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The Impossibility of 'Legal Transplants'

[A] comparative study [sh]ould not aim at finding 'analogies' and 'parallels', as is done by those engrossed in the currently fashionable enterprise of constructing general schemes of development. The aim should, rather, be precisely the opposite: to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other. This done, one can then determine the causes which led to these differences.

Max Weber ¹

§ 1. 'Legal Transplant' Explored

To 'transplant', according to the *Oxford English Dictionary*, is to 'remove and reposition', to 'convey or remove elsewhere', to 'transport to another country or place of residence'. 'Transplant', then, implies displacement. For the lawyer's purposes, the transfer is one that occurs across jurisdictions: there is something in a given jurisdiction that is not native to it and that has been brought there from another. What, then, is being displaced? It is the 'legal' or the 'law'. But what do we mean by the 'legal' or the 'law'? An answer to this question seems imperative if comparatists wish to draw the line, as I believe their hermeneutical quest for understanding compels them to do, between instances of displacement having law as their object and others not having law as their object. Although they tend not to argue the point expressly, students of 'legal transplants' have emphatically embraced the formalist understanding of 'law'. Thus, the

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1. Max Weber, *The Agrarian Sociology of Ancient Civilizations*, transl. by R.I. Frank (NLB, 1976) at 385 [originally published, in German, in 1909].

'legal' is, in substance, reduced to rules – which are usually not defined, but which are conventionally understood to mean statutory instruments and, although less peremptorily, judicial decisions. A good example of this approach is offered by Alan Watson who writes that 'legal transplants' refer to 'the moving of a rule [...] from one country to another, or from one people to another'.² This author, by way of illustration, mentions a set of rules dealing with matrimonial property which would travel 'from the Visigoths to become the law of the Iberian Peninsula in general, migrating then from Spain to California, from California to other states in the western United States'.³ Clearly, Watson has in mind statutory rules.

A consideration of a range of legal systems over the long term should lead anyone interested in the matter of 'legal transplants' to conclude, in Watson's words, that 'the picture that emerge[s] [i]s of continual massive borrowing [...] of rules'.⁴ The nomadic character of rules proves, according to this author, that 'the idea of a close relationship between law and society' is a fallacy.⁵ Change in the law is independent from the workings of any social, historical, or cultural substratum; it is rather – and rather more simply – a function of rules being imported from another legal system. Indeed, Watson has written that 'the transplanting of legal rules is socially easy'.⁶ Taking his observation to its logical conclusion, he asserts that 'it would be a relatively easy task to frame a single basic code of private law to operate throughout [the whole of the western world]'.⁷ Against this background, Watson argues, unsurprisingly I should think, that the comparative enterprise, understood as 'an intellectual discipline', can be defined as 'the study of the relationships of one legal system and its rules with another'.⁸ Moreover, the comparatist should only be concerned with 'the existence of similar rules' and 'not with how [they] operat[e] within [...] society'.⁹ In other words, comparative legal studies is – or, at least, ought to be – about 'legal transplants' which themselves are about legal rules, in the main statutory rules, considered in isolation from society.

§ 2. Rule Examined

Because I do not want to caricature Watson's position, I wish to reproduce the following (somewhat lengthy) passage from his book devoted to legal transplants which elucidates his understanding of 'rule':

2. Alan Watson, *Legal Transplants*, 2d ed. (University of Georgia Press, 1993) at 21.
3. Ibid at 108.
4. Ibid at 107. See also ibid at 95: 'the transplanting of individual rules [...] is extremely common'.
5. Ibid at 108.
6. Ibid at 95.
7. Ibid at 100-01.
8. Ibid at 6.
9. Ibid at 96, footnote 3, and 20 respectively.

Let me quote from a statement by a former Scottish Law Commissioner: ‘... account has necessarily to be taken of English solutions even if these are eventually rejected as unsuitable for reception into Scots law. Indeed in many contexts English solutions have to be studied to identify fundamental differences from Scots law cloaked by superficial similarity. Endeavours to achieve unified solutions in the field of Contract law have in particular revealed that what has been assumed to be common ground was approached by members of the Scottish and English Contracts Teams through conceptually opposed habits of thought. Whereas English comparative research relied particularly on American and Commonwealth sources, the background of some of the Scottish proposals derived from French, Greek, Italian and Netherlands sources – and from the Ethiopian Civil Code, which was, of course, drafted by a distinguished French comparative lawyer.’ Now this, to me, is rather too academic. If the *rules* of contract law of the two countries are already similar (as they are) it should be no obstacle to their unification or harmonisation that the legal *principles* involved come ultimately from different sources, or that the habits of thought of the commission teams are rather different. It is scholarly law reformers who are deeply troubled by historical factors and habits of thought. Commercial lawyers and business men in Scotland and England do not in general perceive differences in habits of thought, but only – and often with irritation – differences in rules.¹⁰

Thus, law is rules and only that, and rules are bare propositional statements and only that. It is these rules which travel across jurisdictions, which are displaced, which are transplanted. Because rules are not socially connected in any meaningful way, differences in ‘historical factors and habits of thought’ do not limit or qualify their transplantability. A given rule is potentially equally at home anywhere (in the western world).

§ 3. Objections

I disagree with Watson’s views which I regard as providing a most impoverished explanation of interactions across legal systems – the result of a particularly crude apprehension of what law is and of what a rule is.¹¹ Yet, in my opinion, anyone who

10. Ibid at 96-97 [emphasis original].

11. Cf. J.W.F. Allison, *A Continental Distinction in the Common Law* (Oxford University Press, 1996) at 14: ‘Watson’s theoretical argument [...] is flawed and his empirical evidence is unconvincing’; Richard L. Abel, ‘Law as Lag: Inertia as a Social Theory of Law’, 80 *Michigan Law Review* (1982), 785 at 793: ‘Perhaps the most serious problem with Watson’s theory is that it is not a theory at all’. *Contra*: William Ewald, ‘Comparative Jurisprudence (II): The Logic of Legal Transplants’, 43 *American Journal of Comparative Law* (1995), 489. For a recent reiteration of his position by Watson, see Alan Watson, ‘Aspects of Reception of Law’, 44 *American Journal of Comparative Law* (1996), 335.

believes in the reality of 'legal transplants' must broadly agree with Watson's position and must accept, in particular, a 'law-as-rules' and a 'rules-as-bare-propositional-statements' model. In this sense, Watson's stance, however simplistic, is representative of the approach that must be followed, explicitly or not, by proponents of the 'legal-change-as-legal-transplants' thesis. Anyone who takes the view that 'the law' or 'the rules of the law' travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage. Indeed, how could law travel if it was not segregated from society? I wish to question this vision of law and, specifically, this understanding of rules which I regard as profoundly lacking in explicatory power. Rules are just not what they are represented as being by Watson. And, because of what they effectively are, rules cannot travel. Accordingly, legal transplants are impossible.

§ 4. Rule and Meaning

No form of words purporting to be a 'rule' can be completely devoid of semantic content, for no rule can be without meaning. The meaning of the rule is an essential component of the rule; it partakes in the rulehood of the rule. The meaning of a rule, however, is not entirely supplied by the rule itself; a rule is never completely self-explanatory. To be sure, meaning emerges from the rule so that it must be assumed to exist, if virtually, within the rule itself even before the interpreter's interpretive apparatus is engaged. To this extent, the meaning of a rule is acontextual. But, meaning is also – and perhaps mostly – a function of the application of the rule by its interpreter, of the concretization or instantiation in the events the rule is meant to govern. This ascription of meaning is predisposed by the way the interpreter understands the context within which the rule arises and by the manner in which she frames her questions, this process being largely determined by who and where the interpreter is and, therefore, to an extent at least, by what she, in advance, wants and expects (unwittingly?) the answers to be. The meaning of the rule is, accordingly, a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned.

These pre-judices (I use the term in its etymological, not in its negative, or acquired, sense) are actively forged, for example, through the schooling process in which law students are immersed and through which they learn the values, beliefs, dispositions, justifications and the practical consciousness that allows them to consolidate a cultural code, to crystallize their identities, and to become professionally socialized. Indeed, even before they reach law school students will have assimilated a cultural profile (let us say the Gadamerian '*Vorverständnis*')¹² – whether English or Italian or German – which will colour in a most relevant way their legal education experience and their internalization of the narrative and mythology in which they will share. Each English

12. Hans-Georg Gadamer, *Wahrheit und Methode*, 4th ed. (J.C.B. Mohr, 1975) at 252.

child, for example, is a common-law-lawyer-in-being long before she even contemplates going to law school. Inevitably, therefore, a significant part of the very real emotional and intellectual investment that presides over the formulation of the meaning of a rule lies beneath consciousness because the act of interpretation is embedded, in a way that the interpreter is often unable to appreciate empirically, in a language and in a tradition, in sum, in a whole cultural ambience.

An interpretation, then, is always a subjective product and that subjective product is necessarily, in part at least, a cultural product: the interpretation is, in other words, the result of a particular understanding of the rule that is conditioned by a series of factors (many of them intangible) which would be different if the interpretation had occurred in another place or in another era (for, then, different cultural claims would be made on interpreters). Specifically, an interpretation is the outcome of an unequal distribution of social and cultural power within society as a whole and within an interpretive community in particular (judges vis-à-vis professors, and so forth) and operates, through repeated articulation, to eliminate or marginalize alternatives. Ultimately, what interpretation will prevail amongst the array of competing interpretations – and what interpretation will endow the rule with a relative fixity of meaning – is a function of epistemic conventions produced as the result of power struggles that are themselves non-epistemic (which means that the other interpretations on offer would also have promoted understanding of the rule if they had been adopted, albeit not in the same ways).

It must be stressed that the interpretation that finally transcends the collision of interpretations does not wholly turn, of course, on the interpreter's idiosyncratic construction. Rather, it depends in part upon a framework of intangibles internalized by the interpreter (without any awareness of this process having taken place) which colours and, indeed, constrains the interpreter's subjectivities. It is more accurate, therefore, to think of interpretation as an 'intersubjective' phenomenon in the sense that it is the product of the interpreter's subjectivity as it interacts with the network of all subjectivities within an interpretive community which, over time, is fundamentally constitutive of that community's articulated values and sustains that community's cultural identity.

§ 5. Rule as Culture

In enacting a rule for the reasons they do and in the way they do, as a product of the way they think, with the hopes they have, in enacting a particular rule (and not others), the French, for example, are not just doing *that*: they are also doing something typically French and are thus alluding to a modality of legal experience that is intrinsically theirs. In this sense, because it communicates the French sensibility to law, the rule can serve as a focus of inquiry into legal Frenchness and into Frenchness *tout court*. It cannot be regarded only as a rule in terms of a bare propositional statement. There is more to ruleness than a series of inscribed words which is to say that a rule is not identical to the inscribed words.

A rule is necessarily an incorporative cultural form. As an accretion of cultural elements, it is supported by impressive historical and ideological formations. A rule does not have any empirical existence that can be significantly detached from the world of meanings that characterizes a legal culture; the part is an expression and a synthesis of the whole: it resonates. Such is Gadamer's point: 'the meaning of the part can be discovered only from the context – i.e., ultimately from the whole'.¹³ Incidentally, it is this ability to see the whole in the part that defines the interpretive competence of the comparatist. Because a rule exists in a larger cognitive framework, the comparatist must relate it to other phenomena in a way that will make the particular proposition look less like an arbitrary event and more like the manifestation of a relatively coherent and intelligible whole. Thus, the rule becomes the unknowing articulator of a cultural sensibility which the observer invests into the language of the text through a process of abstraction from the particular. The habitual tendency of most comparatists to focus on comparisons of substantive law can only be made expressive if set in a context embracing the view-points from which these materials emanate. Beyond the specification, there must be an explication of why what has been specified is in the mode it is, why it could not in important ways be otherwise, and how this specification and explication differ from other experiences of legal order.

§ 6. Comparative Legal Studies and Understanding

As an alternative to an appreciation of law understood as a system of bare propositional statements (or 'law-as-geometry'), I argue that the comparatist can hope to achieve a more meaningful constitution, explication, and critique of experiences of legal order through formulations which show an appreciation of law, to quote from Robert Cover, 'not merely [as] a system of rules to be observed, but [as] a world in which we live'.¹⁴ The comparatist must adopt a view of law as a polysemic signifier which connotes *inter alia* cultural, political, sociological, historical, anthropological, linguistic, psychological and economic referents. To borrow from Mauss, each manifestation of the law – each rule, for instance – must be apprehended as a '*fait social total*', a complete social fact.¹⁵

§ 7. 'Legal Transplants' Reconsidered

If one agrees that, in significant ways, a rule receives its meaning from without and if one accepts that such investment of meaning by an interpretive community effectively partakes in the ruleness of the rule, indeed, of the *nucleus* of ruleness, it must follow that there could only occur a meaningful 'legal transplant' when both the propositional

13. Hans-Georg Gadamer, *Truth and Method*, 2d rev. ed., transl. by Joel Weinsheimer and Donald G. Marshall (Sheed and Ward, 1989) at 190 [originally published, in German, in 1960].

14. Robert M. Cover, 'Nomos and Narrative', 97 *Harvard Law Review* (1983), 4 at 5.

15. Marcel Mauss, 'Essai sur le don', *Sociologie et anthropologie*, 6th ed. (Presses Universitaires de France, 1995) at 274-75 and *passim* [originally published in 1925].

statement as such *and* its invested meaning – which jointly constitute *the rule* – are transported from one culture to another. Given that the meaning invested into the rule is itself culture-specific, it is difficult to conceive, however, how this could ever happen. In linguistic terms, one could say that the signified (meaning the idea content of the word) is never displaced because it always refers to an idiosyncratic semio-cultural situation. Rather, the propositional statement, as it finds itself technically integrated into another legal order, is understood differently by the host culture and is, therefore, invested with a culture-specific meaning at variance with the earlier one (not least because the very understanding of the notion of ‘rule’ may differ). Accordingly, a crucial element of the ruleness of the rule – its meaning – does not survive the journey from one legal system to another. In the words of Eva Hoffman, ‘[y]ou can’t transport human meanings whole from one culture to another any more than you can transliterate a text’.¹⁶ This is because, to quote from this writer again, ‘[i]n order to transport a single word without distortion, one would have to transport the entire language around it’.¹⁷ Indeed, ‘[i]n order to translate a language, or a text, without changing its meaning, one would have to transport its audience as well’.¹⁸ If you will, the relationship between the inscribed words that constitute the rule in its bare propositional form and the idea to which they are connected is arbitrary in the sense that it is culturally determined. Thus, there is nothing to show that the same inscribed words will generate the same idea in a different culture, *a fortiori* if the inscribed words are themselves different because they have been rendered in another language. (As Benjamin wrote, ‘the word *Brot* means something different to a German than the word *pain* to a Frenchman’.¹⁹) In other terms, as the words cross boundaries there intervenes a different rationality and morality to underwrite and effectuate the borrowed words: the host culture continues to articulate *its* moral inquiry according to traditional standards of justification. Thus, the imported form of words is inevitably ascribed a different, local meaning which makes it *ipso facto* a *different rule*. As the understanding of a rule changes, the meaning of the rule changes. And, as the meaning of the rule changes, the rule itself changes. To paraphrase J.A. Jolowicz, the addition of a litre of *green* paint to four litres of yellow does not give us the same colour as the addition of a litre of *red* paint to four litres of yellow.²⁰

16. Eva Hoffman, *Lost in Translation* (Minerva, 1991) at 175.

17. *Ibid* at 272.

18. *Ibid* at 275.

19. Walter Benjamin, ‘The Task of the Translator’, *Illuminations*, transl. by Harry Zohn, (Fontana, 1973) at 75 [originally published, in German, in 1923]. For an application of this reasoning to law, see Max Rheinstein, ‘Comparative Law – Its Functions, Methods and Usages’, 22 *Arkansas Law Review* (1968), 415 at 418-19. Observe how Rheinstein emphasizes the point that ‘[e]ven words of the same language may have different meanings in different legal systems’ (at 419).

20. J.A. Jolowicz, ‘New Perspectives of a Common Law of Europe: Some Practical Aspects and the Case for Applied Comparative Law’, in Mauro Cappelletti (ed.), *New Perspectives for a Common Law of Europe* (Sijthoff, 1978) at 244.

So, the transplant does not, in effect, happen: a key feature of the rule – its meaning – stays behind so that the rule that was 'there', in effect, is not itself displaced over 'here'. Assuming a common language, the position is as follows: there was one rule (inscribed words *a* + meaning *x*), and there is now a second rule elsewhere (inscribed words *a* + meaning *y*). It is not the same rule. (The differentiation between *conceptions* of law is not overcome.)²¹ Meaning simply does not lend itself to transplantation. There always remains an irreducible element of autochthony constraining the epistemological receptivity to the incorporation of a rule from another jurisdiction,²² therefore limiting the *possibility* of effective legal transplantation itself. The borrowed form of words thus rapidly finds itself indigenized on account of the host culture's inherent integrative capacity.

A good illustration of the phenomenon is offered by the English decision in *O'Reilly v. Mackman* introducing a procedural distinction to the effect that in public law cases the plaintiff cannot litigate by way of an ordinary action and that an application for judicial review is her exclusive remedy.²³ The differentiation between public law and private law litigation had acquired significance in nineteenth century France 'in a context characterized by inquisitorial judicial procedures, a categorical approach to law, a conception of a distinct state administration, and a separation of powers that met the need for judges with both judicial independence and administrative expertise'.²⁴ Its recent emergence in English law 'in a context lacking any of the features characterizing the French context of the late nineteenth century' has generated 'extensive debate and uncertainty about the proper procedure and judicial role in public-law cases and about the very idea of distinguishing public- from private-law cases'.²⁵ Consequently, the House of Lords decision cannot be said to have 'entrenched' the distinction between public and private law whereby the importation of the division from France '[would have] brought about a convergence of English and French law'.²⁶ The fact is that the alleged rule that is now to be found in England does not coincide with the French rule even though it is that French rule itself which had attracted the attention of English lawyers: the French formulation has been domesticated by the English interpretive

21. It is the case, of course, that English and French law both make use of the *concept* of 'offer'. It might be said, therefore, that there arises, in such a case, a ready opportunity for uniform legislation to intervene in the name of predictability and general efficiency, if not to achieve formal equality in the market-place. However, what must not be overlooked is that within the English and French legal cultures, there are to be found two discrete *conceptions* of 'offer'. E.g.: John Rawls, *A Theory of Justice* (Harvard University Press, 1971) at 5; Ronald Dworkin, *Law's Empire* (Fontana, 1986) at 90-94.
22. E.g.: F.S.C. Northrop, 'The Comparative Philosophy of Comparative Law', 45 *Cornell Law Quarterly* (1960), 617 at 657: 'in introducing foreign legal and political norms into any society, those norms will become effective and take root only if they incorporate also a part at least of the norms and philosophy of the native society'.
23. [1982] 3 All E.R. 1124 (H.L.).
24. Allison, *A Continental Distinction in the Common Law*, at 235.
25. *Ibid.*
26. *Ibid* at 234.

community with the result that the meaning of what is public law, private law, a public law remedy, a private law remedy, and so on, inevitably differs as between the two legal systems. Making allowance for exaggerated pithiness, it remains helpful to reiterate that 'stateways cannot change folkways'.²⁷

To return to Watson briefly, the inadequacy of his argument should now be plain. I borrow at random a single illustration from his book (which offers many more):

Before the *Code civil* the Roman rules [on transfer of ownership and risk in sale] were generally accepted in France [...]. This was also the law accepted by the first modern European code, the Prussian *Allgemeines Landrecht für die Preussischen Staaten* of 1794.²⁸

Now, the fact is that the Roman 'rules' were written in Latin and purported to regulate the dealings of citizens in sixth century Constantinople. The French rules mentioned by Watson were written in French and intended to govern citizens in pre-revolutionary France. And, the Prussian rules to which Watson refers were written in German and were concerned with legal relationships in what remained feudal Prussia. I argue (admittedly in advance of empirical demonstration) that cultural constructions of reality and of law and of rules in the three settings would harbour certain distinctive characteristics which would, therefore, affect the interpretation of a rule, that is, which would determine the ruleness of the rule according to the distinctive cultural logics of the native systems. These rules, therefore, are not the same rules; any similarity stops at the bare form of words itself. Even then, this conclusion would not account for the fact that the inscribed words appear in three different languages with each language suggesting a specific relationship between the words and their content (for example, '[n]o language divides time or space exactly as does any other [...]; no language has identical taboos with any other [...]; no language dreams precisely like any other').²⁹

Watson's underinterpreted compilation is facile as John Merryman's reflection demonstrates: 'there is a very important sense in which a focus on rules is superficial and misleading: superficial because rules literally lie on the surface of legal systems whose true dimensions are found elsewhere; misleading because we are led to assume that if rules are made to resemble each other something significant by way of *rapprochement* has been accomplished'.³⁰ Watson's argument is also insidious because it effaces the local ideological explanations of why things are done the way they are

27. Jack Greenberg, *Race Relations and American Law* (Columbia University Press, 1959) at 2. The author is referring to William Graham Sumner's work in sociology of law. See, e.g., William Graham Sumner, *Folkways* (Dover, 1959) at 77: 'legislation cannot make mores' [originally published in 1906].

28. Watson, *Legal Transplants*, at 83.

29. George Steiner, *What is Comparative Literature?* (Oxford University Press, 1995) at 10.

30. John H. Merryman, David S. Clark, and John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (Michie, 1994) at 50.

with respect to any given rule. It is wrong to present the law as a stable monolithic element within societies and to overlook the fact that it can only reflect the localized and particularized outlooks of culturally-situated individuals as members of historically and epistemologically conditioned interpretive communities. *Extra culturam nihil datur*.

§ 8. To Summarize

At best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words. To claim more is to claim too much. In any *meaningful* sense of the term, 'legal transplants', therefore, cannot happen. 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 boundaries, the original rule necessarily undergoes a change that affects it *qua* rule. The disjunction between the bare propositional statement and its meaning thus prevents the displacement of the *rule* itself. Consider this statement drawn from ongoing anthropological research on cognition: 'The fact that exactly the same word gets printed or uttered again and again does not mean that exactly the same meaning (which is half the word) spreads from minds to minds'.³¹

Any advocacy of the reality of 'legal transplants', for instance, to account for change in the law, must, however, unavoidably reduce law to rules and rules to bare-propositional-statements. It must suggest that a rule exists in solitary state as the most basic feature of legal activity (and consequently of legal theory) and that it carries definite meaning irrespective of interpretation or application.³² Inevitably, it fails, therefore, to treat rules as actively constituted through the life of interpretive communities. Moreover, it fails to make apparent the negotiated character of rules, that is, the fact that rules are the product of divergent and conflicting interests in society. In other words, it eliminates the dimension of power from the equation. Also, it fails to attest to the existence of local moral worlds or, if you like, local lifeworlds – the worlds of our everyday goals, social existence, and practical activity. In sum, any argument reducing change in law to the displacement of rules across boundaries is little more than an exercise in 'reification as false determinateness': in fact, the shifting complexity of development in the law cannot be explained through a rigid and jejune framework such as that propounded by the 'legal transplants' thesis.³³

This leaves one issue. What of the fact that the inscribed words – assuming a common language between the host jurisdiction and the one from which the words are borrowed

31. Dan Sperber, 'Learning to Pay Attention', *The Times Literary Supplement*, 27 December 1996, 14, col. 3.
32. For Gadamer, 'application' is an essential aspect of 'interpretation'. See Gadamer, *Truth and Method*, 311. See also Frederick Schauer, *Playing by the Rules* (Oxford University Press, 1991) at 207.
33. Matthew H. Kramer, *Legal Theory, Political Theory, and Deconstruction* (Indiana University Press, 1991) at 255.

– are themselves displaced? Even accepting the points that I have argued above, is it not the case that a ‘legal transplant’ is happening at the level of the inscribed words themselves which is consequential for the host jurisdiction in terms of the growth of its law and, therefore, of importance to the comparatist? The answer must be negative: there is nothing in the borrowing of a bare string of words to anchor a theory of ‘legal-change-as-legal-transplants’. All that one can see is that law reformers on occasion find it convenient, presumably in the interest of economy and efficiency, to adopt a pre-existing form of words which may happen to have been formulated outside of the jurisdiction within which they operate – not unlike the way writers on occasion find it convenient to quote from other authors some of whom will be foreigners. What is at issue here is a rhetorical strategy involving the ordinary act of repetition as an enabling discursive method. To say that change in law is in large part driven by mimesis is not to say any more – or any less – than that individuals will turn to the past to help them construct the present. This is as evident in law as it is in literature or mathematics. This observation is hardly the stuff of legal theories about interactions across legal cultures.

Quite irrespective of the spatial or temporal origins of the forms of words that are repeated and of the contents of those forms of words themselves, what would, of course, prove much more promising is to move away from *l'énoncé* to *l'énonciation*, that is, to investigate how the fact of repetition – which always implies repression – is conditioned by a particular epistemological framework, by a specific *mentalité*.³⁴ Civil law discourse, for instance, is centripetal in that it submits to the order of the posited text of law from which it gets its warrant and to which, therefore, it always seeks to return. The common law tradition reveals a different approach, for it studies antecedent discourses (the ‘precedents’) strictly as a propaedeutic toward the elaboration of other, present discourses. What came before is relevant inasmuch as it fulfils an exemplificatory function. Common law discourse is not second-degree discourse nor a gloss. Rather, it is its own discourse constantly broadening its field by moving away from an earlier (equally self-contained) discourse. The common law is centrifugal. How, then, do these epistemological configurations affect the cognitive disposition of the civilian or of the common law lawyer as she engages in the act of repetition *today*? Here is one of the privileged questions that comparatists must be invited to answer.

§ 9. The Politics of ‘Legal Transplants’

To return to the ‘legal-change-as-legal-transplants’ argument, I maintain that the proponents of this thesis pay undue attention to the texts of written language to the detriment of the frameworks of intangibles within which interpretive communities operate and which have normative force for these communities – something which automatically leads them to harbour a limited perspective on law. Their stance is, if you

34. For the connection between ‘repetition’ and ‘repression’, see Gilles Deleuze, *Différence et répétition* (Presses Universitaires de France, 1968) at 139.

like, 'bookish'. But, it must be seen that this attitude betrays a *political* decision to marginalize difference and correlatively to extol sameness. The notion of 'legal transplant' is used as a convenient variance reducer. The proponents of 'legal-change-as-legal-transplants' offer what can be described as a 'synthetic vision' focusing exclusively on the technical level of the law. This decision reflects a faith in abstract universalism which is at odds with the observable decline of formal rationality and the correlative materialization of formal law characterized by the increasing prevalence of informative arguments of a sociological, economic, political, historical, cultural, epistemological or ethical, rather than conceptual nature.³⁵

More importantly, the 'legal transplants' thesis discards the existence of qualitatively differentiated phenomena and the concrete contents of experiences and values. It is an idea concerned with finding patterns the axiomatization of which requires the imposition on effectively disparate experiences of law of an *a priori* rational unity. The advocates of 'legal-change-as-legal-transplants' have nothing to say about thought (recall Watson's own words in the lengthy quotation reproduced above). And, clearly, the 'legal transplants' thesis lacks any critical vocation. It is conservative and favours the *status quo* in that it privileges 'the knowledge of observed regularities' so as to achieve 'certainty, predictability and control'.³⁶ Indeed, Watson rightly stands accused of defending a 'basically conservative world view' and of attempting to 'trivialize the political', his aim being 'to confute radicals'.³⁷

The proponents of 'legal-change-as-legal-transplants' create a false consensus which can only be established through exclusive reference to the formalized elements of the object under discussion and through the delegitimation of a notion such as 'tradition' or 'culture' which, in its intricacy, would intervene as an irrational interloper interfering with the production and the perception of empirical regularity – the kind of regularity that is regarded as necessary to meet 'the regulatory needs of liberal capitalism' (recall Watson's concern with the preoccupations of 'commercial lawyers and business men' in the lengthy quotation reproduced above).³⁸ The 'legal transplants' argument is precariously based on analogies, on *mechanical* analogies. The problem, therefore, is that in the way the reasoning promotes a most exacerbated positivism it fails to grasp and express the multi-layered nature of the interaction between the constituents of a social totality. The refusal or inability to see that law acts as a site of ideological refraction of deeply embedded cultural dispositions does not, however, make reality go

35. I draw on Lawrence M. Friedman and Gunther Teubner, 'Legal Education and Legal Integration: European Hopes and American Experience', in Mauro Cappelletti, Monica Seccombe, and Joseph Weiler (eds.), *Integration Through Law, I: Methods, Tools and Institutions, book 3: Forces and Potential for a European Identity* (de Gruyter, 1986) at 372-74.

36. Boaventura de Sousa Santos, *Toward a New Common Sense* (Routledge, 1995) at 73.

37. Abel, 80 *Michigan Law Review* (1982), 785 at 803.

38. Santos, *Toward a New Common Sense* at 72.

away: bananas *do* exist even if I do not like them and the continental drift *is* happening even if I cannot perceive it.

§ 10. Comparative Legal Studies Otherwise

The ethics of comparative analysis of law lie elsewhere. Comparative legal studies is best regarded as the hermeneutic explication and mediation of different forms of legal experience within a descriptive and critical metalanguage.³⁹ Because insensitivity to questions of cultural heterogeneity fails to do justice to the situated, local properties of knowledge, the comparatist must never abolish the distance between self and other. Rather, she must allow the self to make the journey and see the other in the way he must be seen, that is, as other. The comparatist must permit the other to realize '*his* vision of *his* world'.⁴⁰ Defining a legal culture or tradition for the comparatist means, therefore, 'finding what is significant in [its] difference from others'.⁴¹ Comparison must not have a unifying but a multiplying effect: it must aim to organize the diversity of discourses around different (cultural) forms and counter the tendency of the mind toward uniformization.⁴² Comparison must grasp legal cultures *diacritically*. Accordingly, the comparatist must emphatically rebut any attempt at the axiomatization of similarity, especially when the institutionalization of sameness becomes so extravagant as to suggest that a finding of difference should lead her to start her research afresh!⁴³ To quote Günter Frankenberg, '[a]nalogies and the presumption of similarity have to be abandoned for a rigorous experience of distance and difference'.⁴⁴ I argue that comparison must involve 'the primary and fundamental

39. Cf. Anthony Giddens, *New Rules of Sociological Method*, 2d ed. (Polity, 1993) at 170.

40. Bronislaw Malinowski, *Argonauts of the Western Pacific* (Routledge and Kegan Paul, 1922) at 25 [emphasis original].

41. Charles Taylor, *The Malaise of Modernity* (Anansi, 1991) at 35-36.

42. For a sense of the magnitude of the challenge, see, e.g., Giambattista Vico, 'Principi di scienza nuova', in Fausto Nicolini (ed.), *Opere* (Riccardo Ricciardi, 1953), bk I, XLVII at 452: 'The human mind naturally tends to delight in the uniform' ['*La mente umana è naturalmente portata a dilettersi dell'uniforme*'] (originally published as the definitive edition by Vico himself in 1744); Michel Foucault, *L'archéologie du savoir* (Gallimard, 1969) at 21, who notes that 'one experiences a singular repugnance to think in terms of difference, to describe discrepancies and dispersions' ['*on éprouv(e) une répugnance singulière à penser la différence, à décrire des écarts et des dispersions*'].

43. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 2d rev. ed., transl. by Tony Weir (Oxford University Press, 1992) at 36.

44. Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law', 26 *Harvard International Law Journal* (1985), 411 at 453. I am unable to agree with Rudolf Schlesinger who observes, without supporting evidence, that '[t]raditionally, comparative legal writings have tended to dwell more heavily on differences than on similarities': Rudolf B. Schlesinger, 'Introduction', in Schlesinger (ed.), *Formation of Contracts [:] A Study of the Common Core of Legal Systems* (Oceana, 1968) at 3, footnote 1. See Richard Hyland, 'Comparative Law', in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996) at 185: 'Throughout much of the modern history of comparative law, the dominant comparative paradigm has focused on the similarities [among the various legal systems], attempting in various ways to identify a set of ideas or practices common

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investigation of difference'.⁴⁵ The priority of alterity must act as a governing postulate for the comparatist. To privilege alterity at all times is the only way in which the comparatist can guard against the deception otherwise suggested by the similarity of solutions to given socio-legal problems across legal cultures: the fact that the same solution (say, '6') can be reached by multiplying two numbers (say, '3' and '2') or by adding two numbers (say, '5' and '1') does not entail the same operands or cognitive operations. It is the case, of course, that the success of this comparative project must depend upon an initial receptivity to the otherness of the other.

Law is part of the symbolic apparatus through which entire communities try to understand themselves better. Comparative legal studies can further our understanding of other peoples by shedding light on how they understand their law. But, unless the comparatist can learn to think of law as a culturally-situated phenomenon and accept that the law lives in a profound way within a culture-specific – and therefore contingent – discourse, comparison rapidly becomes a pointless venture. Kahn-Freund went one step further and observed that comparative analysis of law 'becomes an *abuse* [...] if it is informed by a legalistic spirit which ignores [the] context of the law'.⁴⁶

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to all developed legal orders'. See also, e.g., Tullio Ascarelli, 'Etude comparative et interprétation du droit', *Problemi giuridici* (Giuffrè, 1959) at 321, who observes that comparative legal studies are either concerned with unification of laws within substantive or geographical limits or are more philosophically inclined and aspire to a uniform law that would be universal.

45. Michel Foucault, *Les mots et les choses* (Gallimard, 1966) at 68 [*'la recherche première et fondamentale de la différence'*].

46. Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law', 37 *Modern Law Review* (1974), 1 at 27 [my emphasis]. Contrast Alan Watson, 'Legal Transplants and Law Reform', 92 *Law Quarterly Review* (1976), 79 at 81: 'the recipient system does not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule'.