Louisiana Law Review

Volume 46 | Number 1
September 1985

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BOOK REVIEW

SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY. By Alan Watson. Philadelphia: University of Pennsylvania Press, 1984. Pp xvii + 164.

*Peter G. Stein**

In his earlier work, *The Making of the Civil Law*, Professor Watson argued that laws do not develop to fit new social and economic conditions nor in response to political factors, but they develop according to their particular historical traditions, of which the most important component is their official sources. The present work concentrates on those sources and finds them singularly wanting.

In Western societies the principal sources of law have been custom, legislation, juristic opinion, and precedent judicial decisions. The emphasis given to each of them has varied greatly from one period to another, but Watson finds generally "profound indifference among the influential members of the legal community who had some power to change the law as to the quality of these sources and their fitness both for developing law and for clarifying ambiguities" (p. xii). In his usual manner he does it by a series of discrete discussions of the legal sources at particular periods: in ancient Rome; in medieval Germany and France; in Italy, France, and Scotland in the early modern period; and in contemporary England. All are treated with the accuracy and erudition that we have come to expect of the author, but in a somewhat grumpy tone.

His *leitmotiv* is that the nature and quality of a source of law affects the growth of the substantive law and so he seems irritated that the Romans, whom he recognizes as having been creative in finding satisfactory solutions to substantive legal problems, should have shown so little apparent interest in the nature of their mechanisms for making new rules. The most fruitful source of law in Rome was juristic opinion, an adaptable source, but one in which "there is no clear way of deciding when an opinion is authoritative" (p. 2). This was particularly so when the pontifical monopoly of legal interpretation was broken, for the pontiffs' successors gave their opinions as individuals rather than as a college. A jurist's opinion is authoritative only when other jurists decide, on the basis of his earlier views, that what he says is worth heeding. The imperial attempt to regulate the situation by giving some jurists the right to give opinions "with the emperor's authority" had only limited effect. In a number of cases, differing juristic views persisted

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and there was no mechanism for resolving the issue, so that the law on that point remained uncertain, sometimes for centuries.

We are told that statute was "a fairly important source of law throughout the Republic and the reign of Augustus" (p. 11). On the other hand, "law making by statute was always rather rare at Rome," and why the assemblies made such sparing use of it "remains an unsolved mystery" (pp. 13-14). Imperial constitutions, particularly rescripts (which Watson first calls "letters," including subscripts under that head), or answers to requests for rulings on the law, ran into difficulties with publication. Little attempt was made to give them much publicity other than among those making the original request.

The modification of the civil law through the grant of equitable remedies in the praetor's edict worries Watson. He regards its success in modifying the law as "indicative of a failure in law making" since it set up two systems and "there is something pathetic in a jurist like Gaius setting out rules of civil law and then explaining that they have been rendered inoperative by the praetor" (p. 22). But just as English equity was a gloss on the common law and presupposed its existence, so the scope and limits of praetorian law were dictated by the preexisting law, and Gaius could hardly have given an adequate description of the resulting amalgam without explaining the original system and the changes made in it by the praetor. Watson is presumably criticizing the situation which the Romans tolerated rather than Gaius himself, but the comment, which is not an isolated one, suggests that he is judging the situation from the standpoint of another age, rather than, as he himself says, "by the conditions of the times."

Chapter II, on medieval Germany and France, is mainly concerned with custom and its transmission. Although there were many different customs, there was much borrowing from one to another or "transplanting," as Watson prefers to call it. Collections of local custom, such as the *Sachsenspiegel*, although undertaken by private initative and dealing only with a particular region, gained authority in other areas. This must have been mainly because of ease of access. The phenomenon can be paralleled in modern times. Much of the law in Botswana today is customary and there are eight principal tribal groups. When an issue of tribal customary law comes up, the courts ought to institute an inquiry into the relevant custom by consulting the elders. In practice, as I have been informed by a Botswanian lawyer, the courts refer to the *Handbook of Tswana Law and Custom*[1] by Professor I. Schapera, an anthropologist. He collected his information from only two of the tribes, but it is more convenient for the courts to assume that the custom of the others is the same, unless the contrary is proved.

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1. 1st ed. 1938; 2d ed. 1955.

The exponents of medieval German custom were the *Schöffen*, lay judges who often exercised jurisdiction over areas other than their own, through the system of mother and daughter courts. Sometimes the occasion of sending law to another town provided the impetus for putting it into some kind of coherent order. Again a modern parallel is available. The systematic exposition of the common law in the nineteenth century was encouraged by the need to expound it to Indians, so that curiously it was India which triggered the importation of German systematic methods into English law.[2]

In his discussion of the French *enquête par tourbe*, or inquiry into custom, Watson draws attention to a curious limitation in its value. This was the argument that a *turba,* although consisting of at least ten members, was worth only one witness, since its findings were given by the mouth of one, and was therefore insufficient under the evidentiary rule, which properly applied only to findings of fact, that the testimony of one uncorroborated witness was insufficient. It is this limitation which may have hastened the process of redaction of the French customs, which effectively turned them into statutes, but these written costumals provided no means of finding law when they failed to include a relevant rule themselves.

In Chapter III we come to the period of the reception of Roman law, when lawyers became self-conscious about what they were doing. Here Watson relies much on the analysis of Cardinal De Luca in his *Dottor Volgare* of 1673. In the absence of local statute or custom, judicial decisions of the supreme court of the jurisdiction were binding, or failing them, decisions of similar jurisdictions. Only after judicial decisions, moving from the particular to the general, come the texts of Roman law as interpreted by authoritative commentators, and this even though they are "popularly" (Watson did not have to translate "il volgo" as "the mob," who could hardly have had an opinion on such a recondite point) given priority over decisions. The problem was the vast number of commentaries which purported to give the *ius commune.* Until the seventeenth century little attention had been given to the confusion caused by the proliferation of such authorities. In effect courts were free to fix their own forensic customs by following certain authorities in preference to others.

Chapter IV takes us to contemporary English law. The need for the establishment in 1965 of the Law Commission to consolidate statute and propose law reform and the formation in 1970 of the Statute Law Society, point to defects which existed in the making and interpretation of statute law, and Watson has no difficulty in demonstrating that to a great extent these defects still persist. He then discusses the advantages and disadvantages of law making by judicial decision. Though the judge

2. C.H.S. Fifoot, Judge and Jurist in the Reign of Victoria 114 (1959).

can place the law in its actual social situation, he is in effect legislating *ex post facto*; important issues may not be litigated; the law is unsystematic, "there is no organizing instrument," and the judge may be out of tune with social realities. The flexibility claimed for a system based on decisions is countered by the doctrine of binding precedent, particularly when the supreme court regards itself as normally bound by its own decisions. But his main attack is reserved for the unpredictability of case law resulting from the difficulty of identifying the *ratio decidendi* of a case. Both statute and case law are thus inadequate on the ground of uncertainty.

Chapter V summarizes the conclusions. Although for considerable periods there has been little sustained effort to have satisfactory sources of law, yet there have been times when lawyers have expressed their dissatisfaction with them, and their preferred remedy has usually been to demand codification. Justinian in the sixth century, Francis Bacon and Reginald Pole in the sixteenth, and Frederick the Great of Prussia in the eighteenth all yearned for clarity, simplicity, and certainty of law through codification. Yet as Watson sadly notes, "codification once complete, law begins to sink back into complexity and ambiguity" (p. 97). The difficulty is partly the gap between the general rule stated in the code and its application or not to particular sets of facts. The rules seem simple but how they should be applied in a particular case is not predictable. There is also a tendency to regard codes as fixed and not readily changeable. "The notion of a code, the provisions of which will be continually under review, seems unacceptable" (p. 100). The group interest and group psychology of both advocates and of judges are potent factors in maintaining the emphasis on individual decision-making and the consequent ambiguity of the system as a whole. It is admitted that a certain ambiguity "can be fruitful for the eventual development of good and clear rules" (p. 102). The uncertainties may, over time, produce a better rule than any that would have been laid down at the beginning. But Watson rightly points to the social and individual costs of such legal ambiguity, which have been largely ignored.

It is historically true that interest in improving substantive law is not reflected in interest in the mechanisms for legal change. But it may be that those who view the law as something easy to change by legislation deprive it of its continuity with the past and undermine public confidence in the law as something constant. The ancient Greeks legislated a great deal but never built up a legal tradition and never had a professional class of lawyers who were prepared to immerse themselves in its details. The Romans and the English traditionally distrusted legislation and took great pains to disguise legal change under the pretense of preserving existing law; and they were more successful in developing the substantive law.

Watson is clear that today no source of law should have authority but legislation. His own solution to the problem is "two-tier law" (repeated in Chapter VI from a earlier published suggestion). The first

tier, front-rank law, is set out at the level of generality of a code and it is supported by a second rank of law, also legislative in form, which provides an authoritative interpretation of the first. Court decisions have no precedential value. Reports of decisions may be published, and juristic comment is to be encouraged, but they have no authority. A special interpretative committee of experts keeps the law under constant review and the judges have a duty to report to the committee any case which they had to decide, in which the existing law was inadequate. Thus it is "the function of first-rank law to make law comprehensible, of second-rank law to make law comprehensive, and of the interpretative committee to make the law responsive to what the community needs and wants" (p. 116). Various objections to the proposal are set out and answered: the interpretative committee is a non-elected undemocratic body, but its proposals, which primarily concern "lawyer's law," do not have to be accepted by the legislature; its members and the solutions they propose may be remote from reality and the system may discourage innovation by judges and academic scholars, but this need not be so. Despite the cogency of the argument, however, the impression is left that the scheme would not bridge the gap between rule and case and that lawyers would still use past decisions and juristic comments to predict the outcome of cases, whether or not they had formal authority.

A proposal, strikingly similar to that of Watson, was put forward for Louisiana in 1823. In their Preliminary Report, primarily drafted by Edward Livingston, the Code Commissioners pointed out that in civil cases the judge must somewhere find a rule for every case. The Code will deal with as many cases as can be foreseen, and it should then indicate "some source to the Judge from which he is to draw the rules for guiding his discretion in the others." In England this source was "the undefined and undefinable common law," which could on occasion be "no better source than his own caprice." In France, "because the Great Code made no provision on this subject," it was "the rubbish of ancient ordinances, local customs and forgotten edicts," with the result that "the confusion of jurisprudence from which it was the intent of the Code to relieve them" was reintroduced.

The Commissioners therefore recommended the repeal of all former laws and in order

> to govern the decisons of the Judge in all cases, which cannot be brought within the purview of the Code, have proposed that he should determine according to the dictates of natural equity, in the manner that "amicable compounders" are now authorized to decide, but that such decisions shall have no force as precedents unless sanctioned by Legislative will. And in order to produce the expression of this will, and progressively to perfect the system, the Judges are directed to lay at stated times, before the General Assembly, a circumstantial account of every case for the decision of which they have thought themselves obliged

> to recur to the use of the discretion thus given; while regular reports of the ordinary cases of construction, to be made by a commissioned officer, will enable the Legislative body to explain ambiguities, supply deficiencies and to correct errors that may be discovered in the Laws by the test of experience in their operation.
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> By these means our Code, although imperfect at first, will be progressing towards perfection; it will be so formed that every future amendment may be inserted under its proper head, so as not to spoil the integrity of the whole; every judicial decision will throw light on its excellencies or defects. Those decisions will be the means of improving legislation, but will not be laws themselves; the departments of government will be kept within their proper spheres of action.[3]

Nothing seems to have come of Edward Livingston's proposal. Its time had not yet arrived. I doubt if Watson's proposal will fare any better.

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3. Preliminary Report of the Code Commissioners dated February 13, 1823, in Louisiana Legal Archives Vol. I xcii-xciii (1937).