal systems can be grouped into one legal family. David and Zweigert and Kötz list the People's Republic of China, Japan, Korea and Indo-China as members of the "Far Eastern Family".[36] They argue that the old Chinese doctrines of Confucius, which emphasise social, group or community harmony rather than individual interests, have been very influential in all these societies, with the consequence that individuals tend to avoid litigation in favour of compromise and conciliation. Their classification of the East Asian legal systems into one legal family is thus entirely based on what they regard as a common culture. However, some scholars argue that it is simplistic to emphasise culture at the expense of political and economic factors. Consider Japanese law, for instance. The Japanese legal system has been variously classified as part of the "Far Eastern" legal family, described as a "civil law" system based on German law, and treated as a "unique hybrid of different legal systems". Although Zwegert and Kötz follow David in categorising Japan's legal system as "Far Eastern", they remark that contemporary developments in Japan make it

36 The term "Far Eastern" is often said to be problematic since it implies a Eurocentric perspective. A purely geographic notion, such as "East Asian" would be more neutral and therefore preferable.

seem increasingly advisable to consider taking modern Japanese law out of the oriental group and classifying it with those systems which have European origins. These different approaches to the classification of one legal system suggest that the classification process is more arbitrary, subjective and open to manipulation than many traditional comparatists recognize.

Furthermore, one should keep in mind that, as the proposed classifications concern national legal systems as a whole, they do not always coincide with the classifications referring to specific branches of law, or classifications attempted in the framework of micro-comparative legal studies in general. For example, if one ventures a classification from the viewpoint of public law, one may distinguish between federal systems, such as the United States, Germany, Australia and Switzerland, and unitary systems, such as France, Japan, Egypt and New Zealand. Moreover, if one examines legal systems within the context of constitutional law, one may place the American, Italian and German systems into the same group on the basis that all these systems recognize the judicial review of the constitutionality of legislation. As the above examples indicate, with respect to a particular branch of public or private law, a system may be allocated to one group or 'family' in a narrow sense, and allocated to another with respect to a different branch.

Legal Borrowing and Legal Transplants

A great deal of the similarities that exist among legal systems and traditions are the result of 'legal borrowing' or 'legal transplanting'. '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.

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,[37] or it pertains to the perceived quality and prestige of the adopted law).[38] In

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37 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).

38 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*.

many 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. A system's readiness to adopt a foreign legal rule or solution, is often associated with considerations of economic efficiency. According to Mattei, the reception of foreign legal rules is often the end result of a competition where each legal system provides different rules for the resolution of a specific problem.[39] In a market of a legal culture, where rule suppliers are concerned with satisfying demand, ultimately the most efficient rule will be the winner.[40] A study of legal borrowing 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. Furthermore, one should recognize that the process of legal borrowing may be interrupted, or precipitated, by revolutionary change. A revolution may be defined as an historical event that may change the

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39 See U. Mattei, "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics", (1994) 14 *International Review of Law and Economics*, 3 ff; U. Mattei and F. Pulitini, "A Competitive Model of Legal Rules", in A. Breton et al (eds), *The Competitive State*, (Kluwer, Dordrecht, 1991) 207 ff. According to Mattei, from the viewpoint of a particular legal system, 'efficient' is whatever makes the legal system work better by lowering transaction costs.

40 But, as Mattei recognizes, the existence of differences between distinct legal systems does not imply inefficiency. Different legal systems may adopt alternative solutions for the same legal problem, which are neutral as far as efficiency is concerned.

identity of a socio-political system by altering the ideological foundations of its legitimacy and, consequently, its orientation. A revolutionary legitimacy change is the most radical change that a socio-political system may undergo.[41] The transformation of a country's legal system prompted by such a change may entail the system of law moving further away from or closer to other systems, so far as ideological differences and similarities with respect to different countries' socio-political and economic structure are expressed in law.[42]

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 necessarily preclude the successful transplantation of legal rules

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41 Legitimacy is the quality of a socio-political system that explains its authority at a particular place and time over a particular community. A system's legitimacy may be founded on social consensus (democracies), or on a variety of other elements, such as transcendental command (e.g. theocratic states) or, even, arbitrary oppression. In turn, orientation may vary from old-fashioned, open-ended laissez-faire orientations to communism and many other distinct combinations. Efficiency is a quality that refers to the overall performance of a system. A system develops and remains the same to the extent that the foundation of its legitimacy and the direction of its orientation remain stable. Non-revolutionary changes are under legitimacy control. In such a case, since the foundation of legitimacy is not affected, a change in the direction of orientation must satisfy the criteria of the established legitimacy foundation. Revolutionary change may be the result of a catastrophic collapse with respect to the authority or efficiency of a system.

42 On the role of revolution as a factor explaining the divergence of legal systems see R. Rodière, ***Introduction au droit comparé***, (Dalloz, Paris, 1979) 21.

and institutions. Legal rules can be taken out of context and can serve as a model for legal development in a very different society. However, one should keep in mind that an imported legal norm is occasionally ascribed a different, local meaning, when it is rapidly indigenized on account of the host culture's inherent integrative capacity. It is not surprising that, very often, European legal concepts, institutions and rules imported by non-Western countries are understood in a way that is different from that in the donor countries. The absence of substantial differences in the wording of a statute law from the donor and the host countries does not imply that legal reality, or everyday legal and social practice in the two countries, should be identical or similar. The legal reality in the host country may be very different with respect to the way people (including judges and state officials) read, interpret and justify the relevant law and the court decisions based on it. Moreover, the role of statute law in the recipient country may be much weaker than it is in the exporting country and custom may be a predominant factor. Thus, in practice, social rules might effectively prevent people from initiating a legal claim or even using a court decision supporting such a claim. As this suggests, it is not good sense to use the perspective and framework of one's own legal culture when examining a law or legal concept in a legal system operating within the context of another culture.[43] Such an approach carries the risk of implying the existence of many more similarities than there actually are.[44]

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43 See on this O. Kahn-Freund, "On Uses and Misuses of Comparative Law", (1974) 37 (1) *Modern Law Review*, 1.

44 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".

Some Comments on Watson's Theory of Legal Transplants

Since the publication of the first edition of his seminal book, Legal Transplants: An Approach to Comparative Law in 1974, Professor Alan Watson has produced many works on the relationship between law and society, and the factors accounting for legal change.[45] In these works he iterates 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. According to Watson, the nomadic character or rules

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Legal Transplants, (2nd edn, University of Georgia Press, Athens, Georgia, 1993) 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 W. Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants", (1995) 43 *American Journal of Comparative Law*, 489.

45 See, e.g., A. Watson, "Aspects of Reception of Law", (1996) 44 *American Journal of Comparative Law*, 335; "Comparative Law and Legal Change", (1978) 37 *Cambridge Law Journal*, 313; "Legal Transplants and Law Reform", (1976) 92 *Law Quarterly Review*, 79; *Society and Legal Change*, (Scottish Academic Press, Edinburgh, 1977; 2nd edn, Temple Univesity Press, Philadelphia, 2001); *Sources of Law, Legal Change, and Ambiguity*, (University of Pennsylvania Press, Philadelphia, 1984); *The Evolution of Law*, (Blackwell, Oxford, 1985); *Legal Origins and Legal Change*, (Hambledon Press, London, 1991); *The Evolution of Western Private Law*, (Johns Hopkins University Press, Baltimore, 2001). And see R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law", (1991) 39 *American Journal of Comparative Law*, 1 and 343.

proves that the idea of a close relationship between law and society is a fallacy.[46] Law is largely autonomous and develops by transplantation, not because some rule was the inevitable consequence of the social structure, but because those who control law-making were aware of the foreign rule and recognised the apparent benefits that could derive from it.[47] 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.[48] 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.[49] On this basis one

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46 *Legal Transplants*, supra note 44, 108.

47 "Comparative Law and Legal Change", (1978) 37 (2) *Cambridge Law Journal*, 313, 313-15 and 32.

48 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.

49 *Legal Transplants*, supra note 44, p. 6.

may identify the factors explaining the change or immutability of law.[50] 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.[51]

The concept of 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.[52] This receptivity varies from

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50 *Legal Transplants*, ibid., p. 21. To illustrate, 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).

51 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.

52 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. As a factor of legal change, transplant bias interracts with a

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. The adoption of an entire foreign legal code is probably the clearest manifestation of transplant bias. According to Watson, juristic doctrine is particularly susceptible to foreign influence.[53] 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. Transplant bias involves an authoritative argument that takes the form: 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.

The experience of the legal historian underlies Watson's scepticism

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number of other factors: source of law; pressure force; opposition force; law-shaping lawyers; discretion factor; generality factor; inertia; and felt needs. Although these factors pertain primarily to the Western legal tradition, Watson believes that they are valid also outside this sphere. "Comparative Law and Legal Change", (1978) 37 (2) *Cambridge Law Journal*, 313-336.

53 This is evidenced by the fact that the reception of Roman law in Continental Europe first occured in the field of legal science.

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,[54] 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;[55] 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.[56] 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:

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54 He speaks of an 'internal legal logic' or of 'the internal logic of the legal tradition' governing legal development. See A. Watson, *The Evolution of Law*, (Blackwell, Oxford, 1985) 21-22.

55 See on this E. Levy, "The Reception of Highly Developed Legal Systems by Peoples of Different Cultures", (1950) 25 *Washington L.R.*, 233.

56 A. Watson, "Legal Transplants and Law Reform", (1976) 92 *Law Quarterly Review* 79, 80-81.

by their learning, expertise and knowledge of law, domestic and foreign. Societal pressure may engender a change in the law, but the resulting legal rule will usually be adopted from a system known to the lawmaker and often modified without always a full consideration of the local conditions. Watson stresses that law is, to a large 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.[57]

Watson's work on the concepts of legal transplants and legal change

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57 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 opeates 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'. "Legal Chance: Sources of Law and Legal Culture", (1983) 131 *University of Pennsylvania Law Review* 1121, 1152-1153.

calls into question the notion that law is a local phenomenon functionally connected with the living conditions of a particular society. His statement that 'legal rules are not peculiarly devised for the particular society in which they now operate'[58] is descriptive rather than normative in nature. It implies that the reception of foreign legal norms and institutions often occurs without the benefit of full familiarity with whatever is adopted in the receiving country. And even when the borrowed rule remains unaltered, its impact in the new socio-cultural setting may be entirely different.[59] For Watson, the source of the original legal norm or institution does not control the final result of the process of transplantation or borrowing. It is the recipient and not the donor system that has the last word on the mode of application of the imported law. However, as critics have pointed out, Watson's position involves a paradox: if the recipient system controls the outcome of the process initiated by the transplanting, how can one say that foreign models are actually at work in the new local context?[60] According to Legrand, 'legal transplants' cannot happen, for no rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed. This is because, as it crosses borders, the original rule undergoes a change that affects it qua rule. Thus, any approach attributing change in law to the displacement of rules across borders is ill-founded, for it fails to treat rules as actively constituted through the life of interpretive communities. Furthermore, it fails to make apparent the fact that rules are the product

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58 *Legal Transplants*, supra note 44, 96.

59 Id., 116.

60 See P. Legrand, "The Impossibility of Legal Transplants", (1997) 4 *Maastricht Journal of European and Comparative Law*, 116-20.

of divergent and conflicting interests in society, that is, it eliminates the dimension of power from the equation. In light of the above, Legrand concludes that the shifting complexity of development in the law cannot be adequately explained through a rigid framework such as that furnished by the legal transplants thesis.[61]

In my view, the objections of those critics emphasizing cultural diversity do not militate against the validity of Watson's theory. It may be true that each legal culture is the product of a unique combination of socio-cultural and historical factors. Nevertheless, it is equally true that collective cultural identities are formed through interaction with others and no culture can claim to be entirely original.[62] There is a degree of uniformity with respect to the emergence of certain needs as societies progress through similar stages of development and a natural tendency exists towards imitation, which may be precipitated by a desire to accelerate progress or pursue common political and socio-economic objectives.[63] According to del Vecchio, "the basic unity of human spirit makes possible the effective communication between peoples. Law is not only a national phenomenon; it is, first and foremost, a human phenomenon. A people can accept and adopt as its own a law created by another people because, in the nature of both peoples, there exist common demands and needs which [often] find expression in law".[64] The

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61 Ibid., 120.

62 See on this C. Levi-Strauss, *Race et histoire*, (Albin Michel, Paris, 2001), 103 ff.

63 On the so-called 'law of imitation' and its role in the evolution of social institutions see G. Tarde, *Les Lois de l'Imitation*, (F. Alcan, Paris, 1890). And see C. K. Allen, *Law in the Making*, (Oxford University Press, Oxford, 1964), 101 ff.

64 G. del Vecchio, "Les bases du droit comparé et les principes généraux du

German comparatist Konrad Zweigert, cites many examples from various legal systems, to argue that in 'unpolitical' areas of private law, such as commercial and property transactions and business dealings, the similarities in the substantive contents of legal rules and the practical solutions to which they lead are so significant that one may speak of a 'presumption of similarity' (praesumptio similitudinis).[65] This presumption,

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droit", (1960) 12 *Revue internationale de droit comparé*, 493, 497. As Albert Hermann Post, one of the founders of the School of Comparative Anthropology (*Rechtsethnologie*), has remarked "there are general forms of organization lying in human nature as such, which are not linked to specific peoples. …[F]rom the forms of the ethical and legal conscience of mankind manifested in the customs of all peoples of the world, I seek to find out what is good and just. …I take the legal customs of all peoples of the earth as the manifestations of the living legal conscience of mankind as a starting-point of my legal research and then ask, on this basis, what the law is". *Die Grundlagen des Rechts und die Grundzüge seiner Entwicklungsgeschichte: Leitgedanken für den Aufbau einer allgemeinen Rechtswissenschaft auf sociologischer Basis*, (Schulze, Oldenburg, 1884) XI. According to Post, ["C]omparative-ethnological research seeks to acquire knowledge of the causes of the facts of the life of peoples by assembling identical or similar phenomena, wherever they appear on earth and by drawing conclusions about identical or similar causes". *Bausteine für eine allgemeine Rechtswissenschaft auf vergleichend-ethnologischer Basis*, (Schulze, Oldenburg, 1880), citations at 12-13. Other important works of this school include Albert Hermann Post's *Einleitung in das Studium der ethnologischen Jurisprudenz*, 1886, and Henry Maine's *Ancient Law*, 3rd edn, 1866. According to critics, the basis of this school of thought was colonialism and imperialism, which sought to use comparative anthropology, not in order to learn from foreign peoples, but rather in order to justify the expansion of the interests of the European colonial powers across the globe.

65 K. Zweigert, *Des solutions identiques par des voies différentes*, (1966) *Revue internationale de droit comparé*, 5 ff; K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, (2nd edn, Clarendon Press, Oxford, 1987), 36.

he claims, can serve as a useful tool in the comparative study of different legal systems. Despite the sheer diversity of cultural traditions in the world today, the problems dogging the regional harmonization of law (e.g., at a European level) and the difficulties surrounding the prospect of convergence of the common and civil law systems, quite a few comparatists today still espouse a universalist approach either through their description of laws or by looking for ways in which legal unification or harmonization at an international or transnational level may be achieved.[66] The current interest in matters concerning legal unification and harmonization is connected with the phenomenon of globalization – a phenomenon precipitated by the rapid rise of transnational law, the growing interdependence of national legal systems and the emergence of a large-scale transnational legal practice. It is submitted that if it is true that legal rules emanate as a response to social needs (according to the socio-functional view of law), the emergence of a global society will almost inevitably lead to the gradual convergence of legal systems.[67]

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66 It should be noted that whilst unification contemplates the substitution of two or more legal systems with one single system, the aim of harmonization is to "effect an approximation or coordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards". W. J. Kamba, "Comparative Law: A Theoretical Framework", (1974) 23 ***International and Comparative Law Quarterly*** 485, at 501.

67 See M. King, "Comparing Legal Cultures in the Quest for Law's Identity", in D. Nelken (ed.), ***Comparing Legal Cultures***, (Dartmouth, Aldershot, 1997), 119; V. Ferrari, "Socio-legal Concepts and Their Comparison", in E. Oeyen (ed.) ***Comparative Methodology***, (Sage, London, 1990) 63; B. Markesinis (ed.), ***The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century***, (Oxford University Press, Oxford, 1994); R. Zimmerman, "Common Law and Civil Law, Amerika und Europa – zu

Watson's theory of legal transplants has been subjected to strong criticism by scholars who insist on functional-sociological explanations of law.[68] However, much of this criticism fails to detect the intellectual roots of Watson's theory and misses the opportunity to evaluate it in the light of its proper background. As already noted, Watson remarks that, as a matter of fact, societies often tolerate much law that has no correspondence with what is 'needed' or regarded as efficient. The thesis that law may be dysfunctional in relation to society lies in the idea of 'survivals' – a key concept of nineteenth and early twentieth century evolutionary anthropology. In his 1871 work on Primitive Culture, E. B. Tylor (often called 'the father of British anthropology"), formulated a

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diesem Band", in R. Zimmerman (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht*, (Mohr, Tübingen, 1995) 1. For a critical perspective on this issue see P. Legrand, "European Systems are not Converging", (1996) 45 *International and Comparative Law Quarterly*, 52-61. Some scholars have raised the question of whether or not 'natural convergence' is simply an euphemism for what they refer to as 'Western legal imperialism'. See A. T. von Mehren, "An Academic Tradition for Comparative Law?", (1971) 19 *American Journal of Comparative Law* 624; R. Knieper, "Rechtsimperialismus?", (1996) 29 *Zeitschrift für Rechtspolitik* 64.

68 See, e.g.. R. Abel, "Law as Lag: Inertia as a Social Theory of Law", (1982) 80 *Michigan Law Review* 785; P. Legrand, "What 'Legal Transplant'?", in D. Nelken & J. Feest (eds), *Adapting Legal Cultures*, (Hart Publishing, Oxford, 2001), 55; E. M. Wise, "The Transplant of Legal Patterns", (1990) 38 *American Journal of Comparative Law*, 1; G. P. Murdock, "How Culture Changes", in H. Shapiro (ed), *Man Culture and Society*, (Oxford University Press, New York, 1990), 256. On the view that law is the result of the social needs of a given society see in general W. Friedmann, *Law in a Changing Society*, (2nd edn, Penguin Books, Harmondsworth, 1972); M. Damaska, *The Faces of Justice and State Authority*, (Yale University Press, New Haven, 1986); L. M. Friedman, *A History of American Law*, (Simon and Schuster, New York, 1973).

comprehensive theory to bridge the gap between the present and the remote past. This was the theory of 'survivals': elements of culture or society that evolution has left behind – irrational, obsolete practices and beliefs that continue past their period of usefulness. Tylor's influential treatment of survivals inspired Oliver Wendell Holmes's analysis of the permanence of legal norms and institutions after the demise of the beliefs, necessities or customs that generated them.[69] From a functional viewpoint, however, survivals cannot be adequately understood simply by reference to that mental disposition called 'conservativism'. Conservartism itself is in need of explaining and that explanation has to be functional.[70] Watson's notion of 'inertia' may be useful to consider in this connection. Inertia is defined as the general absence of a sustained interest of society and its ruling elite to struggle for the most socially 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 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. Furthermore, the mystique surrounding law as well as practical considerations may obstruct legal change. For instance, the case may be that anticipated

69 See Oliver Wendell Holmes, *The Common Law*, ed. by S. M. Novick, (Dover, New York, 1991), 5 and 35 (originally published in 1881).

70 Consider on this A. Barnard, *History and Theory in Anthropology*, (Cambridge University Press, Cambridge, 2000) 158 ff.

long-term benefits are not sufficient to justify a reform if the costs are not outweighed by the short-term benefits. 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.

We may now proceed to comment on Watson's attempt to explain why the legal rules are quite often borrowed rather than generated by a given society. As previously noted, for Watson much in the law depends upon its 'internal logic' – a logic that is very much that of an elite distancing itself from the rest of society. In the creation of their product, lawyers enjoy a great deal of freedom and legal transplants occur thanks to that freedom. According to Watson, in most areas of law, and in particular within private law, it is not the holders of political power (those who prescribe which persons or bodies create the law and how the validity of the law is assessed) who determine what the relevant rules are or should be.[71] The study of the activity of the jurisconsults in

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71 "Law is power. Law is politics. Law is politics in the sense that persons who have the political power determine which persons or bodies create the law, how the validity of the law is assessed, and how the legal order is to operate. But one cannot simply deduce from that, as is frequently assumed, that it is the holders of political power who determine what the rules are and what the sources of law are to be". A. Watson, ***Roman Law and***

ancient Rome, of the law professors in Continental Europe and of the English judges clearly demonstrates the importance of legal elites as the real shapers of the law. In Watson's scheme, the discourses of legal elites are largely self-referential: the members of a professional group, such as lawyers, regard the law as belonging to their (distinct) professional culture. Within this group, authority is derived primarily from reputation. And reputation, in turn, depends on argumentative skill and inventiveness according to the rules of legal reasoning governing legal debates – rules that have implicitly been established by the participants themselves. This is why lawyers claim to be solving legal problems by applying a legal logic peculiar to their own profession. Thus, although lawyers may be involved directly or indirectly in political decisions, their intellectual outlook does not necessarily depend on their political orientation. Many critics failed to grasp the functional character of Watson's explanation as to why lawyers devote so much energy playing self-referential games. His point is that lawyers' activities that apparently do not satisfy any practical need establish and confirm their identity as an elite. The outcome of lawyers' discussions may be arbitrary or may reflect specific power pressures or demands. But even when the result of the process is arbitrary, it can still be explained functionally.

Concluding Note

Comparative law, when viewed in its narrowest sense of pertaining to the comparison of specific legal rules and institutions, can be fruitful

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Comparative Law, (University of Georgia Press, Athens, Georgia, 1991) 97.

mainly when limited to an intra-cultural comparison, i.e. a comparison of legal systems from the same cultural family that share the same basic conception of law. Of course, cross-cultural comparison, i.e. comparison of legal institutions operating in the context of different cultural traditions, is possible. Such a comparison, however, presupposes an examination of the relevant legal issues from a broader sociological and anthropological perspective. The element of relativity must be considered when comparative law is used in the search for similarities between different legal systems or relied upon to enhance the understanding of one's own legal system, or employed in the process of harmonizing law. This relativity is imposed by the special relationship of the law to its cultural, political and socio-economic environment and its effect on the meaning and function of legal rules, institutions and principles must be addressed. To the extent that cultural diversity is a reality, law is bound to be defined in diversified terms. There is a great deal of uncertainty about what cultural diversity actually means and about the extent to which diversity is or should be reflected in legal choices. However, the view that legal transplants are impossible, as some scholars have asserted, is probably too extreme and betrays an exaggeration of cultural diversity. To deny the possibility or the desirability of legal transplants contradicts the teachings of history and is at odds with the need for legal integration in certain world regions. On the other hand, the statement that law and society are not in close relationship can also be said to be an oversimplification. Recognizing the nomadic of transplantable character of legal rules cannot imply that change in the law is independent from the workings of any social, historical or cultural substratum. What is required is a form of analysis that is capable of striking the right balance between these, seemingly contradictory, perspectives.