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ALAN WATSON\*

## From Legal Transplants to Legal Formants

Comparative law as an academic discipline is a very personal subject, giving its proponents great liberty to choose their interests.<sup>1</sup> Not surprisingly it produces wonderful, flamboyant scholars, like Rudolf Schlesinger,<sup>2</sup> who remain forever youthful. His *Comparative Law* (first edition, Brooklyn, 1950) has been a constant inspiration.

For long my own focus on comparative law was on legal borrowings,<sup>3</sup> but I was aware that other general factors were at work.<sup>4</sup> I realized, for example, that for most of the time rulers and governments in the Western world as a whole were little interested in making private law. Instead, the task devolved upon some group of the legal elite who became in effect subordinate law makers without having been given power to make law. Thus, Roman jurists as such were private individuals with no ties to government: they made law when their opinions came to win approval from other jurists. English judges in the Middle Ages and later were appointed to decide cases: the tradition long was that they found the law but did not make it. Continental law professors were appointed to teach law, not make it. But they did make law when their writings were accepted as having authority by courts or their fellows, perhaps centuries after they wrote. A good jurist was a jurist who was thought to be good by other jurists and persons of similar standing: likewise with judges and professors. The result of their theoretical exclusion from law-making powers was that these law makers developed their own legal culture which was to that extent distant from social reality. This culture determined the parameters of their legal reasoning, the systems of law that they would borrow from, and even the extent to which they would borrow. Above all it would determine the standing of each individual within the culture. The nature of this culture varies from

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1. See Kahn-Freund, "Comparative Law as an Academic Subject," 82 *Law Quarterly Review* (1966), pp. 40ff. at p. 41.

2. And also Rodolfo Sacco. An early version of this paper was delivered at the ceremony at the University of Turin, November 21, 1994, celebrating the publication of *Studi in onore di Rodolfo Sacco*. It is a pleasure to know that Professor Schlesinger is the first recipient of an honorary doctor of laws degree at the University of Trento that Professor Sacco made famous as the center of comparative legal studies in Italy.

3. See, e.g., Alan Watson, *Legal Transplants* (1st ed. 1974; 2nd ed. 1993).

4. See e.g., Alan Watson, *Roman Law and Comparative Law* 97ff. (1991).

one society to another but unless one has an awareness of the importance of this rootedness in a particular legal culture one can never understand the parameters of legal debate.

In this paper I want to discuss three general examples of this importance of legal culture while leaving out any of the common assumptions about a close connection between law and society.

My first general example will be taken from the Pentateuch where I am convinced by the arguments of Calum Carmichael.<sup>5</sup> I will restrict myself to his treatment of the so-called Ten Commandments. He observes that there is no evidence for the standard view that Biblical law mirrored the society. There is, in fact no outside evidence for the political, social or even religious conditions. His own hypothesis is based on two observations from the texts. First, law and narrative are intertwined in the Pentateuch. This surprising fact demands explanation. Second, the narrative continually stresses the first occurrence of something — the first instance of idolatry, the first murder — and the ways in which this behavior reappears. The hypothesis, which Carmichael proceeds to prove, is that the laws in the Pentateuch come from men reflecting on ancient traditions and legends of early Israel, and not from a serious consideration of what rules would be most suitable for the contemporary society. Specifically, for the Ten Commandments he argues that all the rules result from a meditation on the first idolatry and on Adam and Eve, the first human beings.

A few examples of his approach will suffice here. Thus, the fifth commandment:

Honour thy father and thy mother: that thy days may be long upon the land which Yahweh thy God giveth thee.<sup>6</sup>

This is surely striking in at least two regards. First, the rule about honoring parents can scarcely have a legal content. Secondly, the reason for obeying the precept is unexpected: "that thy days may be long upon the land which Yahweh thy God giveth thee." Carmichael's explanation is that the rule grew out of a rumination on the first case where someone did not honor father and mother.<sup>7</sup> Cain lacked all respect for his parents, Adam and Eve, when he slew their other child, Abel. His punishment was precisely to be driven from the land on which God had placed him to till it. Thus we have an explanation both for the rule's existence in the Ten Commandments and for the surprising reason for obeying it.

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5. See in general his *The Origins of Biblical Law: The Decalogues and the Book of the Covenant* (1992).

6. Exodus 20.12.

7. *Origins*, pp. 37f.

This command is followed by "Thou shalt not murder."<sup>8</sup> This juxtaposition requires explanation, and Carmichael provides it.<sup>9</sup> The rule is there as the result of attraction to the previous one: the lawmakers were still thinking of the first act of disrespect towards parents, which was precisely murder of Abel by Cain.

A further example is the ninth commandment: "Thou shalt not bear false witness against thy neighbour."<sup>10</sup> This formulation prompts the question: Why is the rule set out thus, and is not a general prohibition: "Thou shalt not lie"?<sup>11</sup> The answer is that the law maker is thinking of God questioning Adam and Eve in the manner of a judge about eating the forbidden fruit. He questioned Adam first, who blamed Eve. He questioned Eve who blamed the serpent. Not quite false witness, but their behavior raises that issue.

In a similar way, Carmichael shows that the first four commandments arise from reflection on the first act of idolatry: that of Aaron and the golden calf.<sup>12</sup>

My second general example to show that law may develop distant from social realities is taken from Roman law.<sup>13</sup> The famous code, the Twelve Tables, of around 451 B.C. is usually believed to be a great victory for the plebeians. On the contrary, it was an enormous defeat.<sup>14</sup> The plebeians wanted equality before the law and to know the limits of office of the consuls. They got neither. The Twelve Tables is remarkably egalitarian — there is almost no distinction between one class of citizens and another — but this is because it contains only those parts of the law that the patricians were willing to share with the plebeians. It contains nothing about public law: public office, secular and priestly alike, remained a monopoly of the patricians; voting rights still depended on the class in which a citizen was placed, on the basis of wealth; only senators could be judges. But of even greater significance was the fact that interpretation of the Twelve Tables was given to the College of Pontiffs — a patrician monopoly — which chose one of its members each year to deal with private law. This was a momentous decision whose impact is felt to this day.

To begin with, it made interpreting the law a major goal for any ambitious upper-class man: the chosen pontiff had a monopoly of interpreting the law, and his interpretation was authoritative. Besides, the state would accept his opinion. The pontiffs, after all, were

8. Exodus, 20.13.

9. *Origins*, pp. 38f.

10. Exodus 20.16.

11. Carmichael, *Origins*, pp. 42f.

12. *Origins*, pp. 22ff.

13. For what follows see in general Alan Watson, *The State, Law and Religion: Pagan Rome* (1992).

14. See Watson, *State*, pp. 73ff.

public figures with a well-known record of state office. The role the jurists played later in Roman law was thus created. This is why centuries later, even after the College of Pontiffs lost its monopoly of interpretation and public office was open to plebeians, highly placed individuals in the state wanted the prestige of being jurists. This is why the state acquiesced in the jurists, as private citizens, making the law.

Second, what was given to the College of Pontiffs was the monopolistic right of interpreting the law; so later it was interpretation, and interpretation alone, that gave juristic prestige.<sup>15</sup> No kudos was given for systematizing the law, or reforming it. No jurist—except the lowly Gaius—was ever interested in systematizing the law, and no praetor won fame because he was a law reformer. The arrangement of the Edict was chaos, and the *Digest of Justinian* follows the Edict.

Third, as was only to be expected, the pontiffs carried over to the secular law their modes of reasoning on sacred law. Thus, certain types of legal argument were excluded. For example, in religion one cannot use as an argument for a new practice what is done in a different religion; hence for Roman private law there could be no argument from foreign law. Thus comparative law does not appear in the Roman jurists. Again, to find the right decision in religious law, one cannot appeal to general ideas of morality, justice, the advantage of the state, economic interest or to the well-being of the parties. Accordingly, such arguments were not used by the Roman jurists; hence they are still excluded in most western countries to the present day. One cannot exaggerate the importance for subsequent legal development in the whole of the Western world of a monopoly of interpretation of the Twelve Tables being given to the College of Pontiffs around 450 B.C.

The third general example is chosen from rabbinic law as set out in the Mishnah and Talmud. Religious law in so far as it is a guide to conduct differs, of course, from secular law: religious law is law as truth. One instance from the Mishnah, Sabbath restrictions, will suffice.

Mishnah Shabbath 1.1. There are two (which are, indeed, four) kinds of 'going out' on the Sabbath for him that is inside, and two (which are, indeed, four) for him that is outside. Thus if a poor man stood outside and the householder inside, and the poor man stretched his hand inside and put aught into the householder's hand, or took aught from it and brought it out, the poor man is culpable and the householder is not culpable; if the householder stretched his

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15. For what follows see in general Alan Watson, *The Spirit of Roman Law* (1995).

hand outside and put aught into the poor man's hand, or took aught from it and brought it in, the householder is culpable and the poor man is not culpable. But if the poor man stretched his hand inside and the householder took aught from it, or put aught into it and [the poor man] brought it out, neither is culpable; and if the householder stretched his hand outside and the poor man took aught from it, or put aught into it and [the householder] brought it in, neither is culpable.<sup>16</sup>

God forbade work on the Sabbath: "For six days you shall work, but on the seventh day you shall cease work; even at ploughing time and harvest you shall cease work."<sup>17</sup> But God did not define work. The determination of what counted as work was made by generations of sages and is the subject of one of the longest Mishnah tractates, Shabbath. Shabbath 7.2 lists thirty-nine types of work. Our quoted text is given here as an example of the discussion. Exodus 16.29 had forbidden going out on the Sabbath, and from Jeremiah 17.22, 'going out' was taken as implying 'carrying a burden.' These scriptural texts and reasoning on them lie at the root of the Mishnah discussion. Many other texts can be adduced. Thus:

Mishnah Shabbath 8.5. [He is culpable that takes out] red clay enough for the seal of a large sack (so R. Akiba; but the Sages say: For the seal of letters); or manure or fine sand enough to manure a cabbage-stalk (so R. Akiba; but the Sages say: enough to manure a leek); or coarse sand enough to cover a plasterer's trowel; or reed enough to make a pen, or, if it is thick or broken, enough to cook the smallest egg mixed [with oil] and put in a pan.

There are many similar discussions, often (as we have just seen) with differing opinions of the rabbis. But the texts make us ask at least two questions. First, did the rabbis (or Pharisees—because it is the Pharisaic tradition that is embodied in the Mishnah) foresee a legal process if one acted contrary to this ruling and failed to make the appropriate sin offering (while the Temple existed)? Surely not. There is no evidence for any kind of trial process for such breaches. Second, are we to believe that the Pharisees really cared deeply how other Jews such as the Sadducees,<sup>18</sup> Essenes or the 'am-ha'aretz ("people of the land") behaved? Again, surely not. The Pharisees could not set themselves up as a police force over others. So what is the point of the discussion? First, it is to set out ideal rules of conduct that the pious ought to seek to observe. Second, for the rabbis it is also an intellectual challenge to seek out skilled interpretations. Just

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16. The translation is that of Herbert Danby, *The Mishnah* 100 (1933).

17. Exodus 34.21.

18. They cared a great deal about Sadducean power.

as a Roman jurist was interested in interpreting law because he thereby won prestige among his fellows, so would the reputation of being skilled at interpreting the Torah appeal to a rabbi of, say, the first or second century.<sup>19</sup>

I have adduced each of these three examples because of its importance even in later days. First, the Ten Commandments have played a fundamental role in all subsequent history, as does not need saying. Even the fifth commandment that looks so little like law has its place in modern codes. The *Burgerlijk Wetboek*, the Dutch civil code, has a provision: "A child, even of whatever age, owes his parents honor and respect."<sup>20</sup> This replaces a provision (art. 355.1) of the previous civil code although Dutch jurists continually point out its lack of legal application.<sup>21</sup> Indeed, the commandment has had a distinguished career in Holland. Thus, Hugo Grotius declared that children who had been released from paternal power "continue to owe their parents obedience and reverence, as enjoined by the law of nature and the law of God."<sup>22</sup> The commandment appears also in the writings of Samuel van Leeuwen and J. van der Linden. It appears in the draft code of 1820,<sup>23</sup> where in fact it derives from Napoleon's *code civil*.<sup>24</sup> When the minister introduced the present provision in 1947, he said he saw no reason to remove the principle which was rather the expression of a moral demand than a legal prescription.<sup>25</sup> Second, the Roman *Twelve Tables* established — not intentionally — the division between private and public law; and the interpretation of that legislation set the parameters of much subsequent legal reasoning. Third, the legal reasoning set out in the *Mishnah* continues to this day, and its rules still influence conduct.

I brought forward these major, different examples of legal development without in any sense comparing them. Nor does any involve a legal transplant. But when they are looked at together they highlight the importance of comparative law for an understanding of law and society. For example, Carmichael's thesis is simply rejected by

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19. For dispute as the core of the *Mishnah* see e.g., Shaye J.D. Cohen in *Christianity and Rabbinic Judaism* 219ff. (Hershel Shanks ed. 1992).

20. Boek 1., Art. 245.1: "Een kind, van welke leeftijd ook, is aan zijn ouders eerbied en ontzag verschuldigd."

21. E.g., E.A.A. Luijten, *Het Personen- en Familierecht in het Nieuwe Burgerlijk Wetboek* 1 (1991), p. 110; A. Pitloo, *Het Nederlands Burgerlijk Wetboek, i, Het Personen- en Familierecht* 334 (6th ed., J.E. Kasdorp & M. Rood-De Boer, 1979).

22. Inleiding tot de Hollandsche Rechts-geleertheyd, 1.6.4.

23. Art. 499.

24. Art. 371.

25. For more detail see C. Asser, *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht: Personen- en Familierecht* 542f. (J. De Ruiter & J.K. Moltmaker 14th ed. 1992).

many scholars,<sup>26</sup> who do not look at its strengths. They 'know' that law cannot develop like that. But to comparatists who see Roman jurists living out their own legal cultural concerns, or rabbis discussing the ideal behavior, it is not so obvious that law develops simply from economic, social, political conditions in the society, and Carmichael's theory looks more plausible. At the least, the comparative approach insists that Carmichael's theory must be treated seriously to see if it works. That is, does it explain the contents and structure of the Ten Commandments? If so, we know a great deal more about this example of law making and from this example. (I am, of course, not claiming that this example is the same as the others. Only, the others make it apparent that the relationship between law and society may be more complex than the simple notion that societal conditions determines the law.)

My claim that the Roman jurists were not much interested in what happened in court has met with opposition.<sup>27</sup> The other examples set out here show that legal reasoning need not always be geared to determining the outcome of law suits. Winning the respect of one's fellows may be one inducement for a legal expert, respect that filters down to the masses. When set against the example from the Mishnah, my understanding of the jurists' behavior makes this behavior seem more comprehensible.

Likewise, the respect given to the scholar of the Torah will appear less strange to outsiders who reflect on the role of the prestige of their fellows on the lives of Roman jurists.

Reflection on foreign systems will not tell the comparatist what he will find or even what he may expect to find. What it may do is teach the comparatist that his findings based on the sources may be plausible even when they seem to contradict the general, received opinion.<sup>28</sup>

#### APPENDIX

It seems scarcely possible to look at a different system of law without coming into contact with approaches that upset our previously accepted ideas. An example from the present paper concerns the discussions in the Mishnah.

I have argued elsewhere that law comes into being — law, as distinct from some other amorphous means of social control — at that point where a process exists to resolve a dispute with the specific ob-

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26. E.g., Levinson, "Calum M. Carmichael's Approach to the Laws of Deuteronomy," *Harvard Theological Review* 83 pp. 227ff; Carmichael's response is "Laws of Leviticus 19," 87 *HTR* (1994).

27. Most notably though not (yet) in print by P. Birks and A. Rodger at the meeting of British Romanists held in Edinburgh in May, 1994.

28. I am grateful to John Cairns, Calum Carmichael and Ugo Mattei for their constructive criticisms.



ject of inhibiting further unregulated conflict.<sup>29</sup> Similar theories are commonplace. But the thesis has a corollary: where there is no dispute then can be no law or even proto-law.

Michael Gagarin, in his splendid book, *Early Greek Law*,<sup>30</sup> has a very pointed and attractive discussion. He observes that in the Homeric poems the normal result of a homicide is exile of the killer often because he may be pursued by the victim's relatives. But there are two exceptions. Heracles kills his house-guest, Iphitus (*Odyssey*, 21.20-30), but since Iphitus is a foreigner with no family to claim revenge Heracles suffers no material penalty. No legal dispute resulted from killing a foreigner who was a guest in one's house (although there was considered to be a moral or religious violation). Again, Oedipus continued to reign in Thebes after it became known he had killed his father (*Odyssey* 11, 271-280; *Iliad* 23.679-680): there was no living relative who could seek vengeance.<sup>31</sup>

In this very particular context of these exceptional situations for Gagarin there is conflict. But the conflict did not have to be settled (by the community). Indeed, the dispute could not be settled by anything approaching a legal procedure. There was in practice in these situations just no 'plaintiff' who could call a process into being. Thus, he claims, there was not even proto-law. I recognize that if I had reflected on this issue for my views on the nature of law I would have been forced to agree, even if with reluctance.

But from a wider perspective there is clearly something amiss. I have claimed that in the Mishnaic texts discussed in this paper a legal process was not in view. The approach of Gagarin brings that out even more clearly, even if only incidentally. But now the problem is that the rabbis, those formulating and living by the rules set out in the Mishnah, drew no distinction between what we would regard as legal rules (evidenced from many other texts) and what we would not count as even proto-legal rules. If those living the law make no distinction, can we outsiders for the sake of a theory reasonably do so?

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29. Alan Watson, *The Nature of Law* 1ff. (1977).

30. Berkeley, 1986.

31. Greek Law, pp. 14f.