INTRODUCTION

This thesis examines law reform, the comparative method, and the combination of these two elements. These subjects are addressed in different sequences as the chapters progress, all of which sequences seem to naturally follow from the particular topics involved.

In this Introduction, some introductory observations are made on the two elements in isolation, and on constant change as a necessity of modern legal systems. Chapter I then discusses the theory of the combination of the two elements. Section I (Home Thoughts from Abroad) looks at the positive aspects of the combination, while Section II (Limitations and Dangers) looks at the negative aspects. In Chapter II, there is a discussion of the combination of legislation and the comparative method. The discussion moves from reception/major transplants, to special commissions/committees, pre-drafting stage, parliamentary committees and plenary sessions, the choice between special statutes and codification, and finally to the role of academics. In Chapters III, IV and V, the focus shifts to law reform proposals submitted by law reform agencies. First, there is a discussion of the law reform agencies on their own. Much of this discussion is based on a survey carried out of various law reform agencies throughout the world (see Appendices 1 to 5 below). For the sake of convenience, the discussion divides the law reform agencies into two groups. Chapter III discusses the agencies of Group One (U.K., Ireland, Canada, Australia and New Zealand). Chapter IV discusses the agencies of Group Two (U.S.A., Africa, Other Jurisdictions), contains a comparison with European Ministries of Justice and includes some observations on particular topics which arise from the discussion of law reform agencies. In Chapter V, the combination of law reform agencies and the comparative method is examined. In the final Chapter (Chapter VI), the focus shifts to judicial law reform. Again, a natural sequence seems to follow from the particular topic. First, the question as to whether judges can properly be considered
as law reformers must be discussed. Second, the combination of the comparative method and judicial law reform must be examined. A third section has also been inserted, which looks at the suggestive role of judges in law reform. Strictly speaking, this is an aspect of the mechanism for reform by legislation. However, to the extent that in performing the suggestive function judges are catalysts or initiators of reform, it seems fitting to examine this topic as part of Chapter VI.

A preliminary point which must be made is that there is a frighteningly immense number of potential avenues of exploration with respect to these subjects, and as a result it is hard to pin them down, to keep them within manageable bounds. Difficulties of classification are another obstacle - unfortunately the two elements (the comparative method and law reform) do not come neatly wrapped or tidily pigeon-holed. It might even be argued that it would have been just as fruitful to narrow the topic further and thus increase its manageability and usefulness. But the advantages of such a narrowing of the field of inquiry would be offset by its disadvantages, the chief disadvantage being that the study would lose its broad scope; it would become more like an encyclopaedia than an attempt to address some fundamental questions. There is nothing inherently wrong with encyclopaedias. But to narrow the topic and write such a text would go firmly against the grain of two of the main strands of thought in this thesis. The first is that comparative law of an encyclopaedic fashion is the least useful form of that branch of legal studies. The second is that the topic of law reform should not be confined to law reform agencies (LRA's), but should be extended to encompass law reform by the legislature, by the judiciary and proposals for law reform from academics and practitioners.

1 Similarly, John Farrar, Law Reform and the Law Commission (Sweet & Maxwell, London, 1974), p.x: "It has been difficult in writing this book to trap such a dynamic subject into a satisfactory text."

The Comparative Method

Comparative law enquiries have always existed, but the term "comparative law" only began to be used in the nineteenth century. There has always been hostility to comparative lawyers, summed up in Lord Bowen's pleasantry that "a jurist is a man who knows a little about the law of every country except his own". The average lawyer's unease with comparative law is not due to the fact that it is a difficult subject. "Comparative law is a difficult subject, but so are the British law of real estate and the French law of torts." But it may well be because he cannot avail himself of his training in the 'system' of municipal law; he has instead to develop his own method of dealing with legal questions. As Gutteridge says, "there is no 'comparative' branch or department of the law in the sense in which a lawyer speaks of 'Family Law' or 'Maritime Law'".

The truth of the matter is that Comparative Law may in fact be a misnomer. It just happens to be the traditional label given to this method. It is perhaps more accurate to speak, as the Germans (Rechtsvergleichung) or the Russians (Sravnitel' noe pravovedenie), of the 'comparison of laws' or of 'comparative study of laws'. Even the French droit comparé (law compared) is slightly more accurate than the English version.

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5 Ibid.

6 Gutteridge, supra n.3, p.1


9 Schlesinger, supra n.7, loc.cit.
According to Constantinesco, the Germans employ an interesting distinction in terminology whereby the term *comparative law* indicates the method and the autonomous science, *comparative method* is used to signify comparative law as a method, and the autonomous discipline is referred to either as *Theory of Comparative Law* or *Science of Comparative Laws*. This distinction is helpful in explaining the subject-matter of this thesis. "The comparative method" has been chosen for its title since it is concerned with the practical use of comparison of laws in law reform. But the autonomous discipline of comparison of laws is used in studying the subjects of law reform, the comparative method and the combination of these two elements. This thesis is not simply a study of these subjects in one or two jurisdictions; it is a study of these subjects in various different legal systems in a comparative manner. The title could have been lengthened to become "a comparative study of the comparative method and law reform", but that would have been unnecessarily verbose.

Gutteridge says with regard to comparative law that "not the least of its merits is its flexibility .... The comparative method is on trial, it is still in the experimental stage". Zweigert and Kotz state that comparatists all over the world "see themselves as being still at the experimental stage". Koopmans states that "comparative law is still lacking a fixed method; we have more or less to invent it". No particularly rigid technique of comparison has been adopted, but two definite methodological choices have been made from the outset.

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10 Léontin-Jean Constantinesco, *Traité de Droit Comparé* (Libraire Générale de Droit et de Jursprudence, Paris, 1972), tome I, p.6, fn.1

11 Gutteridge, supra n.3, p.10


12 Koopmans, supra n.4, p.8
Firstly, as already stated, there is very little point to comparative studies of an encyclopaedic style. In fact, strictly speaking, such studies are not "comparative law" at all:

Modern legal comparison is critical in its attitude. The comparatist is not interested in the differences or similarities of various legal orders merely as facts, but in the fitness, the practicability, the justice and the why of legal solutions to given problems. The mere description of a certain legal order might be interesting and illuminating; however such 'foreign legal data' are not comparative law. 13

Gutteridge agrees that "comparative law involves a great deal more than a mere description of the laws of a foreign country". 14 He refers to the generally accepted distinction between descriptive comparative law (comparison instituted for the sole purpose of obtaining information as to foreign law) and applied comparative law (comparative research carried on with some other aim in view). Descriptive comparative law is not directed to the solution of any problem of an abstract or a practical nature. This thesis, however, does not merely comparatively describe law reform, the comparative method and the combination of these two elements. Questions are also raised as to the merits of particular methods of law reform and as to the usefulness of the comparative method to law reform.

Secondly, one would be forgiven for believing that the only valid form of comparison is that between the common law and the civil law. Gutteridge specifically confines his book to the technique involved in such comparison. 15 However, this writer believes that comparison within the common law family is extremely important as well. Gutteridge mentions in passing that he doesn't wish to ignore or belittle the importance of comparison between the laws of the different English-speaking nations, only that no special form of technique seems to be called for for such comparison. 16 So there is nothing wrong with such comparison: This thesis includes much com-


15 Ibid., p.xi and p.72, fn.1
parison amongst common law countries, but also comparison between common law and civil law countries. Furthermore, no restriction to comparison between countries only has been imposed. Comparison between California and New York or between New Brunswick and Manitoba is still comparative law; the laws of one or more jurisdictions are being compared with one or more jurisdictions outside it or them. This thesis is concerned with external comparison only, however.17

Law Reform

Ireland's Law Reform Commission Act 1975 (No.3 of 1975) states at section 1 that in that Act

'Reform' includes, in relation to the law or a branch of the law, its development, its codification (including in particular its simplification and modernisation) and the revision and consolidation of statute law, and kindred words shall be construed accordingly.

That definition was obviously intended solely to define the functions of the Commission created by that Act,18 and therefore cannot be relied upon to define the scope of the present study. The nearest dictionary states that the verb "reform" means "make or become better by removal or abandonment of imperfections, faults or errors", etc., and the noun means "removal of abuse(s) esp. in politics; improvement made or suggested".19

The dictionary definition is obviously wide and all-embracing. If we adapt it for legal purposes, it becomes "make law better" and "law improvement". But what have the lawyers to say of this term? There is no one meaning given to it by them. William H. Hurlburt's 1986 study of law reform commissions19a is an indispensable contribution to the topic. In it, he points out that any

16 Ibid., p.xi
17 Cohn (supra n.14, pp. 78-84) contrasts external comparison with inventive, internal and historical comparison. See Chapter I, Section I below.
18 S.4 obliges the Commission to "keep the law under review", to "undertake and conduct research with a view to reforming the law" and to "formulate proposals for law reform". The English provision is substantially similar - s.3(1) Law Commissions Act 1965 (c.22).
discussion of law reform is bedevilled by the fact that different speakers and writers mean different things by the term. Some usages are almost, if not entirely, mutually exclusive. The differences in usage cause not only semantic difficulty but misunderstanding.\(^{19b}\) Often, lawyers have imposed unnecessary limits on law reform. They often assume that it relates only to legislative law reform.\(^{20}\) Sometimes it is confined to fundamental recastings of the law and is said to not to apply to mere technical changes.\(^{21}\) On rare occasions, it has been pointed out that "if there is no pre-existent law on a particular topic then it is arguable that one cannot logically have law reform".\(^{22}\) Finally, many attempts have been made to narrow the scope of law reform to reform of "lawyers' law" only.\(^{23}\)

Farrar\(^{24}\) maintains that there are two senses to the term. The first sense is a broad one, encompassing many instances of lawmaking by the courts or the legislature. The second sense (which has only arisen over the last 150 years) is a narrow specialised meaning which covers "the situation where the inherent tendency of the courts to develop the law is accelerated by increased legislative intervention" and "comprehends reform of the substance and the form of the law and the institutions of the legal system."

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19b Ibid, p.3.


22 Farrar, supra n.1, p.1.

23 See Chap. IV below, Observations (a) Lawyers' Law vs. Social-Policy Law.

24 Farrar, loc.cit.
It is submitted that the use of the term should not be confined in any of the ways mentioned above and Farrar's first broad sense of law reform should be adopted. As Bell has said, "law reform is too important to be the exclusive prerogative of commissions assigned that name". Law reform is a term which evokes a refreshing sense of renewal and improvement. It means not merely change but change for the better. It is a word of approbation. It is a question of the utmost importance, "the really great task of jurisprudence in the second half of the twentieth century", a "question d'actualité which is more urgent than most of us realise", and it is dangerous to confine it within limits which are too strict or it will lose much of its vitality.

Furthermore, by confining it within strict limits, one loses the opportunity of addressing the fundamental question of which method of law reform is most effective, either generally speaking, or with respect to a particular branch of the law, or a particular problem within a particular branch.


28 Michael D. Kirby, Reform the Law: Essays on the Renewal of the Australian Legal System (Oxf.U.P., Melbourne, 1983), p.7. Kirby continues: "We may oppose change, particularly change for its own sake. But, virtually by definition, reform is desirable because we all desire advance, improvement, change for the better" (p.7).

Law reformers are sometimes considered as a breed apart, even a band of revolutionaries. The average lawyer wonders why they do not settle down and be content with the law that is rather than wasting their time suggesting improvements to it. But the law reformers have contracted a kind of bug which does not allow them to rest and they are convinced that the law as it is is unsatisfactory, that it causes a problem which could be solved if carefully considered. Perhaps a helpful definition of law reform would emphasise this problem-solving function as follows:

Law reform is the solution of a problem which arises because law, legal institutions or legal methods are outdated and obsolete.

This, therefore, is the definition of law reform which will be used throughout this thesis.

The definition does not include every alteration in the law. It excludes such things as legislation imposing a tax or creating a new government department, since that legislation does not arise from a perceived outdatedness and obsolescence in the law. It should also be noted that the definition includes problem-solving by legislators, by law reform agencies, by judges and by academics.

**Constant Change**

A mistake which has sometimes been made as regards law reform has been the assumption that it is a process which is finite, that it will end when the legal system is sufficiently modernised to safely be left unreformed. Francis Bennion has stated this as follows:

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30 Graveson, supra n.25, p.354 (Rev.Int.Dr.Comp.), p.128 (One Law).

31 However, Kirby explains that, far from being revolutionary, "reform implies some degree of preservation or conservation of the object of the reform exercise. What is produced at the end of the day is 're-formed'" - supra n.28, p.8. Hence, Lord Macaulay urged "reform that you may preserve". (Debate on the First Reform Bill, 2 Mar. 1831). See also Hurlburt, supra n.19a, p.434.


32a Similarly, Hurlburt, supra n.19a, p.7.
In the relatively tranquil state of society in Britain the pursuit of legal reform should not need to be a permanent activity. It will, however, on any view, be a necessary activity for a considerable time to come. Similarly, the White Paper which led to the establishment of the British Law Commissions commented that "the task of the Commission will be immense and will not be completed for many years", implying that a time would come when its work would be complete.

However, it is submitted that there will never come a time when law reform would be unnecessary. Times are changing so quickly nowadays that it seems likely that new problems for which the law has not provided will constantly continue to arise from now on. Roscoe Pound believed that "law must be stable and yet it cannot stand still". Cohn submits that "law cannot exist otherwise than by constantly changing - as do all living things". The idea that law reform would somehow come to an end (if that is what was seriously meant) is untenable. No matter how up-to-date the law ever became, it would still need constant change as conditions changed and as inevitable problems with the existing framework presented themselves.

One way of explaining the need for constant change is to represent the situation by a graph (See Graph: The Permanent Need for Constant Change). The area marked "Period 1" shows a legal system which is not faring very well. The laws are too complicated and outdated. What has happened in Period 2 is that there has been a massive push for reform, resulting in a situation where laws are quite up-to-date and quite complicated. This is a satisfactory position not to be underestimated. But it is crucial to realise that in order to simply maintain it (Period 3), constant

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36 Cohn, supra n.14, p.81. "Legal reform is the constant companion of any, but a dying, legal system" -- Ibid., p.144.
change is necessary. Otherwise, the system would gradually begin to become outdated and the graph would show up-to-dateness decreasing and complication increasing. However, let us assume that it is sought to improve on the satisfactory position in Period 3. Another push for reform would be needed, as in Period 4, where the law would become extremely up-to-date and uncomplicated. The result would be the "ideal" at Period 5. Even in the ideal situation, constant change would continue, but happily the reward for the superhuman push in Period 4 is that the degree of constant change is reduced.
GRAPH - THE PERMANENT NEED FOR CONSTANT CHANGE

- Up-to-dateness of law
- Complication of law
- Constant Change

- Period 1
- Period 2
- Period 3 (Satisfactory)
- Period 4
- Period 5 (Ideal)

--- TIME ---

Introduction
CHAPTER I - THE THEORY

This chapter deals with the theory of the combination of the comparative method and law reform. An attempt will be made to discover when the two come into contact in theory and why this combination comes about. The limitations and dangers of the combination are also considered. Cohn has rightly said that "nothing could be more dangerous to the cause of both critical and comparative jurisprudence than a naive enthusiasm which would exaggerate the value of the combination." There are two sides to the coin, and both sides must be evaluated. Section I of this chapter examines its obverse side, while Section II discusses its reverse side.

SECTION I: HOME THOUGHTS FROM ABROAD

In the Introduction, law reform was defined as the solution of a problem which arises because the law, legal institutions or legal methods are outdated and obsolete. To the question, "where should we turn for the new law?", some natural answers would seem to be: "Look at what they do in X country, repeal your own laws and follow their example", or "What do they do in other places?", or "The United States (or Germany) could achieve this by legislation, therefore so can we", or "why not look abroad for some ideas to use at home?" (Home Thoughts from Abroad).


2 Critical jurisprudence, in Cohn's terminology, is the science of law reform. It is not to be confused with the modern Critical Legal Studies movement.


5 Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79 at 82.
These are natural answers because it is a natural reaction when faced with any problem to try and ascertain how others have solved the same problem. An Irish doctor who is trying to treat an AIDS victim will quite naturally investigate how the victims have been treated in America and other countries, since those countries have had a lot more experience with the disease. Gutteridge asks

What would have been the fate of the art of healing if our physicians and surgeons had disregarded the research of foreign workers in the same field? It is inconceivable that a surgeon should hesitate to carry out a particular type of operation merely because it emanates from the hospitals of Paris or Vienna.\(^6\)

Standardisation of Life:

Just as the same medical problems can arise all over the world, so can the same law reform problems. Graveson has referred to "the increasing standardisation of life that we face today".\(^7\) Kahn-Freund gives a detailed description of what he calls the "flattening out of economic and cultural diversity". Firstly, there is the assimilation of economic conditions:

Over wide areas only a tiny proportion of the gainfully employed population works on the land, and ... in the developed countries most people earn their living in industry, commerce and public service in ways almost indistinguishable from one country to another ... Owing to the evolution of trade, of mass production and of advertising, their manner of spending what they have earned [has] become equally uniform. In all industrialised countries the legal problems arising from employment have become as similar as those arising from housing: the blocks of flats in which so many people live look very much alike in Manchester or Leningrad, in Cincinatti or Buenos Aires, in Yokohama or in Dusseldorf.\(^8\)

Then, there is the growing uniformity of the cultural environment: The role of religion in people's lives is diminishing (he says), the mass media occupies a central place, and

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everywhere people read the same kind of newspaper every morning, look at the same kind of television every night, and worship the same kind of film stars and football teams everywhere.9

There are various examples of how the standardisation of life means that the same legal reform problems arise. The "ombudsman explosion"10 was one of universal attractiveness as a reaction to the growth of the power and influence of "big government".11 The need to protect the rights of employees from their employers as regards wages and hours of work, safety and health, holidays and pensions is a worldwide necessity; hence the impressive achievements of the International Labour Organisation in these areas.11a The rapid development of computer technology led to the adoption of data protection legislation in numerous jurisdictions. With respect to civil delictual liability,

precisely the same problems of insurance, of risk and fault, of producer's liability, of the relation between private liability and social security are discussed wherever you go.12

Comparative Method an Alternative Supplementary Method:

What are the options open to a legislator, a member of a law reform agency, a judge, or an academic faced with a problem of law reform? He/she discovers that the law, legal institutions or legal methods are outdated and obsolete and he/she wishes to solve that problem. There would appear to be four options open to him/her, which can be used independently of each other or in combination.

9 Ibid., loc. cit. He recognises that his description applies mainly to the developed countries, but insists that even in relation to the developing world there is a tendency to assimilate the law to that of developed countries (p.10 MLR; pp. 302-303 Sel.Writ.)

10 This description comes from the former Chief Ombudsman of New Zealand, Sir Guy Powles in 'Citizen's Hope: Ombudsmen for the 1980's' (1979) 5 Commonwealth Law Bulletin 522 at 525.


11a Kahn-Freund, supra n.8, pp.20-21(MLR), p.313 (Selected Writings).

12 Kahn-Freund, supra n.8, p.9(MLR), p.314 (Selected Writings).
Firstly, he/she could try and invent a solution, create it in a vacuum, so to speak. He/she would compare the potential solutions which his/her mind envisages with the current situation. If there were no such native geniuses, the result would be worldwide stagnation, but it is to be remembered that such geniuses are very rare indeed. Cohn calls this process that of "inventive comparison".13

Secondly, he/she can use "internal comparison"14 to produce a suggestion to help him/her solve the problem. The same sort of problem may have already been solved in a different branch of the law in the same legal system. For instance, equity may have provided a more progressive solution than the common law.

Thirdly, the reformer can look at solutions adopted by the legal system in the past (historical comparison.)15 This will widen greatly his/her field of view.

Fourthly, he/she can try and ascertain how the problem has been solved in other jurisdictions. If he/she considers a foreign solution to be appropriate, he/she can borrow it for his/her own system, a technique which has paradoxically been referred to as "heureux plagiats".16 This depends, of course, on the recognition on his/her part that many law reform problems are the same worldwide due to the increasing standardisation of life described above.

Although this thesis is about the combination of the comparative method and law reform, and hence it focusses on the fourth option open to the reformer, it must be remembered that the comparative method is merely an alternative method. The first three options still remain of sub-

13 Cohn, supra n.1, p.78. At p.2, Cohn laments the fact that the reformer is destined to remain unknown. If his/her reform is not accepted, he/she vanishes into obscurity. If it is accepted, the reform itself becomes better known than the reformer.
14 Ibid., pp.79-80.
15 Ibid., pp.80-81.
It is of great importance to remember that the part that comparative jurisprudence can play in the solution of the task set to critical jurisprudence [i.e. law reform] should not be exaggerated. It is probably not right to say that comparative jurisprudence constitutes the last tool to which the critical jurist ought to resort. But it would certainly be wrong to consider it as the first or the most important tool .... All that can be claimed is that comparative law furnishes a valuable alternative method .... It forms a valuable supplement to, but under no circumstances a substitute for, the other alternatives.  

Role in Law Reform Only One Function of Many:

Any listing of the functions of comparative law would be incomplete if it did not include the comparative method's role in solving law reform problems. Hence, virtually all the theorists include it on their list of the functions of comparative law. There is an incredible volume of opinion as to what this list of functions contains and as to which functions are most important. In 1973, for example, Professor Mario Rotondi invited papers on the aims and methods of comparative law and received 42 articles, in 5 languages, which varied enormously in the emphasis they attributed to the practical function of the comparative method in law reform. Fairly typical lists of the functions of comparative law can be found in the writings of David, Gutteridge and Kam-ba. David says that the interest of studies of foreign law and comparative law derives from five sources:

a) Interest in knowledge of foreign laws  
b) Better understanding of positive law  
c) Improvement of national law  
d) Unification and harmonisation of laws  
e) Application of the comparative method to studies of legal history and legal philosophy.

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17 Cohn, supra n.1, pp. 82-83.  
Gunteridge\textsuperscript{20} adopts the broad distinction between Descriptive Comparative Law and Applied Comparative Law, and his list of functions might be summarised as follows:

\begin{itemize}
  \item[a)] The obtaining of information on foreign law (Descriptive Comparative Law)
  \item[b)] Comparison to aid a legal philosopher to construct abstract theories of law (e.g. re the "common core" of civilised legal systems)
  \item[c)] Comparison to assist the historian in tracing the origins and evolution of legal concepts and institutions
  \item[d)] Comparison for law reform purposes
  \item[e)] Comparison for the purpose of the unification of divergent laws.
\end{itemize}

Kamba's list\textsuperscript{21} is really only a list of general headings, which he particularly expresses not to be "exhaustive or in any way watertight compartments".\textsuperscript{22}

\begin{itemize}
  \item[a)] Academic studies
  \item[b)] Legislation and law reform
  \item[c)] The judicial process
  \item[d)] Unification and harmonisation
  \item[e)] International law
  \item[f)] International understanding
\end{itemize}

It is important that in each of these lists the function of comparative law as a source of ideas for law reform is only one of many functions which it has. It is incomplete and one-sided for any theorist to confine its functions to one particular object alone. Lévy-Ullman confined its functions to the unification of law by defining comparative law as

\textbf{Branche spéciale de la science juridique qui a pour objet le rapprochement systématique des pays civilisés.}\textsuperscript{23}

There were various authors (e.g. Kohler, Pollock)\textsuperscript{24} who identified comparative law with comparative legal history. And Sir Henry Maine, whom Gunteridge describes as having "more profound-\

\textsuperscript{20} Supra n.6, pp. 7-9.
\textsuperscript{22} Ibid., p.490.
\textsuperscript{23} Lévy-Ullman, \textit{Droit Mondial du XXe Siècle}, cited by Gunteridge, supra n.6, p.3, fn.1. Translation: "A special branch of legal science, the object of which is the systematic bringing together of civilised countries."
\textsuperscript{24} Gunteridge, supra n.6, p.3.
ly influenced the development of comparative law than any other English lawyer",25 was unduly restrictive when he said that it would be

universally admitted by competent jurists that, if not the only function, the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law.26

Cohn is surprised that such a distinguished scholar as Maine could seriously hold such a view:

Comparative law .... has its own tasks in its own field. Assistance to critical jurisprudence [i.e. law reform] is only one of its functions. It is neither its sole, nor its main, function.27

Cohn criticises the belief that comparative law's role in law reform is the main justification for its existence on three grounds:

a)If that were so, the majority of all comparative legal studies were lacking that justification because they were written without any regard for the needs of a critical utilisation of their results.
b)Frequently, for one or the other reason, such utilisation would anyhow be either impossible or very difficult.
c)Comparative jurisprudence, like every other science, can serve so many purposes that it is quite impossible to enumerate them.28

Transplantation and Reception:

Even though assistance in the solution of problems of law reform is only one of many functions of comparative law, nevertheless it can be said that this practical function is one which makes comparative law more easily acceptable to lawyers generally and practitioners in particular. In the Introduction, reference was made to hostility amongst lawyers to comparative law. Its practical role in law reform has helped to change this attitude towards it. In an inaugural lecture delivered

25 Ibid, p.v (Dedication) and p.xii. Later, (pp.15-16, p.38), Gutteridge refers to Lord Mansfield as "perhaps the greatest of English comparative lawyers", with no mention of Maine.

26 Maine, Village Communities in the East and West (3rd ed. 1871), p.4. This view was also held by Ottelisamu in Die Aufgaben und die praktischen Anwendungs-moeglichkeiten der vergleichenden Rechtswissenschaft, vol.6 (1941), pp.259ff. and Zahn, Wirtschaftsfuehrerum und Vertragsethik im neuen Aktienrecht (1934), p.11; both cited in Cohn, supra n.1, p.83, fn.133.

27 Cohn, supra n.1, p.83.

28 Ibid., pp.83-84
in the University of Birmingham in 1967, Professor L. Neville Brown said that it is its [comparative law's] practical application to law reform, I suggest, that has been chiefly responsible for the widespread change of attitude towards it in the last 15 years or so.29

This change in attitude has been helped in Britain by the statutory recognition of comparative law in paragraph (f) of section 3(1) of the Law Commissions Act 1965 and in Ireland by paragraph (b) of section 4(3) of the Law Reform Commission Act, 1975.30

Gutteridge says that comparative research with a practical aim in view, such as law reform or the unification of divergent laws, "is the most vigorous and fertile in output".31 It is now almost inconceivable in the majority of countries that any attempt at reforming national law should not be preceded by an examination of foreign solutions to the same problem, although naturally the quality of this research and the importance attributed to it varies considerably.32 Thus, comparative law has become the "handmaid" of law reform.33 Norman S. Marsh, Q.C. was the Director of the British Institute of International and Comparative Law before he was appointed as one of the first members of the Law Commission for England and Wales in 1965, and has written extensively on the practical, as opposed to the theoretical, use of the comparative method in law reform. In his view, the practical comparatist/law reformer uses what he calls the "eclectic reformer" approach:

Il [use] de sa science de plusieurs systèmes juridiques de manière éclectique, avec le projet de trouver des solutions plus satisfaisantes aux problèmes de son propre système.34

29 Brown, supra n.4, p.3.
30 See Chapter V below.
31 Gutteridge, supra n.6, p.9.
32 See below, Chapters II and V.
33 Marsh, supra n.3, p.86 (Proceedings), p.667 (RabelsZ); Brown, supra n.4, p.9.
34 Marsh, 'Quelque Réflexions Pratiques sur l'Usage de la Technique Comparative dans la Réforme du Droit National' (1970) 47 Rev.de Dr.Int. et de Dr.Comp., 81 at 81. Translation: "He uses his own knowledge of many legal systems in an eclectic manner, with the object of
This is a "rigorously practical"\textsuperscript{35} conception of comparative law, he says, and

Il peut sembler à l'homme de science que cette approche implique un mode assez dégradé du droit comparé, un équivalent de la "science appliquée" par rapport à la "science pure".\textsuperscript{36}

Reasons for Transplantation and Reception:

The transplantation or reception of a foreign legal idea can occur for various reasons.

Firstly, on an \textit{involuntary} basis, due to chance or due to colonisation. This will be dealt with in more detail in Chapter II (Reception/Major Transplants).

Secondly, on a \textit{voluntary} basis, due to a great respect on the part of the donee for the donor's laws. ('The Transplant Bias'). This will be discussed in part c of Section II below.

Thirdly, to further the cause of unification of law, or because there is a harmonisation convention on the topic to which the state has acceded. Examples of the latter are the obligations of member states of the European Communities, commercial law conventions, conflicts of laws conventions and the Data Protection Convention 1981.

Fourthly, to solve a problem of law reform which was shared by the donor and the donee and which has been solved more successfully by the donor. Kahn-Freund breaks this reason into two parts:

\begin{quote}
finding more satisfactory solutions than those of his own system.\textsuperscript{35} Marsh contrasts this approach with the "highest common factor" approach, where a comparatist tries to extract a common core of legal systems, the only real result of which is to prove that the majority of the legal systems studied treat plain situations in a similar manner, but that they tend to diverge in solving more difficult problems.
\end{quote}

\textsuperscript{35} Ibid., p.83.

\textsuperscript{36} Ibid., p.82. Translation: "It can seem to the man of science that this approach implies a fairly reduced fashion of comparative law, an equivalent of 'applied science' as opposed to 'pure science'.'
a) To give adequate legal effect to a social change shared by the donor with the donee
b) To promote at home a social change which foreign law is designed either to express or to produce. 37

But it is submitted that this distinction is unhelpful and extremely difficult to draw in practice. When there is no question of transplantation or reception, it is difficult to distinguish between legal reforms which give legal effect to a social change and those which promote a social change. If homosexual acts were legalised by the Oireachtas or by the courts in Ireland, would that come under heading (a) as an adjustment of the law to the social change that homosexuals account for a certain percentage of the population (a fact which was not recognised in the past) or would it come under heading (b) as "educative" law reform, whereby the Oireachtas or the courts would be promoting social change, i.e. promoting the acceptance by the community of homosexuals within its midst? Similar problems would arise in trying to classify the abolition of capital punishment. The difficulty in making the distinction continues if there is a question of transplantation or reception. Marsh 38 points to the example of the transplantation of the ombudsman idea (in a rather watered-down fashion) 39 to Britain. At first it seemed as though its introduction would be impossible under heading (a); but after extensive reports, tours of Britain by the Danish ombudsman, favourable newspaper publicity and a change of government, a wide measure of general support was secured for the scheme. Was this a reform which reflected a social change or a reform which brought about social change?

The fourth reason explains why comparative research is so important to law reform in these days of rapid change. The reformer (legislator, LRA member, judge or academic) can only be sure that the proposed reform is the best solution possible if he/she looks to possible advances which have been made abroad:

37 Kahn-Freund, supra n.8, pp.2-5(MLR), pp.295-298 (Selected Writings).
38 Supra n.3, p.86 (Proceedings), pp.667-668 (RabelsZ.)
39 See Britain's Parliamentary Commissioner Act, 1967.
There are too many good solutions of difficult problems which remain confined to a few or even to an individual legal system because nobody outside this system has heard of the happy solution that has been found.\footnote{Cohn, supra n.1, p.78}

The question of the reception of foreign legal institutions is "simply one of expediency, of need. No one will fetch a thing from abroad when he has as good or better at home".\footnote{Rudolph v. Jhering, \textit{Geist das romischen Rechts} (9th ed., 1955), p.8.} Cohn says of comparative studies:

Such studies reduce the amount of creative ability that is required for the research on problems of legal reform. It places at the disposal of the student the result of the creative hearts and brains of all the nations and all the times. It means nothing less than the full utilisation of all those legal talents that in the course of time have been granted mankind. If mankind is under a moral duty not to neglect his talents, mankind is under a moral duty not to neglect comparative critical [i.e. law reform] studies.\footnote{Cohn, supra n.1, p.52. In the same vein, David believes that if a reformer doesn't consult foreign solutions, he/she can be accused of rashness/arbitrariness. Supra n.19, p.114 and p.118.}

Fifthly, transplantation or reception can occur because a foreign solution is seen to have functioned effectively in practice. In other words, comparative law helps to solve the problem of practicability and enforceability of the proposed law.\footnote{Kamba, supra n.21, p.497.} All reformers know only too well that a reform may look very well on paper, but may be totally impractical or unenforceable in reality. Kamba points to the fact that the American experience regarding prohibition served a strong warning to any other country which might have passed similar legislation.\footnote{Ibid., loc. cit.} Much modern legislation is a "process of trial and error",\footnote{Gutteridge, supra n.6, p.36.} and we can profit from the experience of other systems, even if we merely learn in this way how to avoid the mistakes which they have made.\footnote{Ibid., p.33.}
Cohn places great emphasis on the requirement of practicability in proposals for law reform. It is a major part of his threefold test which any new rule must satisfy: justice, consistency/compatibility and practicability.\footnote{Cohn, supra n.1, p.17.} With regard to the latter, external comparison offers one considerable advantage over all other methods. It is able to supply not only solutions, but also experience with the practical working of the solutions in question.\footnote{Ibid., p.88.}

If he/she is lucky, the reformer will discover that the foreign solution works well in reality as well as looking well on paper. But sometimes he/she will discover that its enforceability and practicability were disastrous. Even in such cases, however, the use of the comparative method has not been in vain:

It does at least show how not to do it. It will prevent the repetition of errors committed. It will frequently indicate the direction in which fresh innovation is required simply by demonstrating that possibilities in other directions do not exist.\footnote{Ibid., p.87. At p.50, he states that "injustice is more easily discovered than justice."}

This fifth reason can be compared to a doctor's or a scientist's reliance on experimentation\footnote{Brown, supra n.4, p.6: "The comparative method is for the lawyer what the experimental method is for the scientist"; Gutteridge, supra n.6, pp.156-7: "The common fund of human wisdom and experience has been enriched from the individuality of experiment which is a characteristic of the existence of several competing systems of law."} as a means of testing whether a given cure will actually work. The doctor treating the AIDS victim can look to experiments done abroad to see which treatments are most successful. Similarly, the reformer seeking to solve a problem of law reform in his own jurisdiction can look abroad to see how experimental foreign solutions have functioned in practice:

As legal science has no laboratories, some societies may ... serve as grounds for experimenting in law reform. These values have been acknowledged even in an integrated federation such as that of the United States of America. In matters where under the Interstate Commerce Clause of the Federal Constitution the Union might have claimed to exercise exclusive jurisdiction, the federal powers, and among these the US Supreme Court, have preferred to stand aloof and not interfere with state legislation. One reason for this has been the wish to see how a
certain legislative approach worked in practice in order to learn whether it might serve as a model for later federal legislation.51

However, Cohn disapproves of this sort of an analogy with experimentation. He believes that a law reformer cannot use experimentation, as this would be to use human personalities as means to an end, that is to abuse them.52 In reply, it might be said that the kind of experimentation included in the analogy is often not consciously experimental at all. The jurisdiction which first adopts a new solution does not consider itself as using its people to test that solution. It considers itself as trying to improve its people's legal system. It is only as a byproduct of that attempt at improvement that the solution is used by other countries as a model to be studied as to how it functioned in practice. Even in rare cases of frank experimentation, such as the establishment of neighbourhood justice centres in New South Wales on a trial basis,53 it is untrue to say that people are being abused. On the contrary, as with all laws, there is just as much likelihood that they will benefit from the change as that they will suffer due to it. At any rate, even Cohn concedes that the comparative method does for legal science what experiment can do for the natural scientist.54 And his warning as to the dangers of taking the analogy with experimentation too far cannot be denied. Obviously, it would be barbaric to use capital punishment on a consciously experimental basis to see whether it would reduce the level of crime.

51 Ole Lando, 'The Contribution of Comparative Law to Law Reform by International Organisations' in Proceedings (supra n.3) 59 at p.61; reprinted (1977) 25 AJCL 641 at 645-646.

52 Cohn, supra n.1, p.48

53 See Community Justice Centres (Pilot Project) Act 1980 (NSW); cited by Kirby, supra n.11, p.19, fn.32.

54 Cohn, supra n.1, p.48
SECTION II: LIMITATIONS AND DANGERS

The reverse side of the coin must now be considered: the limitations and dangers in combining the comparative method and law reform. They will be considered under the following headings:

a) The Danger of Getting the Foreign Law Wrong
b) Misuse of the Combination because it is Fashionable
c) Excessive Respect for a Certain Jurisdiction (Transplant Bias)
d) Legal Isolationism/ Xenophobia
e) The Need for Adaptation to Suit the Donee's Present System.

Particular attention will be paid to the last of these headings, as this aspect of transplantation has caused lengthy theoretical debates.

a) The Danger of Getting the Foreign Law Wrong

It is very easy when making a statement about the law in the donor's system to get it wrong: "Error of law is probably more common in comparative law than in any other branch of legal study". Rabel warns comparatists of the danger of coming upon "natives lying in wait with spears" in their explorations of foreign territory. Gutteridge says that the "greatest bugbear" of comparative study and research is "the difficulty in discovering the exact state of the law of a country at any given moment". In the first place, the comparatist's library may be unable to assist. He/she may have to rely on what secondary sources of law he/she can find, which sources may well be inaccurate or out-of-date. If he/she is lucky enough to have access to primary sources, they may well be out-of-date too. In addition, there is the problem of languages. Translations of foreign legislation, case-law and academic opinions are often virtually impossible to

56 Gutteridge, supra n.6, p.136.
57 "More than other legal scholars, the comparatist feels the loss of a common language, the role played by Latin for so long and by French until the nineteenth century." - Richard J. Cummins, book review (1984) 58 Tul. L. Rev. 1277 at 1280. See also Gutteridge, supra n.6, chapter IX (The Problem of Legal Terminology).
come by. If the comparatist is familiar with a foreign language, he/she must be extremely careful not to misinterpret the foreign terminology. A word often has a quite specialist meaning in one language which is lost in translation. For example, the French *contrat* is not a 'contract', and 'domicile' is anything but *domicile*.\(^{58}\)

While Marsh agrees that "a little knowledge of a foreign legal system can ... have its special dangers for law reform", citing Holmes' opinion that "ignorance is a great law reformer",\(^{59}\) he also believes that difficulties of language are often overemphasised:

Differences of language ... have been with us since the Tower of Babel and, although important, can at a cost usually be surmounted.\(^{60}\)

It may also be added that the introduction of on-line computer databases such as LEXIS ensures that the risk of getting the foreign law wrong is greatly reduced.

The surest way to improve accuracy of information on foreign law is the personal contact or the written enquiry to the Ministry or other body in the jurisdiction concerned. Often "the right man in the right place" can "prove decisive".\(^{61}\) Marsh says that personal relationships across frontiers are "an important aspect of the practical influence of comparative law".\(^{62}\) There are numerous examples of this phenomenon. Karl Llewellyn was the right person in the right place as chief draftsman of the American Uniform Commercial Code and it was influenced by continental law because of his familiarity with the subject.\(^{63}\) And the New Zealand Royal Commission on the Electoral System took the trouble of sending a five-person team to Canada, Ireland and West

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58 Examples from K.-Freund, 'Comparative Law as an Academic Discipline' (1966) 82 LQR 40 at 52.
59 Supra n.3, p.80 (Proceedings), p.659 (RabelsZ). No reference is given for the Holmes quote.
60 Ibid., p.79 (Proceedings), p.657 (RabelsZ).
Germany in order to study the voting systems in those countries. Watson has argued that whilst a reformer should do his/her utmost not to get the foreign law wrong, even inexact knowledge may inspire worthwhile ideas. This will be considered in more detail in subsection (e) below.

b) Misuse of the Combination Because it is Fashionable

Reference has already been made to the fact that in most countries it is now almost inconceivable that any attempt at reforming national law should not be preceded by an examination of foreign solutions to the same problem (Section I above). Professor Tallon has said that "comparative law is popular, just now, even fashionable" and speaks of the new state of affairs of "the penetration of comparative law in the activity of every jurist", particularly the law reformer. According to Professor Brown, comparative law

\[\text{has become something of a bandwagon on which academics and practitioners alike scramble for seats, so much so that the older passengers may sometimes be surprised at the company in which they now travel.}\]

The danger with the fashionability of combining the comparative method and law reform is that the combination may become distorted and is liable to be misused. There are two particular dangers which can arise from the fashionability of the combination.

Firstly, there is the danger that a foreign solution will be adopted merely because it is foreign. Emerson believed that it was "suspicious" when a reform was adopted from abroad as opposed to being the result of native genius. It is obviously a misuse of the comparative method if it is

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64 *Irish Times*, Sat. 19 Apr. 1986, Weekend p.6, 'Voting Survey'.

65 D.Tallon, 'Comparative Law - Expanding Horizons' (1968-69) 10 J.S.P.T.L. (n.s.) 265 at p.265 and p.266. See also David, supra n.19, p.117, speaking of France: "Pour toute réforme de quelque importance il est devenu courant de s'enquérir de ce qui se fait a l'étranger." (For every reform of some importance, it has become fashionable to inquire what has happened abroad.)

66 Brown, supra n.4, p.2.

67 Kahn-Freund, supra n.8, p.1(MLR), p.294 (Selected Writings).
used "merely as an artifice to enable foreign rules to be introduced surreptitiously into a national system of law". At the very least, foreign solutions should not be used when the existing solution at home is as good or better. For a higher standard of reform, it is also essential that the native genius be allowed to do his/her best to invent an even better solution than any foreign solution. Otherwise, as was said before, the result would be stagnation all over the world.

Secondly, foreign solutions may be consulted at length because it is fashionable and because public opinion demands it, but no practical use may be made of them at the end of the day. In situations where this happens, it would be better for the reformer to have been honest and not have referred to the foreign research at all, rather than wasting so much precious time, energy and money on it. Marsh is particularly critical of this kind of tokenism due to the fashionability of the combination. He says that a gap often exists "between very extensive comparative research in connection with a legislative project and a practical result on the proposals made". In the case of one particular report he cites, the Committee itself seems to have admitted that the research was irrelevant and did not use any of the foreign suggestions. Another example is the famous Pearson Report on accident compensation, in volume 3 of which there was assembled a vast amount of information on foreign systems. It has been noted that the Commission "then seemed to ignore this in many of its conclusions". The gap between extensive comparative research and

68 "Every project in the history of reform, no matter how violent and surprising, is good when it is the dictate of a man's genius and constitution, but very dull and suspicious when adopted from another." : Essays, Second Series, 'New England Reformers'.

69 Gutteridge, supra n.6, p.20.

70 Marsh, supra n.3, p.82 (Proceedings), p.662 (RabelsZ).


action on it applies not only to legislative law reform, but also often arises in the case of law
reform by judges or suggestions for law reform from academics.

c) Excessive Respect for a Certain Jurisdiction (Transplant Bias)

It is said that in the fifth century B.C. the Romans engraved in Bronze and set up in the market
place in Rome a set of legal rules known as the "XII Tables." The story says that a mission had
been sent to Greece to study the code (594-593 B.C.) of Solon and that the Tables were heavily
influenced by Greece, since Greece was unquestionably the most advanced state of the times.
Marsh has used this story to illustrate how laws may be transplanted merely because the donee
has excessive respect for a certain jurisdiction:

I think it important for law reformers who are tempted to adopt some law or insti­
tution of another society to ask themselves whether it is the appropriateness of
the law or institution to their own society which attracts them or whether it is in
fact some broader-based approval of the foreign country which makes them look
on the particular law or institution with favour.74

The Romans adopted the Greek laws because the culture and political reputation - if not the actual
power - of the Athenians long occupied a dominant position in the Mediterranean.75 Marsh terms
this "Kahn-Freund in reverse". Kahn-Freund had argued that transplantation cannot take place
where political and cultural backgrounds are fundamentally different,76 but Marsh maintains that
such transplantation will take place if the donee has great respect for the donor's system.

Watson has used the phrase 'Transplant Bias' as a label for this:

The term Transplant Bias is used to denote a system's receptivity to a particular
outside law, which is distinct from an acceptance based on a thorough examina­
tion of possible alternatives. Thus, it means for instance a system's readiness to
accept Roman law rules because they are Roman law rules, or French rules
because they are French rules.77

74 Marsh, supra n.3, pp.73-74 (Proceedings), p.650 (RabelsZ).
76 Kahn-Freund, supra n.8, passim.
Obviously, there are times when the law imported due to high respect for a certain jurisdiction will be of inherent value. But on the whole, the danger with great respect for certain jurisdictions is that it is usually excessive. Due to this excessive respect, solutions from that country may be adopted although they are not the best solutions available. A prime example of transplant bias is the excessive respect in Ireland for English statutes and case-law, a topic to which further reference will be made in later chapters.

Watson has conveniently summarised the reasons for the existence of a transplant bias as follows:

Its extent will depend on such matters as linguistic tradition, the general prestige and accessibility of the possible donor, the training and experience of the local lawyers.\(^{78}\)

Those three factors have obvious applications to the Irish situation. Linguistically, English is the common language of both Ireland and England. English law's prestige is unquestionable; and its statutes, case-law and textbooks are very easily accessible in Ireland. The Irish lawyers are trained in the common law tradition and are highly experienced in researching English law. By way of contrast, the transplant bias in the United States towards English law is weaker, due to differences in training, accessibility of English law and prestige of English law.

d) Legal Isolationism/Xenophobia

Ptolemy was a celebrated astronomer who lived in Alexandria in the 2nd century, A.D. He developed a theory whereby the relative motions of the sun, moon and planets were explained to take place round the earth, which was supposed to be stationary. There is a tendency amongst lawyers to believe that their system of law is like the earth in Ptolemy's theory - their system remains stationary and all the other systems revolve around it. The ptolemaic character of the law\(^{79}\) is a fact-

\(^{78}\) Ibid., loco cit.

tor in discouraging the combination of the comparative method and law reform. If there is a generally held belief that one's own legal system is at the centre of the legal universe, then the borrowing of ideas from abroad will seem unnecessary. In fact, it will be expected that foreign reformers will learn from one's own system since it is so "central". The result is legal narcissism, insularity, provincialism and isolationism, combined with a fear of foreign influences (Xenophobia) and a horror alieni juris.

All of this stems from Inertia, which can be defined as the general absence of a sustained interest on the part of society and its ruling elite to struggle for the most 'satisfactory' rule.

C.J. Haughey, then Minister for Justice, defended inertia as being a "practical, pragmatic approach" resulting from "the feeling that any system that works reasonably well is good enough". Whatever the reasons for this inertia, it often leads to unjustified rejection of foreign solutions merely because they are foreign.

The most potent influence at work would seem to be a dread of the polluting or disruptive effects which it is feared might result from the infiltration of legal ideas from abroad. Lawyers are prone to regard the institutions and the rules of the legal system in which they have been trained, not necessarily as perfect, but as affording the best solution which can be arrived at in the conditions in which rules of law are called upon to function in a workaday world.

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79a Zweigert and Kotz, supra n.55a, p.15.
80 See Cohn, supra n.1, pp.93-100 ('Legal Universalism, Legal Isolationism and Legal Regionalism').
81 Hans Dolle, 'Der Beitrag der Rechtsvergleichung zum Deutschen Recht' in M. Rotondi (ed.), supra n.18, 123 at 151.
82 Watson, supra n.77, p.331.
83 Haughey, 'Law Reform in Ireland' (1964) 13 ICLQ 1300 at 1311.
85 Gutteridge, supra n.6, p.25. "A mythology of fundamental superiority (for the particular society
Legal tradition can be a serious limitation on law reform. 'Legal Tradition as a Limit on Law Reform' was a topic for the tenth Congress of the International Association of Comparative Law held at Budapest in 1978, while Graveson has criticized 'legal idolatry' (worship of ancient precedents for their own sakes) and the subconscious barrier which tradition raises against imaginative legal pioneering. Legal tradition not only limits law reform generally, but also limits the consultation of foreign solutions in law reform:

All systems of law are to some extent rooted in tradition, and this traditional aspect of national law has, in all countries, produced an intransigent attitude towards any attempt to promote the study of foreign legal institutions and foreign rules of law.

In this writer's view, it would seem that legal isolationism and xenophobia are unjustified in the modern world, given the increasing standardisation of life which has been referred to in Section I of this chapter. Ptolemy was proven wrong by Copernicus, who established that the planets, including the earth, move in orbits around the sun as a centre. Similarly, it is wrong for any legal system to reject foreign influences merely because they are foreign in these days of international commerce and communication, with increasing talk of the "global village". Jhering put it succinctly when he said:

Nur ein Narr wird die Chinarinde aus dem Grunde zurückweisen, weil sie nicht auf sein em Krautacker gewachsen ist.

at least) grows up around law, among lawyers and laymen alike; in France for the Code civil, in England for the common law, and in Scotland for Scots law: Watson, supra n.77, p.331.


88. Gutteridge, supra n.6, p.24.

89. Copernicus is the Latinized form of Koppernik, the astronomer, a native of Prussian Poland (1473-1543).

90. Jhering, supra n.41, p.8. Translation: "Only a fool would refuse quinine just because it didn't grow in his back garden."
Finally, the law's isolationism and xenophobia lags behind the opinions of the general public and leads to the danger that non-lawyers will lose all respect for law:

If the raison d'être of our case law be that it provides an attractive and amusing puzzle, the men and women of the twentieth century will impatiently sweep it aside - and with it the legal profession.

**e) The Need for Adaptation to Suit the Donee's Present System**

Comparatists have repeatedly stressed that a solution which has worked in one jurisdiction may not work in another. In the words of Arminjon et al,

Telle institution ... qui fonctionne ... bien dans son pays d'origine ... donne parfois un très mauvais rendement dans certains autres. Il en est des institutions comme des espèces de végétales ou animales. La transplantation des cépages américains en Europe y a introduit le phloxera, l'acclimatation des lapins en Australie y a causé des ravages incalculables.

The reformer who borrows a solution from abroad must be careful to discover whether and to what extent the solution needs to be adapted. Adaptation may be necessary due to differences between the donor and the donee - differences of a legal nature, or of a historical, political, social, economic, cultural or environmental nature. The danger of foolish imitation would seem to necessitate scrutiny by the reformer of two factors:

a) The legal/ historical/ political/ social/ economic/ cultural/ environmental context of the proposed rule within the donee's system

b) The legal/ historical, etc., etc., context of the existing rule within the donor's system.

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91 Gutteridge, supra n.6, p.25.


93 Arminjon et al, supra n.16, p.20. Translation: "An institution which functions well in the country where it originated can sometimes give a very bad profit in certain others. Some institutions are like types of vegetables or animals. The transplantation of American vine-plants to Europe brought about phyloxera there; the importation of rabbits to Australia caused incalculable havoc there."
I-The Theory

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CIRCLE A (Donee)

CIRCLE B (Donor)

DIAGRAM 1

Subcircles:
1-Legal context
2-Historical context
3-Political context
4-Social context
5-Economic context
6-Cultural context
7-Environmental context

DIAGRAM 2
Factors (a) and (b) can be roughly represented as Circle A and Circle B as in Diagram 1. Circle A represents a portion of the donee's system and Circle B represents a portion of the donee's system. The dot in the centre of each circle represents a particular rule or institution and the circle round it represents its context within the system. In the case of Circle B, the rule is an existing rule. In the case of Circle A, the dot represents the locating of the new transplanted rule within the donee's system. It is often easy to lose sight of the fact that (a) and (b) are separate factors and so it is best to bring that distinction out into the open as soon as possible and to bear it in mind throughout the whole of the discussion that follows.

Many questions of great importance arise from the need in legal transplantation for adaptation to local conditions. When can a foreign law be transplanted? How much adaptation is required to local conditions? How detailed must the reformer's scrutiny be of factor (a)? Of factor (b)? Which elements in each of the factors are most important - the legal context? The historical context? The political context, etc.?

Amongst those who have tried to answer these questions, three of the most interesting writers have been Otto Kahn-Freund, Alan Watson and Norman S. Marsh. Their arguments have contained constant references to Montesquieu's De l'Esprit des Lois (1748) and so that would seem to be a convenient starting point for this discussion.

Montesquieu:

Montesquieu took more than twenty years to write his monumental De l'Esprit des Lois.94 It is a book which encompasses a wide range of subjects - law, philosophy, history, politics, etc. Montesquieu was a polymath and his genius is best appreciated by taking the work as a whole, ignoring the minor faults. Unfortunately, for the purposes of this discussion, it is necessary to examine

94 "Of the Spirit of Laws". Various editions are available. This writer has used the 1878 edition (Garnier Frères, Paris). Thomas Nugent's translation into English (2 volumes, George Bell & Sons, London, revised by J.V. Prichard, 1897) is of assistance, but his choice of words has not always been adhered to here.
it from a specialist, comparative law, angle. His ideas on comparative law are scattered throughout the work. They are not presented as a complete theory and do not form a complete theory. Some have said that Montesquieu was the father or ancestor of comparative law, but it is submitted that this is a dangerous overestimation. He certainly was instrumental in drawing attention to the exploration of foreign concepts, but so were many others. It would seem that too many modern comparatists have given Montesquieu too much uncritical respect with too little justification.

Attention has often been drawn to a "purple passage" which comes less than ten pages into the book, and particularly to certain words in that passage (which are in italics below):

La loi, en général, est la raison humaine, en tant qu'elle gouverne tous les peuples de la terre; et les lois politiques et civiles de chaque nation ne doivent être que les cas particuliers où s'applique cette raison humaine.

Elles doivent être tellement propres au peuple pour lequel elles sont faites, que c'est un très-grand hasard si celles d'une nation peuvent convenir à une autre.

Il faut qu'elles se rapportent à la nature et au principe du gouvernement .... Elles doivent être relatives au physique du pays, au climat [etc., etc.] C'est ce que j'entreprends de faire dans cet ouvrage. J'examinerai tous ces rapports: ils forment tous ensemble ce qu'on appelle l'ESPRIT DES LOIS.

95 Shackleton, 'Montesquieu in 1948' (1949) 3 French Studies 299-323 at 299: "Montesquieu was a polymath and has been interpreted by specialists."


97 Montesquieu "attempted too much, and his work is disconnected, unsystematic and marred by eccentricities. Great as was the success of De l'Esprit des Lois it was not the means of placing comparative legal research on a lasting foundation." - Gutteridge, supra n.6, p.12. Sir Frederick Pollock: "He [Montesquieu] took his examples from universal history and travellers' stories, without worrying about the enormous differences between the contexts from which he detached them." - 'Le droit comparé, Prolégomènes de son histoire', Rapport présenté au Congrès int. de droit comparé tenu à Paris en 1900 (Procès-verbaux des séances et documents, Paris 1905) I, 253 at 256.

98 Zweigert and Kotz, supra n.55a, p.49 refer to Fortescue, Struve, Stryck, Bacon, Leibniz, Grotius, Pufendorf and Hugo. Gutteridge (supra n.6, p.12) adds Vico.

99 Livre I, chapitre III (Des Lois Positives). Translation: "Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation
Earlier in the chapter, he has defined "le droit politique" as "les lois dans le rapport qu'ont ceux
qui gouvernent avec ceux qui sont gouvernés" i.e. public law and "le droit civil" as laws
regarding "le rapport que tous les citoyens ont entre eux" i.e. private law. The third paragraph
in the quotation above is an abbreviation of his assembly of causes, the factors which link laws so
closely with their habitat. The list includes geographical, climatic, political, sociological, cultural,
religious and economic factors. Certain factors will be more important in certain countries
than in others.

It is important to make it clear that he never actually discusses in detail whether or not legal
borrowing is possible or desirable. Even Niboyet, who is very supportive of the Baron's views,
adopts this. Montesquieu says he believes in particularism as opposed to uniformity (dismissing
ideas of uniformity as ones which "frappent infailliblement les petits [esprits]"), and that
laws are best understood by taking the whole of the legal/ historical/ political, etc., etc. context
ought to be only the particular cases in which human reason is applied. They should be adapt-
ed in such a manner to the people for whom they are framed that it should be a great coinci-
dence if those of one nation suit another. They should be in agreement with the nature and
principle of the government ... They should be relative to the physique of the country, to the
climate [etc., etc.] This is what I have undertaken to perform in the following work. These
relations I shall examine, since all these together constitute what I call the SPIRIT OF
LAWS."

laws regarding the relationship between the governors and the governed.

the relations between the citizens.

The list is abbreviated in Book XIX, chap.4 to "le climat, la religion, les lois, les maximes du
gouvernement, les exemples des choses passées, les mouers, les manières" (the climate, the
religion, the laws, the maxims of government, the example of past events, morals and cus-
toms). This is "perhaps the most significant chapter of the whole work" - Robert Shackleton,

Book XIX, chap.4: "À mesure que, dans chaque nation, une de ces causes agit avec plus de
force, les autres lui cèdent d'autant." (In proportion as, in every country, any one of these
causes acts with more force, the others are weakened to the same extent).

Niboyet, supra n.96, p.257.

"infallibly make an impression on little minds" - Book XXIX, chap. 18 (Des idées d'unifor-
mité).
into account. It can easily be deduced that he is against transplantation of laws without adaptation to factor (a) and close scrutiny of factor (b), but this is only an implied deduction.

Kahn-Freund:

While he does not agree with Montesquieu completely, Kahn-Freund is highly enamoured of the Baron's writings. He refers to the contrast between kidney transplantation (with problems of 'adjustment' or 'rejection') and the transference of a carburettor from one vehicle to another. "The kidney and the carburettor are the terminal points of a continuum, and any given legal rule or institution may be found at a different point on it". He admits that there are some laws which are very easily transplantable, such as the law of shipowner's liability, but says that in most cases there are questions of adaptation to be considered. Turning to Montesquieu, Kahn-Freund states that obviously he believed that "legislative transplantation was much closer to the organic than to the mechanical terminus of our continuum". Laws can hardly ever change their habitat, due to the assembly of causes. While Montesquieu says that certain elements will be more important in certain categories than in others, Kahn-Freund adds that certain elements will be more important at certain times than at others. In particular, the political factors have greatly gained in importance in recent times. Kahn-Freund recognises the increasing standardisation of life referred to in Section I above, but says that "the fact of political differentiation is as obvious as that of cultural and social integration" in three respects:

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106 Book XXX, chap. 11 (De quelle manière deux lois diverses peuvent être comparées) and chap.12 (Que les lois qui paraissent les mêmes sont quelquefois réellement différentes).

107 Kahn-Freund, supra n.8, p.6 (MLR), p.299 (Selected Writings).

108 Ibid., p.7 (MLR), p.299 (Sel.Writ.).

109 Ibid., p.7, fn.29 (MLR), p.300, fn.29 (Sel.Writ.): "Montesquieu adds the - in our context significant - observation that the more potent one factor is in a given country, the less important are the others. What he puts in terms of space (country) can also be put in terms of time (period)."

110 Ibid., p.11 (MLR), pp.303-4 (Sel.Writ.). Constantinesco is of the opinion that while the world has become more copernican, legal science has remained paradoxically ptolemaic - supra
i) the gulf between communism and non-communism
ii) the variations on the democratic theme
iii) the role of organised interests in the making and the maintenance of legal institutions (the power factor)

He says that family law is generally surprisingly amenable to transplantation nowadays. But one of the exceptions is Ireland's refusal to introduce divorce, and this is only to be explained in terms of the political power of the Catholic hierarchy, i.e. factor (iii) above. The power factor is even more strongly in evidence as regards the law of procedure in the widest sense of that word. The jury could not be introduced to France because it went too much against the grain of the inquisitorial method of criminal procedure.

In conclusion, Professor Kahn-Freund reiterates that "we cannot take for granted that rules or institutions are transplantable", that the use of the comparative method "requires a knowledge not only of the foreign law, but also of its social, and above all its political, context" and that this use becomes an abuse "only if it is informed by a legalistic spirit which ignores this context of the law".

Watson:

Professor Alan Watson is very critical of Montesquieu and Kahn-Freund on various grounds. He believes that

one simply cannot accept Montesquieu's claim that it is "un grand hasard" if the rules of one nation can suit another.

Montesquieu badly - very badly - underestimated the amount of successful borrowing which had been going on, and was going on, in his day.

n.79.

111 Ibid., pp.15-16 (MLR), p.308 (Sel.Writ.)
112 Ibid., pp.17-18 (MLR), p.310 (Sel.Writ.)
113 Ibid., p.27 (MLR), pp.318-319 (Sel.Writ.)
114 Watson, supra n.5, p.80.
115 Loc. cit.
And indeed, as Watson says, the reception of Roman law in Western Europe is the prime example of successful borrowing which Montesquieu seems to have ignored. The reception also illustrates that, in spite of Montesquieu, transplantation may occur even when the donee's legal, historical, etc., etc. context is very different from that of the donor.\textsuperscript{116}

Watson thinks that a law reformer, in looking at foreign solutions, "should be after ... an idea which [can] be transformed into part of the law of his country."\textsuperscript{117} The reformer's knowledge of the donor's legal, historical, etc., etc. context (factor (b)) need not necessarily be systematic and detailed. He gives the example of someone whose function is to consider possible improvements in the law of bankruptcy in Scotland:

\begin{quote}
[He] may well set out to discover the legal approach in England, France, Sweden, South Africa, New Zealand, and so on. He may have no knowledge of those systems to begin with, and at the end may know little about them except for an outline of their bankruptcy laws. He may, indeed, have little idea of how well or how badly these laws operate. But his concern is with the improvement of bankruptcy law in Scotland. What he is looking for in his investigation of foreign systems is an idea which can be transformed into part of the law of Scotland and will there work well.\textsuperscript{118}
\end{quote}

Even if the reformer gets the foreign law wrong (see I(a) above), that does not detract from the usefulness of the idea. Here, Watson's example is that of how the framers of the U.S. Constitution took over the inexact ideas of Montesquieu on the separation of powers in England:

\begin{quote}
Whether Montesquieu was or was not was or was not known to be inexact is irrelevant.\textsuperscript{119}
Foreign law can be influential even when it is totally misunderstood.\textsuperscript{120}
\end{quote}

\begin{flushright}
\textsuperscript{116} Loc. cit.
\textsuperscript{117} Ibid., p.79
\textsuperscript{118} Watson, supra n.55, p.17.
\textsuperscript{119} Supra n.77, p.315.
\textsuperscript{120} Supra n.55, p.99.
\end{flushright}
As regards the power factor, Watson specifically addresses Kahn-Freund's example of the Irish rejection of divorce by saying that should an attempt be made to introduce divorce in Ireland, it would be enough to look at the Irish power structure (the political power of the Catholic hierarchy) to know that the attempt would fail and the English power structure would be irrelevant.\textsuperscript{121} In other words, as regards the political context, it is enough to look at factor (a) (the political context of the proposed rule within the donee's system) and factor (b) is irrelevant. Watson also says that factor (a) is easier to discover than factor (b), if one is dealing with a rule which is firmly established and working efficiently in the donor's system.\textsuperscript{122} Factor (b) is difficult to discover, in his view, because as the rule becomes older, its link with the people, time and place becomes less obvious.\textsuperscript{123} In other words,

to a large extent law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and desires and political economy of the ruling elite or the members of the particular society on the other hand. If there was such a close relationship, legal rules, institutions and structures would transplant only with great difficulty, and their power of survival would be severely limited. Changes in societal structure would always entail changes in the law.\textsuperscript{124}

Marsh:

\textsuperscript{121} Supra n.5, p.82.

\textsuperscript{122} [Ibid., loc.cit. "When a legal rule is firmly established and working efficiently in one country it is not always easy to see how closely it is linked with the power structure [factor (b)]. This will be particularly true when the rule in question is of some considerable antiquity. But on the other hand, when a legal change is suggested for a particular country, it is not so difficult to spot the factors which would favour, or militate against, the success of the reform [factor (a)]."

\textsuperscript{123} Ibid., p.81. At fn.12, he explains that this was the main point he was trying to make in \textit{Legal Transplants}. See also Watson, \textit{Society and Legal Change} (Scot. Academic Press, Edinburgh, 1977).

Reference has already been made to Marsh’s conclusion that there are many examples of "Kahn-Freund in reverse" (II (c) above) - transplantation can take place even if political and cultural backgrounds are fundamentally different. Marsh also uses his eleven years of experience in the Law Commission to show how difficult it may be in practice to apply the guidelines of a "detached scholar" like Kahn-Freund. Three of Marsh’s observations are of relevance here.

Firstly, shortage of time limits the amount of comparative researches which can be undertaken. If reference to foreign systems would be misleading (due to differences in socio-political structure between the donor and the donee), it may be better to omit it. The reformer may of course be wrong in this, but that often cannot be helped. Secondly, the reformer often cannot rely on articles in journals, etc., since the information has to be tailored to the particular needs of the project in hand. Thirdly, the reformer must consider whether his/her reforms will have any chance of implementation by the legislature. It is often better to suggest many small improvements rather than a fundamental pulling up by the roots on the basis of comparative researches.

Montesquieu, Kahn-Freund, Watson and Marsh:

The arguments of Montesquieu and Kahn-Freund are unsatisfactory for a number of reasons. The principal reason is that they appear to be demanding far too high a standard of scholarship of reformers, with the result that reformers may decide not to refer to foreign solutions at all since the risks are so high. In other words, their theories are counterproductive.

Certainly, there are dangers of misuse of comparative law if a reformer uses it as an excuse to import a totally alien rule which simply cannot function in the existing national system. But the primary danger is with factor (a), not factor (b). The reformer need only primarily look at factor (a), his/her own system. Furthermore, he/she need only primarily look at the legal context of the proposed rule within his/her own system, and to a certain extent within the donor’s system. He/she will presumably be an expert as regards his/her own system, and need not necessarily aspire

125 Marsh, supra n.3, p.84 (Proceedings), p.665 (RabelsZ).
to be an expert in the donor's system. As Watson stresses, he/she is looking for an idea from abroad. He/she will be more efficient the more he/she knows about the foreign system, but knowledge of that system is not theoretically necessary. Even if the reformer gets the foreign law wrong, the idea may be of inherent value anyway. Montesquieu and Kahn-Freund are placing too many obstacles in the way of a reformer's search for inspiration from foreign solutions.

In deciding what adaptation is needed to the donee's present system, the reformer's primary concern should be that present system and not the donor's system. The legal context of the donor's system is primarily of concern only as regards enforceability of the proposed rule. Within the donee's system, the legal context is obviously the most important. The rule must not be inconsistent with an existing rule (unless that existing rule is to be repealed as part of the reform). After that, the other elements in factor (a) as first explained above decrease in importance as one moves further and further away from the actual rule or institution itself.

Diagram 2 is a more elaborate version of Diagram 1, and can be used as an aid to understanding all of this. The simple circles in Diagram 1 have become subdivided into 7 subcircles. The legal context of the rule is the most important, and so it is subcircle 1, the subcircle closest to the dot. The contexts diminish in importance from circles 2 through 7 (historical, political, social, economic, cultural and environmental contexts respectively). This order of priority would differ for different rules. It is this writer's view that as a bare minimum, a reformer need only consider the two dots and subcircle 1 of Circle A (the legal context of the new rule within the donee's system). Thereafter, his/her priorities should be subcircle 1 of Circle B, followed by subcircles 2 through 7 of Circle A, followed finally by subcircles 2 through 7 of Circle B.

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126 David, supra n.19, p.114, p.116, p.117.