

FOREWORD

Legal Change, Legal Transplants and the Scholarship of Alan Watson

In 1977 Alan Watson, then a professor of Civil Law at the University of Edinburgh, published *Society and Legal Change*, which is now brought out in its first American edition. Since then Watson has become one of the world's foremost scholars of legal history. Much of his work has been in Roman law, where he is generally recognized as the leading expert in the English-speaking world. Similarly, his work on the law of slavery is especially valuable. His *Roman Slave Law* (1987) is the definitive work in the field. His masterful *Slave Law in the Americas* (1989) illustrates the range of his work, bringing together his work in Comparative Law, the law of slavery, and Roman law. In the last decade Watson has branched into the biblical context of law, with such books as *The Trial of Jesus* (1995).

Because *Society and Legal Change* was first published in Scotland, it is appropriate and useful that it is now published in the United States, where American legal scholars are more likely to have access to it. The book provides a theory for integrating comparative legal developments both into legal history and more generally into legal scholarship.

Watson's theories, laid out here, are remarkably simple. In his earlier book *Legal Transplants* (1974), Watson argued that Comparative Law was, in the end, the study of legal development, of patterns of legal change, and thus of the relationship of law and society. Watson argues that to uncover these factors we must concentrate on the development of law over a long period of time and in different societies. Such study illuminates the similarities and differences, the causes of legal growth. Watson argues that the relationship between law, society, history, and social change are invariably the result of borrowing, whether from one of these societies by another, or from a common source, or both.

In *Society and Legal Change*, Watson follows up on some of his earlier work on the spread of law from place to place. As he argues in Chapter 9, appropriately titled "Legal Transplants": "at most times, in most places, borrowing from a different jurisdiction has been the principal way in which law has developed" (p. 98). This is certainly true in the English

world. British colonists brought English (and sometimes Scottish) law to America, where they imposed it on a landscape and emerging culture, sometimes successfully, sometimes not. More successfully, Americans from the eastern seaboard moved west, taking law and legal ideas with them. Kentucky's first Constitution looks much like Virginia's; Tennessee's Constitution mirrored North Carolina's. On the Pacific coast Constitutions resembled those of mid-western states. Similarly, it is possible to talk about an American law of slavery, because most of the states borrowed from each other as the institution of human bondage spread west. Similarly, as Watson's own work shows, the master class throughout the Americas borrowed Roman law concepts when constructing legal regimes to support slavery.

Sometimes of course the borrowing is less voluntary. When the United States purchased Louisiana from Napoleon, the Francophone settlers suddenly were forced to "borrow" such concepts as the jury trial from their new American overlords. But, as Watson shows, such forced change cut for and against French law: Napoleon's armies brought law and legal theory with them, as they spread over Europe. Similarly, at least at the level of Constitutional development, the Allied victory and American occupation of the defeated Axis powers in World War II brought new legal ideas to West Germany and Japan; so too did the Soviet occupation lead to legal imposition on East Germany and eastern Europe.

The most obvious examples of this kind of borrowing and transplantation come from Roman law. And here, of course, Watson has always been at his best. In *Slave Law in the Americas* he shows how Roman slave law was taken to the New World, where it sometimes worked, and sometimes did not. But, however appropriate it was, Roman slave law became the model for the law of slavery throughout Latin America, as well as in Louisiana. In *Society and Legal Change*, Watson shows us the Roman borrowing where we might expect it, noting, for example, that "the theory that the Holy Roman Empire was a continuation of ancient Rome would play a very important role in Germany, but the general high quality of Roman law, the accessibility of the legal materials in the *Corpus Juris Civilis*, and the richness of the materials within a reasonable compass were the final and vital determinants" (p. 99) in the spread of Roman law into the early German states.

But he also shows borrowing from Roman law where we might not expect it. What is fascinating about Watson is his ability to teach us about legal borrowing and Comparative Law even in the modern era. Thus, he tells us the story of *Pahad v. Director of Food Supplies and Distribution*, a South African case from 1949. This case involved commodities "frozen" by a war board, which were stolen before the war board could take actual possession of the goods. Who then, suffered the loss? The

court turned to Roman law, which it distinguished from the Byzantine corruption of that law, to help settle this very modern issue. Borrowing, not only across borders, but also across many centuries, still exists.

Part of the richness of this book, and indeed of all of Watson's work, is a function of the breadth of his scholarship. He cites works in English, Italian, German, Dutch, Latin, and French. His cases are from England, Scotland, South Africa, California, and Ireland, among others. He goes from the latest law review article to the *Mishnah* and the Twelve Tables of Rome with the ease that most scholars read the morning paper. In essence, the scholarship is breath-taking. This is how Comparative Law was meant to be done.

While further elaborating his thesis on borrowing, *Society and Legal Change* takes off in important new directions as well. Watson looks at legal systems in tandem as he explores patterns of development. His conclusions are startling. He argues that even in the most innovative systems, the persons with the power to change the law often do not do so for centuries even when the law is dysfunctional and harms these leaders. This is the case even when the elite are well aware that change would be helpful. For instance, the English introduced land registration into Ireland in the seventeenth century, and into their American colonies. This was a positive innovation. But England itself rejected registration until 1925, and it was not until 1990, after this book was first published, that the system was fully in place. Watson's argument is that legal cultures resist many useful innovations, such as land registration, in part because of inertia and in part because of the desire of legal actors to avoid radical change. The insight here, from English law, can of course be applied to American law. One simple example explains this. The English settlers brought with them English procedure with its cumbersome and impossibly complex writ system. Americans kept this system going for over a century and a half after independence. Watson's work may provide a theory to answer the question, Why did the legal profession resist wholesale procedural change until the promulgation of the Federal Rules of Civil Procedure?

Watson's work, especially *Society and Legal Change*, challenges the foundations of the traditional sociology of law. Watson published *Society and Legal Change* at almost the same time as Morton J. Horwitz's pathbreaking work on American law, *The Transformation of American Law* (1977). The two books offer contrasting visions and understanding of law. Horwitz propounded a concept of "instrumentalism" to argue that judges, particularly American judges in the nineteenth century, consciously used their power to reshape the law in order to help some industries at the expense of others. The law and economics movement, which began to grow at about this time, had of course a similar thrust, but with

a different conclusion. Where Horwitz saw special interests gaining power, the conservatives of the law and economics movement saw efficiencies where the law worked and developed “right,” and inefficiencies where the law did not develop. From a slightly different perspective James Willard Hurst, the dean of American legal historians, argued two decades before, in *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956) that law was the catalyst for the release of creative energies among settlers.

Watson offers two complimentary and equally compelling theories of legal development. The first, which is found throughout his work, is the notion of borrowing. In this sense, Watson dovetails a bit with Hurst and also John Reid. Hurst’s western settlers brought law with them, and used it to provide the mechanisms for economic development. This is a kind of borrowing. John Reid, in *The Law for the Elephant: Property and Social Behavior on the Overland Trail* (1997), described how settlers carried the law with them on the wagon trains. This too mirrors Watson’s notions of borrowing. However, Watson takes the borrowing further, seeing it in global terms. Unlike most legal historians, Watson’s work is not limited by time, geography, or language.

Watson’s second theory, which is the major thrust of *Society and Legal Change*, differs from Horwitz, Hurst, and the law and economics scholars. Here Watson offers the suggestion, radical at least in 1977, that the legal system may not be so much about change as it is about continuity and repetition. This is implicit in the concept of legal transplantation and borrowing. Rarely, Watson argues, do judges and legislatures actually create new law; rather, they borrow from others or, as is often the case, they make do with what they have. Thus Americans borrowed the writ system, already obsolete and cumbersome, and suffered with this antique system for a century and a half. .

Dovetailing with borrowing is Watson’s startling argument that legal systems will tolerate great inefficiencies before accepting change. This cuts against both Horwitz and the law and economics movement. Consider, as Watson does, English land law: The system was notoriously inefficient and, quite frankly, stupid. The rules of land ownership grew up in feudal times. The rules were complex then, and got worse over time. By Blackstone’s time the rules made no sense at all, but, as Watson reminds us, in the hands of an expert, they could be manipulated to “produce almost any result which an aristocratic landowner could wish” (p.48). As Watson notes, such manipulation was expensive, and while “it is true that the rich can afford to pay for the services of the best conveyancers” it is also true that “even the rich can hardly be expected to take pleasure in doing so” (p.48). Thus it would seem, from an instrumentalist perspective, like that of Horwitz, the land system should have

been replaced by something less cumbersome and less expensive, but still supportive of the economic and social goals of the elite. From a law and economics perspective the system should also have changed, because it was simply inefficient and too expensive. Significantly, Horwitz sees some English innovations, like the fellow servant rule, as instrumentalist. If English judges were instrumentalist, or economically efficient, just as their American counterparts, they should have moved against the land system. But, as Watson notes, the system did not change. It instead went on and on and on with its costly conveyancers and dangerously complex rules. Thus, despite the “importance of real property in English law,” the land law system remained “out of step with society” (p. 49).

Most legal historians, looking at one society, one country, and one time period, offer explanations about legal change. Watson’s great contribution is that he offers us a theory of legal stagnation. He explains why law does not change, rather than telling us why it did change. This is a remarkable contribution, since so often law does not change.

Watson’s insight into how law changes or remains the same is informed by his argument that the legal history of one country cannot be understood in isolation. Every legal historian, he implies, must be a comparativist, and conversely every comparative lawyer must be a historian. We can of course dispute the thesis. Many of us work in the legal history of one country and even in one slice of that country’s history. Our work nevertheless can be fruitful and important. But surely, Watson’s comparative insights can improve our understanding of what we do. Every legal historian cannot be a comparativist, but surely we can all learn from the kind of comparative legal history that Watson offers in this book. Furthermore, we can test our findings against Watson’s theories. My guess is, that if we do, our work will be vastly improved.

Many scholars will continue to reject the idea of transplantation or borrowing; more will be uncomfortable with the idea that the legal system will tolerate inefficiency to avoid change. But whether we reject or accept either thesis, our work will be enriched by coming to terms with Watson’s ideas and arguments.

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PREFACE TO THE SECOND EDITION

When Douglas Grant, publisher of the first edition, invited me to consider republication of this book I was delighted. Then I was surprised to find that I wished to make no changes. The message of the book remains as it was in 1977. But a short preface seems appropriate. My starting point is a recent comment by Charles Donahue with which I am partly in agreement. He writes:¹

Conscious or unconscious borrowing of institutions, ideas, ways of thought, or whole codes is a legitimate topic of comparative inquiry, but it is not in itself a topic of comparative inquiry. To say that Turkey adopted the Swiss Civil Code and Swiss Code of Obligations in 1926 is not a comparative statement; it is a statement about the history of Turkish law. To engage in comparative inquiry we must compare. We must, for example, show that the Swiss Civil Code was interpreted differently in Switzerland from the way it was interpreted in Turkey—or that it was interpreted in the same way. We must ask how adoption of the Swiss Civil Code impacted on Turkish society in comparison with how it impacted on Swiss society. We must ask what happened when a body of law that presupposes a whole series of western ideas about the nature of law and governance was adopted by a people that did not fully share those ideas.

To say this, of course, is an implied criticism of one aspect of the work of the man who is probably the most prominent comparative legal historian North America, Alan Watson. Watson's work is stimulating. There is no question that his numerous works on the history of the transplant and reception of legal rules have arrived at a comparative conclusion. To put it perhaps too bluntly, in Watson's view the legal profession in most western societies is so out of touch with reality that social forces have relatively little effect on the way that legal systems develop. That conclusion may be right. My problem with it is that by focusing almost exclusively on the formal statements of the rules rather than on their interpretation, their impact on society and their interaction with the high-level ideas that surround them, Watson has made it too easy for himself. He is doing comparative work, but it is comparative work that ignores some of the more important questions that the method inspires.²

This preface is particularly apt for commenting on the comment. Donahue is, of course, correct that my main focus in comparative legal history has

been on the formal statements of the rules. But he misleads when he claims that this focus is almost exclusive. Indeed, specifically on the impact of the reception of Swiss law in Turkey I wrote: "Even after such legislation a reception is not a once and for all act, but a social process extending over many years. The result will not be Swiss law in Turkey, but Turkish law that owes much to Swiss legal culture, concepts and rules."³ When one writes about legal borrowing the focus must be on rules, institutions, and structures. That is what is appropriated. One can borrow Roman legal rules but not the spirit of Roman law.⁴ In the nature of things, legal rules that are identical whether as a result of borrowing or not will operate differently in two societies. The Dominican Republic took over the French *code civil* in 1845, even leaving it untranslated until 1884. No one (I imagine) would think that in 1860 the rules of contract operated in the same way in the two countries. Indeed, in my earliest sustained effort on comparative law I wrote:

Variations in the political, moral, social and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level. For instance, the legal problem of rent restriction is not the same both in a country where rented accommodation is common and in a country where it is less common; the problem of alimony for divorced wives in a jurisdiction where it is usual for women to work differs from that in a country where women do not have jobs;⁵ that problem and the proper legal response to it may also be altered by the availability or otherwise of crèches and nursery schools for young children; the legal problem of the enforceability of contracts against minors will vary with the affluence of the society, the age at which young people become accustomed to living on credit, and the extent to which residing away from their parents is prevalent.⁶

Professor Donahue writes: "We must ask how adoption of the Swiss Civil Code impacted on Turkish society in comparison with how it impacted on Swiss society."⁷ We may ask the question but it would be foolish to expect a satisfactory answer.⁸ Comparative law and comparative legal history are in their infancy. Professor Donahue's approach would subject them both to crib-death syndrome. We must begin with simple questions: on the nature of the borrowing of legal rules; on their how, when, and why. Actually the answers here are also not so simple. At the same time we may study the impact of one identical rule on similar persons in the two societies. But we cannot at this stage of the game evaluate the impact on a society as a whole of the acceptance even of a single rule, far less of a whole code.⁹ The extent of the difficulty becomes plain when we notice that even within one country legal rules impact very differently on different groups.¹⁰

In *Society and Legal Change* I am dealing specifically with the impact of legal rules on society. In particular I look at the phenomenon of survival of legal rules long after it is well known that their effect is not beneficial.

My proposition of a high survival rate of known harmful legal rules in Western states can, I believe, be generalized, but for clarity and simplicity I concentrate on two restricted areas: the two most admired legal systems; and rules which are disadvantageous to the ruling elite or some powerful section of society. If Roman law and English law can support laws that are known to operate badly and unnecessarily so for the leaders of the society, then surely we may assume that other Western societies will long tolerate legal rules that impact badly on other societal groups?

Roman *patria potestas*, the power of a father over his children and grandchildren, meant above all that persons in paternal power could own no property. This was true no matter the age of the son, even if he were consul, the highest state official. *Patria potestas* could have little meaning for the poor, the bulk of the free Roman population, but would bear heavily on grown-up sons from the wealthy classes. But *patria potestas* did not disappear. Absence of registration of title to land and unnecessary complication of tenure in England long survived to the harm of the property-owning classes who controlled Parliament.¹¹ Well-known and attested absurdities in the law of libel long continued to the great disadvantage of wealthy and powerful newspaper proprietors.

This volume is one of an ongoing series of works in which I try to tease out and account for aspects of law and its relationship to the society in which it operates.¹² In the earliest of these, *Legal Transplants*, I seek to show the enormous extent of legal borrowings, and to indicate some of the implications. In *The Making of the Civil Law*¹³ I try to bring out something of the importance of the legal tradition itself for the shaping of legal institutions and rules. In a book in progress, still untitled, I hope to show that the dominant characteristics of any particular legal system are the product of a small number of recognizable elements.

I should like to leave the last word of this preface to F. W. Maitland, probably the greatest of all English legal historians: "The law of Husband and Wife is in an awful mess (I don't think that a layman would really believe how bad it is). . . ."¹⁴

Since 1977 I have reflected often on the basic message of *Society and Legal Change*: that law that was prejudicial to the ruling elite who had power to change it could long remain in force. A paradox. But I have not written to the point. Rather I have been much occupied with related issues: patterns of legal development in systems where the input of society, is in the background. How can it be that very different social systems undergo similar legal growths? How can governments for so much of the time be indifferent to private law? Why, when great legislators appear, such as Justinian, Frederick the Great, Napoleon, Atatürk, is there so little of a precise social or economic message in their law? In the hope that this new edition will provoke controversy, I append a chronological list of my subsequent works that may be useful.

Books

- The Making of the Civil Law* (Cambridge, MA, Harvard University Press, 1981).
The Sources of Law, Legal Change and Ambiguity (Philadelphia, University of Pennsylvania Press, 1984; European edition, Edinburgh, T. & T. Clark, 1985; 2d ed. University of Pennsylvania Press, 1998).
Failures of the Legal Imagination (Philadelphia, University of Pennsylvania Press, 1988).
Studies in Roman Private Law (London, Hambledon Press, 1991).
Joseph Story and the Comity of Errors (a Case Study in Conflict of Laws) (Athens, University of Georgia Press, 1992).
Legal Transplants, 2nd ed. (Athens, University of Georgia Press, 1995).
Law Out of Context (Athens, University of Georgia Press, 2000).
The Evolution of Western Private Law (Baltimore, Johns Hopkins University Press, 2001).

Articles

- ‘Comparative Law and Legal Change,’ *Cambridge Law Journal* (1978), pp. 313-336.
‘The Justice of the U.S. Constitution,’ *International Journal of Moral and Social Studies* (1985), pp. 21-30.
‘Slavery and the Development of Roman Private Law,’ *Bullettino del Istituto di Diritto Romano* (1987), pp. 105-118.
‘Chancellor Kent’s Use of Foreign Law,’ in *The Reception of Continental Ideas in the Common Law World, 1820-1920*, ed. by M. Reimann (Berlin, 1993), pp. 45-62.
‘Thinking Property at Rome,’ *Chicago-Kent Law Review* (1993) (Symposium on Slave Law), pp. 1355-1371. (Reprinted in *Slavery and the Law*, ed. by Paul Finkelman (1997), pp. 419-434.)
‘Seventeenth-Century Jurists, Roman Law, and the Law of Slavery,’ *Chicago-Kent Law Review* (1993) (Symposium on Slave Law), pp. 1343-1354. (Reprinted in *Slavery and the Law*, ed. by Paul Finkelman (1997), pp. 367-378).
‘The Importance of Nutshells,’ *American Journal of Comparative Law*, (1994), pp. 1-23.
‘Aspects of Reception of Law,’ *Am. Jnl. Comp. Law* (1996), pp. 335-351.
‘Trade Secrets and Roman Law: the Myth Exploded,’ *Tulane European and Civil Law Forum* (1996), pp. 19-29.
‘Fox Hunting, Pheasant Shooting, and Comparative Law,’ *Am. Jnl. Comp. Law* (2000), pp. 1-38 (with Khaled Abu El Fadl).

PREFACE

The argument of this book is that in the West rules of private law have been and are in large measure out of step with the needs and desires of society and even of its ruling elite; to an extent which renders implausible the existing theories of legal development and of the relationship between law and society. The ability and readiness of society to tolerate inappropriate private law is truly remarkable. The main but by no means sole cause of this divergence is inertia, a lack of serious interest in developing legal rules to a satisfactory point and in changing them when society changes. Theorists seeking to understand the nature of law have neglected the significance of inertia and the longevity of legal rules. Lawyers in fact have exaggerated the role of private law rules in promoting the well-being and happiness of society; society's essential stake in these rules is the avoidance or settlement of conflict, and for that their quality is of secondary importance. In the discussion the historical dimension of law is stressed. A legal rule has its being not only in the present but in the past, and the future develops from the present.

As always I have been lucky in my friends. Too many to be mentioned here discussed problems with me, but at one stage or another David Bentley, Prodromos Dagtoglou, Tony Honore, Sandy McCall Smith, Neil MacCormick, and Gianfranco Poggi all read a draft to my great benefit. So did John Barton and Otto Kahn-Freund, both of whom went far beyond what could reasonably be expected from friends and colleagues in pointing out deficiencies and suggesting improvements.

A kind invitation from the Faculties of Arts, Law, and Social and Environmental Studies at the University of Liverpool to deliver six lectures on this subject in January and February, 1976 gave me a welcome opportunity to test reactions to my thesis. I could not here thank by name all those who provided stimulus, criticism and hospitality, but my gratitude extends to all individually.

As on previous occasions Mrs. Mary Schofield coped admirably with an untidy manuscript.

Finally, I must thank the Leverhulme Trust which allowed me to

use the remainder of a research grant (awarded for a different purpose) to visit libraries to collect material and discuss points with European scholars.

Alan Watson

Edinburgh
April, 1976

Chapter 1

INTRODUCTION

Writers have long been fascinated by the relationship between law and society. As G. Sawyer puts it:

The material content of a legal system has always been seen to reflect in some sense the needs or demands of societies, whether of all societies or of a particular historically conditioned society or of a particular society considered as a type in a range of types.¹

For many, law is intimately connected with the society in which it operates. For instance, among leaders of Western legal thought we have Montesquieu:

The political and civil laws of each nation . . . must in fact be so particular to the, people for whom they are made, that it is the merest chance if those of one nation can suit another.²

Or more romantically, Friedrich von Savigny:

If we ask further for the subject in which and for which positive law has its existence, we find this is the people. Positive law lives in the common consciousness of the people, and therefore we have also to call it the law of the people (Volksrecht). But this should not be so understood as if it were the individual members of the people through whose arbitrary will the law is brought forth. . . . Rather it is the spirit of the people (Volksgeist), living and working in all the individuals together, which creates the positive law, which is therefore, not by accident but necessarily, one and the same law to the consciousness of each individual.³

The followers of this view are legion. Thus, Lord Cooper of Culross, a famous Scottish judge:

The truth is that law is the reflection of the spirit of a people, and so long as the Scots are conscious that they are a people, they must preserve their law.⁴

E. N. van Kleffens:

The history of a nation's law is a condensed history of its *mores*; it describes the unfolding of its concepts of what is permissible

and what is not, of what must be done and of what is merely recommended.⁵

And J. P. Reid:

Law is the signet of a people and a people are the product of a land. The primitive law of the eighteenth-century Cherokee nation reflects the mores, the integrality, and the rapport of the Cherokee people just as the characteristic traits of the Cherokees themselves reflect the physical environment of their existence: the mountains upon which they lived, the harvest reaped from forest, field, and stream, and the enemies – both in nature and mankind – that their geographical location required them to fight.⁶

A rather different, but equally significant view is maintained by those who believe that in early systems of law a common pattern of development is discernible. Credit for establishing this view must be given to Sir Henry Maine, and we may cite among more recent writers F. Pringsheim who declares:

A natural relationship exists at an early stage between all primitive legal systems; each system during its youth seems to pass through a similar process before the peculiarities of the nation are imposed upon its juridical order.⁷

A. S. Diamond opens his *Primitive Law Past and Present*⁸ with the words:

The purpose of this book is to attempt an account of the general course of development of law from its beginnings until maturity.

Yet another opinion is that law is – ‘is’ not ‘ought to be’ – social engineering. Thus Roscoe Pound, who owes much to Rudolf von Ihering:

What then is the practical measure of values which the law has been using where theories have failed it? Put simply it has been and is to secure as much as possible of the scheme of interests as a whole as may be with the least friction and waste; to secure as much of the whole inventory of interests as may be with the least impairment of the inventory as a whole. No matter what theories of the end of law have prevailed, this is what the legal order has been doing, and as we look back we see has been doing remarkably well. . . . While philosophers are debating whether a scheme of values is possible, lawyers and courts have found a workable one which has proved as adequate to its tasks as any practical method is in any practical activity. Without putting it in that way they

have treated the task of the legal order as an engineering task of achieving practical results with a minimum of friction and waste. . . . I am not offering this idea of social engineering as a cure-all to be taken over by political and juristic theory and used to solve all the difficult problems of the science of law in the world of today. What I have set forth is no more than a description of how the legal order actually functions. It is a sketch of what courts do and jurists and judges have been doing since the Roman jurists of the first century. In the whole development of modern law courts and lawmakers and law teachers, very likely with no clear theory of just what they were doing, have been at work finding practical adjustments and reconcilings, and if nothing more was possible, practical compromises of conflicting and overlapping interests.⁹

For still others, and not just Marxists, law is or represents the interests of the ruling classes. From Karl Marx himself – with Friedrich Engels – we have:

In actual history, those theoreticians who regarded *power* as the basis of law were in direct contradiction to those who looked on *will* as the basis of law. . . . If power is taken as the basis of law, as Hobbes, etc. do, then law, statute, etc. are merely the symptom, the expression of *other* relations upon which the State power rests. The material life of individuals, which by no means depends merely on their ‘will’, their mode of production and form of intercourse, which mutually determine each other – this is the real basis of the State and remains so at all the stages at which division of labour and private property are still necessary, quite independently of the *will* of individuals. These actual relations are in no way created by the State power; on the contrary they are the power creating it. The individuals who rule in these conditions, besides having to constitute their power in the form of the *State*, have to give their will, which is determined by these definite conditions, a universal expression as the will of the State, as statute – an expression whose content is always determined by the relation of this class, as the civil and criminal law demonstrates in the clearest possible way. Just as the weight of their bodies does not depend on their idealistic will or on their arbitrary decision, so also the fact that they enforce their own will in the form of statute, and at the same time make it independent of the personal arbitrariness of each individual among them, does not depend on their idealistic will. Their personal rule must at the same time be constituted as average rule. Their personal power is

based on conditions of life which as they develop are common to many individuals, and the continuance of which they, as ruling individuals, have to maintain against others and, at the same time, maintain that they hold good for all. The expression of this will, which is determined by their common interests, is statute.... The same applies to the classes which are ruled, whose will plays just as small a part in determining the existence of statute and the State.¹⁰

And there is the statement made by Tumanov:

We Marxists assert that law is carried out in practice by means of coercion and violence, because all law is a class law, and the law of the class without coercion is not a law.¹¹

However different these views may be, their proponents – along with many other legal scholars – have in common the firm belief that legal development is very much a rational response or is *the* natural response to existing circumstances, social, economic, political, geographical and so on, including religion.¹² Law could not be ‘the spirit of the people’ unless it accurately reflected the needs and desires of the people. Law in early society could not everywhere have the same general pattern of development unless it were that such people everywhere, above all in underdeveloped economic circumstances, had to face similar problems and approached them in a manner conditioned by their circumstances, giving the best answer available to them. The legal order could not operate well as social engineering unless it were in tune with the needs and desires of the society. All law could not be class law unless the class in question recognised its interests (consciously or unconsciously) and protected them by coercion.

This fundamental assumption of rationality in legal development or of a response determined by the circumstances seems to me to be inadequate and falsifies the relationship between law and the society in which it operates. It has, however, enough truth in it to be superficially plausible. No reasonable person would want to deny that to some extent a people’s law is peculiar to it, that the law does reflect that people’s desires and needs. Everyone would accept that certain problems are common to many relatively simple societies, and that at times the responses of societies – which have no connection with one another – are similar. It is easy to agree that a legal rule is often the result of social engineering especially if we consider only case law, or a statute when it is passed. And who would deny that much of law reflects the interests of the ruling élite? More-

over, pointing to occasional blemishes or lapses from rationality or circumstanced causality in systems would not greatly affect these theories. Most scholars who hold any of the views expressed in the preceding paragraphs would concede that there were instances where the relationship was not perfect, whether because past history influenced the course of legal development, law lagged behind social changes, a mistake was made in choosing the best response, the power of the proletariat was growing, individual law-makers were careless, greedy or biased, and so forth. The idea of a lapse from a perfect relationship between law and society can also, as we shall see in a moment, be expressly built into any of these theories. Moreover, many scholars bring the idea of a 'time-lag' into their discussion of legal development.¹³

Yet even if one accepts that some plausibility or truth is contained in each or any of these theories and one also allows for the obvious qualification of occasional lapses and a time-lag, each theory based on the idea of rational legal development or of law naturally responding to circumstances seems to me unsatisfactory. None of them pays or can pay sufficient attention to the numerous factors which cause law to be out of step with its society.

It is the thesis to be maintained in this book that, though there is a historical reason for every legal development, yet to a considerable extent law in most places at most times does not progress in a rational or responsive way, and that the divergence between law and the needs or wishes of the people involved or the will of the leaders of the people is marked. There is a divergence in the sense in which I am using the term when the legal rule, principle 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. Divergences appear in many shapes and sizes and might be classified in various ways whether in terms of how they come into existence or the effect they have upon the legal system or upon society in general. The main causes of divergence will be discussed in chapter ten after we have examined instances of actual divergence; and the complication which divergences bring to the legal system is the subject of chapter eight. As for their effect upon society in general this is basically either to produce a result different from what society could wish or need or, whatever the end result, to increase unnecessarily the economic costs. Further classification of legal divergences is not here necessary.

Rules of law which produce results which are intolerable to the

society or its ruling class will no doubt be replaced. But to argue that in consequence any given system of law will reflect the needs and desires of society or its ruling class is a *non sequitur* unless we take that proposition in a very restricted sense indeed. Society and ruling classes are, in practice, able to tolerate a great deal of private law which serves neither the interests of society at large or its ruling class nor the interests of anyone else.

To prove this thesis one should ideally look at every aspect of law and legal development in every system, past and present. In practice this approach is as out of the question here as it is for any of the 'rational or causal theories' of law and society. Yet obviously it is not sufficient to examine at random a few instances in several systems where law and society are out of step. What can be done is to look at the pattern of growth in important areas of law in some of the major systems and also to examine closely some of the details which can be regarded as most important for the society's outlook. I shall restrict myself to developed Western law.¹⁴ If we find it reasonably easy to spot in Roman law in English law, in systems deriving from these, major instances where law and the wishes or needs of the society or its leaders are not greatly in harmony then I believe the thesis may be regarded as proved. Codification introduces new complicating factors without, however, greatly disturbing the over-all picture. At an appropriate point I will explain why in the present work I am leaving modern codified systems aside.

The closeness of the relationship between law and society will vary from one branch of law to another. It should be stressed that in this work I will consider only the subjects traditionally considered as private law; not administrative or constitutional law, not social welfare law, not criminal, law except that with regard to this last I will permit myself occasional lapses.¹⁵ What I want to do is say something about private law, and the conclusions will be restricted to that. It may be, but need not be, that the great divergence which I think exists between private law and the needs of the society has parallels in other areas of law, and I will produce a few examples especially from criminal law to indicate the possibility of some divergence. But this is a book about private law and society.

As I mentioned in passing, some theories have expressly built into their views an inevitable degree of divergence between law and society at large. For instance, it was an essential part of Savigny's case that statutory intervention for a higher political purpose could easily be a fruitless corruption of law.¹⁶ Again Marxists, especially Friedrich Engels, have argued that when the new division of labour makes professional lawyers necessary, then this new independent