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# ROMAN LAW INFLUENCE ON THE CIVIL LAW

*Charles Donahue, Jr. \**

THE MAKING OF THE CIVIL LAW. By *Alan Watson*. Cambridge: Harvard University Press. 1981. Pp. xii, 201. \$22.50.

This is an important book. The argument is complex, but its complexity is likely to be lost in the clarity of the exposition. Each of the pieces of the exposition is carefully crafted and full of insight, but the contribution of each piece to the structure of the overall argument is not revealed until the end, by which time many readers will not have the patience or the ability to put it all together. This reader has the patience (although he is not at all sure that he has the ability) and offers the following in the hope that those with more ability but less patience will find it a useful guide.

The book was written in the "firm conviction that at the present time there is little knowledge of why law changes when it does, or why it changes in the direction that it does, or when and why it responds to pressure" (p. vii). This may be the central problem of legal history, if not at all times, at least in our time, and many, including this reviewer, would rank it among the central problems of the academic study of law. Professor Watson looks at the problem of legal change in the context of the basic division between civil law and common law legal systems and asks how this basic division came about. He concludes that

[t]he basic differences between civil law and common law systems are explained in terms of the legal traditions themselves; that is, the differences result from legal history rather than from social, economic, or political history. Above all, the acceptance of Justinian's *Corpus juris civilis*, in whole or in part, as authoritative or at least as directly highly persuasive[,] determined the future nature of civil law systems and made them so distinctive.

[P. viii.]

While this conclusion is not new, Watson reaches it with a force and in a manner that this reviewer cannot recall encountering before. The method by which Watson gets to his conclusion gives the book both its originality and its complexity.

The book may be divided into two parts. The first seven chapters deal with the civil law prior to codification; the next five chapters deal with codification and its aftermath. The first part of the first chapter and the last chapter should be excluded from this basic division, since the former defines civil law and the latter offers general observations on legal change. This material is best considered after we examine the core of the book.

Within this core the order of topics is roughly chronological. We begin

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with a discussion of the *Corpus juris civilis* itself (pp. 10-13), and we note (ch. 2) what Watson calls the "block effect" of Roman law, a striking metaphor for the fact that the materials in the *Corpus juris* are arranged so that it is possible to outline schemes of rules for a given area of Roman law without much reference to the other areas. Roman law then is a highly "transplantable" body of law — a body of law appropriate for study by any group of lawyers who lack a body of literature concerning their native law and who choose to study law generally. These were the conditions facing European lawyers in the central Middle Ages and may well have accounted for the peculiar attraction of the *Corpus juris civilis* for those who revived its study in the twelfth century. Study of the *Corpus juris civilis*, however, had substantial methodological consequences (ch. 3). The book was studied at the feet of teachers who did not need to be connected with practice. Their teaching acquired a distinctly international character. This international character, in turn, led to the book's dominating university legal education. The style of reasoning became one of "formal rationality." Problems were solved by cutting facts down to their bare bones and by searching for the commentator who "got it right." This in turn gave a timeless character to the statements of the problems and to their solutions. All these characteristics may be found in the case decisions which were published in the civil law countries in Europe prior to codification (ch. 4).

The study of the *Corpus juris* fixed the mode of legal thought. Examples drawn from Roman law were used to illustrate techniques of argumentation, comparisons were drawn between Roman law and local law, and writing about local law made use of Roman law categories (ch. 5). In particular, the categorization system of Justinian's *Institutes* became the way by which authors described their local legal systems. This became particularly important when the humanists in the sixteenth century showed that the medieval developments of Roman law had carried it far beyond what the classical authors had in mind (ch. 6). Natural law thinking in the seventeenth and eighteenth centuries began by breaking away from Roman law, but ultimately it was tamed and forced into Roman law categories (ch. 7).

With the discussion of modern codifications (ch. 8), Watson changes his style of argumentation, offering more explicit consideration of possible contrary arguments. The chapter begins with a recognition that political backing is necessary for any kind of codification, but argues that neither the difficulty of finding the law nor social upheaval adequately explains why modern codifications took place. What is shown, and shown quite powerfully, is that both the French and the German codes are deeply rooted in the particular legal traditions of the countries and that the important differences between them can be explained in terms of those traditions.

Watson next analyzes the effects of codification by contrasting codes with institutes as sources of law. Codification leads to even greater abstraction, to a total loss of the sense of the history, to a loss of the international character of law, and to a fixity which makes codes difficult to change. On the other hand, drafters of new codes frequently undertake comparative work (ch. 9). Roman law distinctions embedded within the codes are critical to the modern divisions of law: the public-private distinction, the development of specialized tribunals for handling administrative matters,

separation of commercial law from the law of obligations generally, even the divisions within the law of obligations (ch. 10). The sources of modern civil law are considered (ch. 11), and Watson shows that, although the role of statute differs from what it was in the precodification period, the role of the jurist and of case law is a direct descendant of what had come before.

Thus the story is told — and well told. So far as this reviewer is able to judge, the book, with a few minor exceptions, is accurate and well-presented, and it is notable for its clarity and its interest.<sup>1</sup> The book is not an elementary textbook of the history of the civil law. The exposition requires too much knowledge for the beginner. As a sophisticated retelling of a well-known story, however, the book deserves high marks. Watson has done good service for the English-speaking reader who knows something of European legal history and wants to know more.

But the book was not written with exposition as its primary purpose, and whether its argument is ultimately convincing will depend on whether the definition of the problem found in the first chapter and its solution found in the last prove to be convincing. Watson has chosen to develop his argument out of a distinction between civil law systems and common law systems. That the distinction exists is generally recognized by all who work in comparative law, but there is disagreement as to exactly *what* the distinction is. "Civil law" turns out to be a convenient shorthand for describing any one of a number of characteristics which tend to exist in countries whose legal traditions are not derived from England. The characteristic which Watson focuses on in his first chapter is the greater influence of the *Corpus juris civilis*. Defining civil law in this way requires that Watson exclude the Scandinavian countries and the socialist countries from his definition of civil law, and he says very little about the countries of the Far East. My difficulty, however, is not with the fact that Watson groups the countries this way in order to make the definition of civil law more precise. The legal systems of the excluded countries are frequently recognized as quite different from the systems of central and western Europe and from those of, for example, South America, whose legal systems are derived from the central and western European legal systems. My difficulty is that Watson's definition of civil law comes perilously close to rendering his conclusion tautological. He defines civil law as a legal system in which the influence of the *Corpus juris civilis* is strong, and he demonstrates that the characteristics of the civil law system depend upon the influence of the *Corpus juris civilis*.

The conclusion is not tautological, however, because Watson's point is that the influence of the *Corpus juris civilis* is the cause of many of the dis-

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1. This is the mandatory "nit-picking" footnote: There is no Thomas M. Green at the University of Michigan, but there is a Thomas A. Green (p. viii). Pages 82 and 160 n.34 have typesetting errors which produce noticeable stray marks on the page. On p. 129 "influential" should be so spelled. On p. 134 René David's name needs an accent mark. On p. 145 the statement that the Twelve Tables rigorously excluded administrative, constitutional and public sacral law seems odd in the light of Tables 9.1-2, 10 (is this "private" sacral law?), 11.2, 12.5. The discussion of partnership and *laesio enormis* on pp. 164-65 is overly compressed. In particular the effect of the Uniform Partnership Act on the so-called "aggregate theory" might have been mentioned. Page 175 would have benefited from a citation to Dawson, *Effects of Inflation on Private Contracts: Germany, 1914-1924*, 33 MICH. L. REV. 171 (1934). Considering the wide range that the book covers in such a short space, the fact that I could find so little of the detail to criticize convinces me that this is a remarkably accurate piece of work.

tinctive characteristics of the legal system in those countries in which its influence was strong. Codification is the most important variable explained by the influence of the *Corpus juris civilis*. The role of the jurist, the style of deciding cases and the authority given to him, the separation of civil from commercial law, and separate tribunals for public and private law are other characteristics which are seen to depend on the influence of the *Corpus juris*, although the argument here is less powerful, because the phenomena themselves are not observed, or not observed to the same degree, within all the selected countries.

Working out the implications of all of this for the general theory of legal development is largely left to the reader. The final chapter, in which one might expect to find a conclusion, in fact contains a theoretical discussion, derived from an earlier article, which operates on an abstract level and is difficult to connect with the rest of the book. Watson clearly believes that general political, social and economic developments do not explain why a legal system is the way it is. The most powerful evidence for this proposition, stated a number of times although never elaborated, is the fact that England and the Continental countries with which Watson is dealing have gone through basically the same political, social and economic development and yet have arrived at very different legal systems. Some, of course, would want to argue the uniqueness of the English political experience. Certainly England had in place very early a group of institutions which allowed it to develop its native law in a way that was comparatively free from the all-pervasive effect of the *Corpus juris* that existed on the Continent, particularly in the early modern period.

The difficulty with Watson's book, however, is deeper than the quibbles which one might raise about the comparison that he draws. The difficulty is that his evidence, his methodology and his theory are never juxtaposed in such a way as to allow one to see how they all fit together. There are a number of methodological suggestions in the book, but they are never treated systematically. I find myself attracted both to the suggestion that historical explanations must be judged on the basis of their plausibility, not their inevitability (pp. 96-97), and to Watson's use of Ockham's razor (pp. 186-87), which suggests in the context of legal history that explanations internal to the legal system are to be preferred to explanations which require the use of forces external to the system. But it is difficult to see from the way Watson tells his story whether these methodological principles are to be regarded as always at work or only at work in those particular sections where he recognizes them, and both principles are sufficiently problematical as to require more justification than they receive.

Perhaps more problematical still is the final, theoretical chapter, which presents a complex general model of legal change and which, at least in its emphasis on forces for and against change, seems to undercut much of what is said in the book. If it is true, as the model seems to suggest, that basic changes are, at least in part, the result of "pressure forces," should we not have been told more about those forces at the points in the book where major changes are discussed? The chapter on codification, as we noted, concedes that political support must exist for codification, but the analysis of what those forces were in the examples considered is scattered. The consideration of the political forces supporting codification is not treated sys-

tematically; the influence of the *Corpus juris* is. Thus, the influence of the *Corpus juris* is made to seem more powerful than that of the various political forces.

Finally, and perhaps most importantly, many common law readers will question Watson's focus on formal legal rules and their organizing schemes. To argue that these elements in a legal system owe a great deal to what went before in the intellectual tradition is almost too easy. Many of us who have argued that there is a stronger relationship between law and society than Watson sees do so on the basis of a realist emphasis on the decisions in actual cases. Watson does not offer us much systematic discussion of decisions in actual cases; indeed, he offers us relatively little in the way of middle-level rules. The story he tells is a fascinating one, but in the end this reader was left unsatisfied because of Watson's failure to address this question: Does this difference really make a difference?

The systematic study of legal change is, as Watson notes, in its infancy. The great German legal historians, Koschaker and Wieacker, who deal with many of the same topics that Watson covers, do not consider the theoretical issues that Watson raises. Watson's book, then, is path-breaking, and a new path is not always easy to follow. I, for one, hope that he returns to the issues he has raised in this book.