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Alan Watson

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SOCIETY'S CHOICE AND LEGAL CHANGE

*Alan Watson**

This Article is one of a continuing series of writings by the author on both the connection between a society and the legal rules and institutions that operate within it and on the forces that control legal change.¹ My aim is to express more clearly than I have previously the role of lawyers and the legal tradition in changing the law, and the implications of this role for social choice theory in the realm of law.

SOCIETY AND ITS LEGAL RULES AND INSTITUTIONS

It would, I believe, be universally agreed that some connection exists between a society and the legal rules and institutions that operate within it. The question of the nature of that connection, its closeness, and the factors within society that determine legal change is not so easily settled. What is needed is a theory that can be shown to be in harmony (or at least not out of harmony) with the observed phenomenon of legal growth in a range of societies. However attractive a theory of legal change and of law and society might be on a priori terms, it requires to be checked and rechecked against systematically collated historical experience.

The minimum connection between a society and the law that operates in it may be briefly stated. Law is necessarily only a means and cannot be an end in itself. Consequently, the institutions—for instance, marriage or slavery—that we lawyers in our insularity normally think of in terms of law, as legal institutions, are in fact social institutions regulated by law.² In light of this, an existing or desired social institution that involves any law—and this will be

* Professor of Law, University of Pennsylvania.

1. *LEGAL TRANSPLANTS* (1974); *SOCIETY AND LEGAL CHANGE* (1977); *THE MAKING OF THE CIVIL LAW* (1981); *THE NATURE OF LAW* (1977); *Comparative Law and Legal Change*, 37 *CAMBRIDGE L.J.* 313 (1978); *Two-Tier Law—A New Approach to Law Making*, 27 *INT'L & COMP. L.Q.* 552 (1978).

2. Here I am using "regulated by" as including, but not necessarily restricted to, "supported by" and "being proselytized by." By "being proselytized by" law, I mean that the ruling elite wishes to bring about a social change, and is using law as at least one of the means to effect the change.

the case except where the principle "Law keeps out" applies³—will involve law that, at least in the broadest sense, reflects the known needs or desires of the society or of a powerful group in the society. For instance, an established and stable democratic society will have democratic institutions involving legal rules that indicate the democratic nature of the society; a tyranny will have organs of despotism involving legal rules showing that a tyranny exists. As for private law, a society that believes in and supports polygamy as a social institution will have legal rules relating to polygamy; a society that has slavery based on the subjugation of a race will have legal rules on the social institution of slavery indicating racism, whereas a society whose slavery is not based on the notion of the inherent inferiority of a race will have legal rules not indicating racism.

The existence of some such correlation between law and society is inevitable and certainly not surprising. But it had to be made express since it is *possible* that on a theoretical level it sets out the *only necessary* correlation between a society and its legal rules: Namely, that existing or desired social institutions will be surrounded by legal rules relating to the institution. It is *possible* that, as a *necessarily true* proposition, the claim that "Law reflects society" can be reduced to the notion that any social institution will have legal rules attached, and that any new or different social institution will in turn be surrounded by legal rules. If so, the proposition would have little significance. Likewise, it *may* be the case that the often expressed and very obscure Marxist idea that, "in the last analysis," law supports the class structure means no more than that.⁴

I think it is fair to assert that no one, however, would claim that there is no further correlation in practice between a society and its law. But it is difficult to establish the nature and extent of such a correlation.

A question which is often put (in various guises) is whether the institutions, needs, and desires of society or its ruling elite are supported to the greatest possible extent by the related legal rules. Is there a divergence between a society and its law?—where the term "divergence" is used to indicate that the "legal rule, principle

3. For a description of this principle, see A. WATSON, *THE NATURE OF LAW* 96-98 (1977).

4. See M. CAIN & A. HUNT, *MARX AND ENGELS ON LAW* 50 (1979). The idea goes back to Engels.

or institution is inefficient for its purpose in satisfying the needs of the people or the will of its leaders and when a better rule could be devised, *and* where both the inefficiency and the possibility of marked improvement are known to the persons concerned.”⁵ The answer that I reached in an earlier study,⁶ and which I would maintain today, is that there is frequently a considerable divergence in developed Western law—to such an extent as to render unacceptable existing theories of the development of law and the relationship between law and society. A related, but subordinate question, is whether society or the ruling elite can easily tolerate such a divergence. The answer is again in the affirmative. However, it should be emphasized that the divergence cannot simply be explained by the notion of a time lag between the change in society and the corresponding change in the law.⁷

If the correlation between law and society is not always very close, and if society and its ruling elite can easily tolerate many and great divergences, then we must ask what determines the particular rules that do emerge when others might seem at least as suitable. Such divergences and their toleration mean that legal growth cannot be sufficiently explained in terms of present societal conditions or the social history of law.

Yet legal growth cannot be entirely haphazard (nor, I believe, would anyone claim that it is). If legal institutions are social institutions that are regulated by law, and if the social institutions are de-

5. A. WATSON, *SOCIETY AND LEGAL CHANGE* 5 (1977).

6. *Id.* at 130-39. To make the case manageable, but systematic, and to avoid entering into debate on the meaning of some sociological concepts, I expressly attempted to deal with what seemed to be major instances of divergence where the impact of the legal rules could either not be avoided or else avoided only at considerable cost and where one could not identify any group or class (including the ruling elite) that benefited from the rules that existed. This approach has not been approved by all critics. J. N. Adams finds the approach atheoretical, considers it inappropriate or weak to avoid dealing with concepts like class, elite, and status groups, and objects that I did not distinguish between major and minor instances of divergence. Adams, Book Review (A. WATSON, *SOCIETY AND LEGAL CHANGE*), 42 *MOD. L. REV.* 121 (1979). I stand by my approach. Given that the examples of divergence included much of the Roman system of contracts, which is the most highly praised and most influential part of Roman law, the Roman power of the father, which was regarded by the Romans as the most characteristic feature of their law (but which they attempted assiduously to circumvent), and the system of land tenure and registration in England until 1925, I unashamedly assert that they are major, and that a theoretical discussion of the distinction between major and minor examples of divergence would serve no constructive purpose. A. WATSON, *SOCIETY AND LEGAL CHANGE* 12-60 (1977).

7. A. WATSON, *SOCIETY AND LEGAL CHANGE* 12-22, 47-60 (1977).

sired by the society or its ruling elite, then the law must be supportive, at least to some degree. In addition to this a priori argument, which by itself gives no indication of the closeness or the nature of the tie between law and society, there exists a second, a posteriori, argument: Namely, it is not difficult to spot a pattern of development in Western legal systems, and to divide these systems into families—especially into civil law and common law families.⁸ The existence of a pattern of development postulates common elements important to this development.

Nevertheless, the particular family groupings that are observable for the West alert us to a further feature of legal change. The division into civil law systems and common law systems is not paralleled by divisions in social, political, or economic conditions in the countries that have adopted one route or the other. While some civil law countries and some common law countries may have experienced the same extreme economic changes such as were caused by the Industrial Revolution, others were spared that experience. And civil law countries may have governments ranging from democratic through aristocratic and monarchical to tyrannical without losing the legal characteristics of being civil law systems. To make the division of systems into legal families more interesting still, the same legal historical elements—such as Roman law, Germanic customs, canon law, feudal law—have gone into the development of both. The explanation of the division is to be found, I suggest, in one element of the otherwise shared legal tradition: Civil law systems accepted Justinian's *Corpus Juris Civilis* in whole or in part as the law of the land or as directly persuasive. The resulting study of the *Corpus Juris* over the centuries produced approaches to law differing markedly from those found in common law systems.⁹

If this argument is soundly based on the evidence, then we must face its implication: To a very large extent, the structure of the law and the legal rules derive from the legal tradition itself. It may seem obvious that the legal tradition will affect the growth of the law, but it is an element that is easily overlooked. Even when it has not been overlooked, the general tendency, in my opinion, has been not to give it the importance it clearly merits.

8. See, e.g., R. DAVID & J. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 21-29 (2d ed. 1978).

9. See generally A. WATSON, THE MAKING OF THE CIVIL LAW (1981).

FACTORS OF LEGAL CHANGE AND THE LEGAL TRADITION

Previously, I set out abstract models for legal change and the relationship between legal rules and society. I suggested:

The precise relationship between legal rules (both particular and in general) and the society in which they operate can be expressed as the balance between two opposing sets of factors, the first which inhibits change, the second which determines the change that is proposed. Namely, on the one hand: Inertia plus Opposition Force. On the other hand: Felt Needs, weakened by the Discretion Factor, activating the Pressure Force as affected by the Generality Factor, to work on the Source of Law, all as modified by Transplant Bias (and Law-shaping Lawyers).¹⁰

I will now return to these factors, examining each from the angle of their involvement with the legal tradition.

Source of Law

The Source of Law—and each Source such as precedent or legislation has different effects on the course of legal development—is involved to different degrees with the legal tradition. For instance, juristic opinion above all and precedent only to a slightly lesser extent come directly out of what lawyers feel the law should be, and the constraints here arise from the legal tradition itself. Thus, while judges may regret reaching particular decisions, they may express that they are bound by what they feel the law already is. Legislation is less inevitably tied to the legal tradition. One may envisage a legislature entirely composed of nonlawyers, which determines the contents of a statute without knowing the pertinent, general legal background. Typically, however, lawyers in the legislature are prominent in framing the issues and limiting discussion. Again, typically, the legislation will be drafted at some stage by lawyers who will be working within their own legal experience. Custom derives from what the society or a group within society approves. This does not directly involve the legal tradition, except that for a custom to become legal custom it must be judicially recognized.

None of the above should be taken as suggesting that even juristic opinion or precedent will be free from social, political, or

10. Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 333 (1978).

economic conditions. Rather, the Source of Law will frame law in terms of the options known and thought acceptable by the Source.

Pressure Force

Pressure Force is the organized person(s) or recognizable group(s) who believes that a benefit could result from a practicable change in the law. The power of a Pressure Force to effect change depends on both the social and economic position of its members and its capacity to act on a particular Source of Law; some Sources are more responsive to Pressure Forces than are others. There is no necessity for a Pressure Force to be involved with the legal tradition. The members may not have legal training, but only a strong notion of what they want the law to be on the particular issue. I have previously argued that legislation was particularly subject to a Pressure Force, precedent much less so, and that juristic doctrine was largely immune.¹¹ If that is correct, then each of these three Sources of Law are affected by a Pressure Force in an inverse ratio to their involvement with the legal tradition. This is even more the case when the Source of Law is custom, which is least involved with the legal tradition; the Pressure Force frames the custom that gains legal acceptance.

Opposition Force

The converse of Pressure Force is Opposition Force, which is the organized person(s) or recognizable group(s) who believes that harm will result from a proposed change in the law. Likewise, the Opposition Force need not have a connection with the legal tradition.

Transplant Bias

Transplant Bias is a system's receptivity to a particular outside system of law—a receptivity distinguishable from an acceptance based on a thorough examination of possible alternatives. Law, I believe, develops mainly by borrowing rules and structures from elsewhere.¹² Since the rules and structures must be known in order to be borrowed, and since it is lawyers who predominately know foreign law, the Transplant Bias is very much involved with the legal tradition.

11. *Id.* at 325.

12. A. WATSON, LEGAL TRANSPLANTS (1974).

A slight qualification is required: A Transplant Bias might be determined by political ideology rather than by legal tradition. This is particularly noticeable with legislation, especially with a large-scale reception. Thus, many countries accepted a code of private law that was either in its entirety or with slight modifications the French *code civil*—at least partly because of France's prestige following Napoleon's conquests. But we must be careful not to exaggerate: The countries that voluntarily did so already had a civil law system; no common law country was so influenced by Napoleon's fame that it adopted even a modified *code civil*. To bring Turkey into the modern world, Attaturk adopted the Swiss codification in 1926. The Turkish legal tradition had been very different, but it should be noted that Attaturk's Minister of Justice had studied law in Switzerland.¹³

Mercantile custom is also susceptible to a considerable Transplant Bias—without the borrowers' necessarily having much knowledge of law. But what is borrowed is international mercantile law based on what merchants do. To a very large degree, this law is received because the merchants' business would otherwise be directly disadvantaged. This means that what is borrowed is not just any reasonably suitable law, but the only suitable law.

Law-Shaping Lawyers

This factor need not detain us. Law-shaping Lawyers are the embodiment of the legal tradition. In the model set out above, this factor is placed within parentheses to indicate that it is not a separate factor of legal change.

Discretion Factor

The Discretion Factor is the degree of discretion that is inherent in the operation of the law. The discretion may be given to the parties, to the judge, to the executive, or even built into the legal rules. The Discretion Factor is very much part of the law as it already exists—it is, in effect, part of the legal tradition. In general, the greater the Discretion Factor, the less impetus there is for further change.

Generality Factor

The Generality Factor refers to the range of recognizable groups of persons or to the range of different types of transactions

13. A. WATSON, *THE MAKING OF THE CIVIL LAW* 120-27 (1981).

or situations affected by a legal rule. Since the Generality Factor is determined by the existing legal rule, it too is part of the legal tradition. Again, to speak generally, the greater the Generality Factor, the more difficult it is to effect a legal change. For the analysis in this Article, both the Discretion Factor and the Generality Factor are treated as largely unimportant.

Inertia

I have previously defined Inertia as the "general absence of a sustained interest on the part of society and its ruling élite to struggle for the most 'satisfactory' rule."¹⁴ Inertia has been grossly underestimated as an element relevant to legal growth: Inertia, above all, is the factor that determines that legal rules will be greatly out of step with the needs and desires of society and the ruling elite.¹⁵

But my previous analysis of Inertia requires sharpening. As a factor relevant to legal change, Inertia should not be attached to society or its ruling elite at large, but to particular legislatures, judges, or juristic writers. This is not to say that society or the ruling elite always push hard for reform, but only that their contribution or lack of it is adequately covered in terms of the factors of change by Pressure Force, Opposition Force, and the combination of the two. This is most clearly seen when we consider a successful legal change. It may not have occurred to anyone besides the legislature or a jurist that a change was desirable or possible, and there may have been profound public indifference. That is, there may have been no outside Pressure Force. Yet, if the legislature or jurist overcomes its or his own Inertia, the legal change will be made.

Inertia, however, should not be merged with Source of Law as a factor of legal change. Inertia is not relatively constant within one Source of Law, such as legislation, nor can one detect a general difference between the extent of Inertia concerning one Source, such as precedent, and another, such as juristic doctrine. Rather, Inertia is a factor attached to a particular legislature, for instance, and it varies both from time to time and between that legislature and other legislatures. The same is true with jurists, and so on: One jurist may have a different Inertia rate than another, and that

14. Watson, *supra* note 10, at 331.

15. See A. WATSON, SOCIETY AND LEGAL CHANGE 115-29 (1977).

Inertia may vary from time to time. Public indifference will have an effect on the energy of legislatures, judges, and jurists. But that does not move Inertia back as a factor attached to society or the ruling elite.

Felt Needs

Felt Needs are the social purposes of law that are known to and thought appropriate by the Pressure Force that operates on a Source of Law. They are, therefore, connected with the legal tradition only insofar as is the Pressure Force itself.

MAKING LAW ACCOUNTABLE TO SOCIAL CHOICE THEORY

The main purpose of the preceding section was to show the immense extent to which the factors of legal change are involved with the legal tradition itself. We may also see that the involvement of the legal tradition with legal change varies to some extent according to the Source of Law.

If my arguments and conclusions up to this point are correct, then we are faced with a problem of great magnitude for social choice and law reform. Whatever our resolutions for measuring social consensus or for deciding the principles of general approval that should determine when law should be changed—which will be discussed by other contributors to this symposium—the existence of all the indicators for change in any particular instance will not mean that reform will occur or is even *ipso facto* likely to occur. And if a reform does occur, it is very likely to be shaped in terms of the legal tradition. Put bluntly, general law reform should primarily be approached not from the angle of what people in society want in particular situations, but from the angle of improving the quality of the Source of Law.

To inject a personal observation: It is a matter of astonishment that in an age when so many resources are devoted to seeking out and proposing the most satisfactory rules of substantive law, so little attention is paid to the fitness of the available Sources of Law for responding to what is wanted. One minor illustration may point the problem. Conveyancing reform had long been sought in Scotland. There was an absence of opposition to it, and eventually the Land Registration (Scotland) Bill 1979 was laid before the U.K. Parliament—a bill described in the House of Lords by Lord Mackay of Benshie as “probably about 100 years overdue.” Indeed, it appears that among the inequities of political life is that an unopposed issue frequently attains low priority—since no political

party profits from it. In keeping with this assessment, much of the discussion of the Bill in both Houses was facetious, fatuous, and anecdotal. Expressed narrowly, the lesson might be that in a country in which private ownership of land is not itself in issue, a politically appointed legislature is not a satisfactory Source of Law for questions relating to the technical method of land transfer. But, as other examples show, the lesson is also broader:¹⁶ Lawmaking by a legislature which is primarily politically based can be very neglectful of human values that politically are neutral or offensive even to a small minority. Yet legislation is the predominant mode of lawmaking in the modern Western world.

What, then, is needed to make law more satisfactory in a society wishing to take account of social choice theory as fully as possible? The answer is twofold: First, the available Sources of Law must be directly responsive to the serious needs and desires of society. For this, they must be able to introduce legal change when society changes; they must make law as comprehensible as possible, since only if people know what the law is can they express disapproval of it and emphasize the desire for change; and they must make the law as comprehensive as possible. Exactly how all this can be achieved may vary from country to country, but the best solution will have, I believe, two main characteristics. To begin with, the dominant Source of Law must be legislation, since no other Source can so easily make law responsive to social change, as well as comprehensible and comprehensive. And this legislation must somehow be directly in the hands of law makers who are at least one step removed from the political legislature. I have previously proposed and would still maintain a system of two-tier law.¹⁷ The first-tier law would be similar in structure and content to a code such as is found in civil law countries. It would provide answers to the vast majority of legal questions, and would be written and structured so as to be understood by the majority of the population. The second-tier law would be much more detailed, rather akin to some of the commentaries on the code existing in many civil law countries. But this second-tier would itself be law with the function of providing an authoritative interpretation of first-tier law, setting out the principles and determining the law in detail

16. *Id.*

17. Watson, *Two-Tier Law—A New Approach to Law Making*, 27 INT'L & COMP. L.Q. 552 (1978). The model in that article was not for a federal system, but it could be adapted without too great difficulty.

and in borderline disputes. The second tier would make the law comprehensive. Attached to the legislature would be an interpretative committee, which would prepare second-tier law and lay a draft before the legislature, and once a year lay proposed changes in first-tier law before the legislature. The legislature could debate the changes, and its decision would naturally override the interpretative committee, but rules not debated or challenged would become law automatically on the expiry of a fixed period. When the legislature passed a statute, the interpretative committee would have the function of reformulating it to fit it within the first- or second-tier law. The interpretative committee would make the law responsive to changes in society while the legislature would remain supreme in lawmaking, but it would be spared—when it wished—the necessity of preparing and debating law reform having little immediate political impact or where the impact on any political party proposing reform would be deleterious, although all parties favored reform.

If some such structure of tiered law were adopted, it would be possible to have a system of law in which the impact of social choice could be much greater. And this brings us to the second part of the answer on how to make law more satisfactory in a society wishing to take account of social choice theory. The legal tradition itself—the importance of which for legal change has been emphasized throughout this Article—can be manipulated to serve the community better.

The main vehicle for legal change would be the interpretative committee, and its members would be selected for their technical legal ability, the clarity and precision of their drafting style, their balance, their legal inventiveness, and their social awareness.¹⁸ Inevitably, most committee members would be legally trained. Hence, the committee would be more bound to the legal tradition than legislators generally are.

One advantage of the legal tradition's having an impact on legal growth is that it is precisely this that enables different parts of the law to have some degree of coherence. By concentrating legal growth in the hands of a small group of specialists who are experts in the legal tradition, one major effect will be to make the law more coherent. Coherence makes the law more aesthetically pleasing to lawyers, but more importantly, it makes the law more com-

18. For a more detailed discussion on the composition of the interpretative committee, see *id.* at 553-60.

prehensible and more in accord with the particular view of justice that predominates in the society.

Thus, the legal tradition is a bonus for society, provided it works for society. The legal solution closest to the wants of society is needed. This can be achieved only when the lawmakers are aware of the whole range of legal possibilities. In other words, the members of the interpretative committee should have as much comparative expertise as possible, and they and their fellow lawyers should be open to the influence of foreign legal ideas.

CONCLUSION

The conclusions of this Article can be briefly stated. While the legal tradition plays a fundamental role in legal change, legal rules, structures, and institutions are often greatly out of step with Western society. Thus, to bring about the most satisfactory law reform, it is not enough to identify what society wants, but it is essential to provide the best Source of Law and make the legal tradition serve society's needs.