

REVIEW

The Making of the Civil Law. ALAN WATSON. Harvard University Press, Cambridge, 1981. Pp. xii, 201. \$22.50.

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This historical and comparative essay describes some of the principal features believed by Alan Watson to be common to legal systems that have long been exposed to Roman law and believed by him to distinguish them from legal systems that have followed the English common law. Both the recurrence of these features in different "civil law systems" and the contrasts between civil and common law he attributes to the influence of history, so the history is heavily stressed. The historical sources are treated with the erudition and lively style that we have come to expect from this much admired author. Watson has very little to say about Roman law itself, the subject as to which he has previously demonstrated his exceptional expertise.¹ The arrangement is essentially topical, for this is less an account, following historical sequences, of the processes by which modern civil law was "made" than a search for reasons for present-day resemblances and differences. It is meant to be provocative and does provoke, even when it does not persuade.

I

The author does describe one set of attributes found in classical Roman law, apparently for the purpose of showing how that vast compilation, Justinian's *Corpus Juris*, could later prove so immensely useful in such diverse ways to societies distant in time and place. He describes Roman law as comprised of numerous self-contained "blocks."² Each was consistent with but independent of the

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¹ See, e.g., A. WATSON, *LAW MAKING IN THE LATER ROMAN REPUBLIC* (1974); A. WATSON, *LAW OF THE ANCIENT ROMANS* (1970).

² A. WATSON, *THE MAKING OF THE CIVIL LAW* 18, 19-20 (1981).

others, so that blocks found relevant for a particular purpose in later times could readily be extracted and put to use without drawing on the rest. This quality resulted from the abstract style used to describe both the problems and their solutions, divorced from the settings in which the problems arose—the personal or transactional background, the procedural context, or estimates of human or social consequences that would vary with time or place.

The expository style described here clearly seems to be, among the Roman sources, that peculiar to the jurists. To this most remarkable group of men was entrusted almost the whole task of elucidating and developing Roman law throughout the classical period, its most creative phase. Their training and great skill were in problem solving rather than high-level speculation. Their solutions constitute the *Digest*, the most admired and the largest part of the *Corpus Juris*.

Yet in Watson's account of the subsequent influence of Roman law on the "making" of modern "civil law systems," the Roman jurists recede from the prominent, indeed the predominant, position that most modern students of Roman law would assign them. Their place is taken, strangely enough, by the *Institutes*, the elementary handbook for beginners that was included as part of Justinian's *Corpus Juris*. The period of time with which the author is most concerned for its lasting influence stretches over the last three centuries of the old regime in Europe (say, from 1500 to 1800). As to the authors and decisionmakers of that time he makes such statements as that, "inevitably, sooner or later," any society that accepts any part of the *Corpus Juris* as then in force "gives a place of particular honor to Justinian's *Institutes*."³ Not only does Watson repeatedly extoll this handbook and make it appear as the most important surviving monument of Roman law, but he then describes at length writings of the sixteenth through the nineteenth centuries that, appropriating the title of *Institutes*, gave

³ *Id.* at 62. There is no need to list the dozens of places where he makes similarly extreme statements, but I will mention one other example. In summarizing the impulses toward codification he defines "the distinctive element of civil law systems" as "the acceptance, past or present, of the *Corpus juris* or part of it as authoritative." This has, he says, profound consequences, which include domination of legal education by Roman law, "and particular prominence falls on Justinian's *Institutes*, because it is both the fundamental book for beginners and is the authoritative attempt to give a systematic structure to law." *Id.* at 103.

Watson comes much closer to the truth, I suggest, when he describes the *Institutes* as an "elementary textbook [that] never stood in first place as a statement of the law. The *Digest* and the *Code* were both treated much more seriously." *Id.* at 136.

short and elementary summaries of rules of strictly local origin and application.⁴

There was enough of this elementary literature scattered over Europe to indicate that it met a real need for at least a rudimentary organization of the competing legal rules with which these societies were oversupplied. Yet these later *Institutes* varied greatly in style, arrangement, and quality. Moreover, some had the evident purpose of interposing barriers to the spread of Roman law by preserving local idiosyncracies or advancing new and original points of view.

Watson evidently considers that this is not the occasion to outline again, as part of the "making" of modern civil law, the strenuous and concerted effort of medieval minds to comprehend and adapt to their own needs the massive legacy in law from antiquity. He does not try to describe the enormous intellectual investment of the glossators or the creative work of their successors, the commentators, led by Bartolus and Baldus.⁵ These were the interpreters through whom Roman law was made available to the societies of western Europe. The demands on those who sought to understand and make use of this complex literature certainly did not diminish with the passage of time, for its volume increased steadily. It was a formidable compilation of book learning whose transmission and elaboration were almost necessarily functions of learned men, most of them sponsored by universities.

This meant that the enterprise fostered a continuing interchange among the learned community of Europe, transcending political boundaries, that was critical in transmitting expertise in Roman law. It also preserved a common fund of complex ideas that had been assembled and maintained through a massive, sustained intellectual effort and then reviewed, renewed, and reappraised over centuries. Even the sixteenth century humanists, who sought to strip away the medieval and post-medieval accretions and return to the original Roman texts, did not disrupt communication among those learned in Roman law.⁶ As new concerns emerged in later centuries, the interchange between scholars continued at levels of complexity that were certainly far beyond that reached by

⁴ *Id.* at 65-82. Watson sees these *Institutes* of local law as "the direct descendants of Justinian's *Institutes*." *Id.* at 65.

⁵ Watson recognizes the debt those who followed owed to the glossators and the commentators, *id.* at 42-45, 54, 132, but does not describe their efforts.

⁶ *Id.* at 72-73.

quotations from Justinian's *Institutes*.

The "civil law systems," as the author describes them, that have survived into modern times are composed of a fusion of elements derived from Roman law and elements derived from their own earlier experience by the countries concerned, in varying forms and degrees of admixture. The salvaging of these indigenous elements occurred by many different means and to an extent that differed greatly from place to place. As Watson points out, a mixed pattern could emerge within a single country, as in France, where the southern one-third was governed until the French Revolution by an adapted form of Roman law but the northern two-thirds was divided into some sixty independent districts.⁷ In Germany a large-scale reception of Roman law was already far advanced when conscious efforts were made to preserve the local law of some German communities by elementary restatement of its rules and at times by placing it within a broader framework of ideas. Watson describes these German writings from the seventeenth and eighteenth centuries, some of which attempted by these means to set barriers to the incoming tide of Roman law.⁸ The diversity revealed by their own accounts showed how difficult it would have been in Germany then to achieve a larger synthesis.

II

What then are the attributes left behind as residual effects of this extremely complex history, attributes that are common to all "civil law systems" and also peculiar to them? Watson describes one feature with a phrase used by Max Weber: "logically formal rationality."⁹ This phrase is intended to include much more than the readiness with which detached "blocks" of Roman law could be understood and used as needed, extracted from the vast repository of other Roman law ideas.¹⁰ As explained by an admirer of Weber, "logically formal rationality" aims in precisely the opposite direction and operates through "a highly logical systemization," making the resolution of specific problems depend on "processes of specialized deductive logic proceeding from previously established rules or principles."¹¹

⁷ *Id.* at 7.

⁸ *Id.* at 78-81.

⁹ *Id.* at 23.

¹⁰ *Id.* at 15-22.

¹¹ Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 *Wis. L. Rev.* 720, 730,

Anyone who has tried to work his own way through the dense thickets provided by the medieval glossators, some of their great successors such as Bartolus, or early modern Romanists will not recognize in Watson's description the mental processes he himself has undergone—tracking a path through the intricacies of analysis, the variant readings, the references to all relevant texts that are painstakingly assembled to the last grubby detail. For some 400 years after its rediscovery in medieval Italy, Europeans had effective access to Roman law only by working their way through these dense thickets. Thereafter (say, after 1600) restless minds, especially in Germany and Holland, began to strive for syntheses that were more broadly conceived and to sketch designs for a more harmonious and durable edifice of ideas of a kind that Roman law had never had. But in France during the last two centuries of the old regime any such effort faded away as the academic profession fell into decay and the *mélange* of custom, smatterings of Roman law, and rules emanating from court decisions accumulated in disorderly fashion.¹²

My own conclusion is that the countries of Europe that were continuously exposed to Roman law drew from it but also from their own indigenous sources what they were able to assimilate and found useful. What they retained varied enormously from place to place and also over the long stretches of time during which these processes continued. And as to "logically formal rationality" we should remember that some persons trained in the common law have conceived the application of law to consist of deduction from general propositions of very broad reach that rest on unassailable premises. Where this is found on the continent of Europe there seems to be no good reason to lay the blame on Roman law.

A second respect in which "civil law systems" are said to differ from those based on the English common law is in the form and content of judicial opinions. Watson quotes from several opinions whose dates range from 1563 to 1977.¹³ In this *mélange* there appear as common features numerous citations to Roman law and the learned jurists and highly abbreviated accounts of the facts (the last feature being found also, of course, in early private reports in England). From this collection Watson concludes, surpris-

quoted in A. WATSON, *supra* note 2, at 23.

¹² J. DAWSON, *THE ORACLES OF THE LAW* 346-50 (1968).

¹³ A. WATSON, *supra* note 2, at 39-50. Those dating from before the year 1800 do not prove much, for they were prepared independently by private reporters.

ingly, that "modern civilian law reports retain many elements from their precodification ancestors."¹⁴ He does not explain what these elements might be. If one looks to France and Germany, two prototypes in this as in so many other respects, one does not need to read many to discover the enormous differences between the law reports in these two countries. German opinions are filled with citations (not of course to Roman law but to modern German court decisions and the writings of modern German jurists) and also with pages of explanatory and argumentative discourse.¹⁵ French opinions can hardly follow models derived from olden times because French courts under the old regime were strictly forbidden to publish the reasons for their opinions.¹⁶ The most one can say is that in France the habit of reticence is deeply built in; giving no citations and using a stereotyped and laconic style, French courts have succeeded in reducing disclosure to a minimum. With differences as wide as these, it seems that judicial opinions in the two countries have somehow escaped the pressures toward conformity that supposedly have been exerted by the "civil law system."

Another special attribute of the "civil law systems," the author says, is that they are particularly open to the influence of philosophy, especially as compared with any system derived from the English common law.¹⁷ This he attributes to two factors: first, the influence of Justinian's *Institutes*, whose account of Roman law was so simple that philosophers could understand it (!!); and second, the leadership in civil law systems of academics, who were more ready than practitioners to devise a rational plan for the legal order and articulate its higher purposes.¹⁸ It was not until the seventeenth century, however, that inquiring minds in some parts of Europe undertook a new and critical reappraisal of the societies they knew and sought to construct a grand design more open to the moral values that they aimed to redefine. This was a period of new creation and restructuring of central ideas that to the legal systems of some countries—Germany and Holland, for example—brought permanent gains. England surely played its full part in the broad philosophical speculation of eighteenth century rationalism, but on

¹⁴ *Id.* at 52.

¹⁵ The author suggests the opinions of the present German high courts are extremely formal and meager. *Id.* at 177-78. I have never seen one, out of hundreds read, that corresponds with his description.

¹⁶ J. DAWSON, *supra* note 12, at 286-305.

¹⁷ A. WATSON, *supra* note 2, at 83.

¹⁸ *Id.* at 83-84.

the English legal system its effects were minimal. The response of English lawyers was what one should expect from a tiny, self-sufficient group of practitioners, walled off from the world around in their intense focus on litigation. So during these last two centuries (roughly 1600 to 1800), which for the law of some continental countries, at least, was a productive time of reappraisal and renewal, England produced only Blackstone, the self-satisfied apologist, who looked out on English law and found all of it good.

This contrast is striking and calls for an explanation, which Watson provides. He finds it in an attribute that is built into "civil law systems," that they were and still are "open" to philosophy while "common law systems" are not. This explanation will satisfy those willing to endow "systems" with human attributes—with minds that open or close, as the case may be. The poverty of the English common law through most of its history seems to me more basic than that. It is an almost total lack of human resources, that is, of expositors who were trained and were believed to be needed to explain, to organize and also to criticize the legal system.¹⁹ This kind of deficiency can be remedied, and active efforts to accomplish this have been made, surely, in the United States. But our author makes it appear that in a "system" a deficiency such as a mind that is closed is congenital and therefore incurable.

One other attribute that is "inherent in the civil law tradition"²⁰ is then discussed, not as inescapable but merely as a propensity—the propensity at a late stage to become codified. As Watson points out, codes that are at all comprehensive are rare in countries governed by the common law, while among "civil law systems" only two, South Africa and Scotland, remain uncoded. In all the others the codes that have been adopted came relatively late: the earliest was the Bavarian in 1756, the French was not adopted until 1804, and the present German Code was put off until 1900. Because these countries managed so long with no strong enough impulse to codify, the most the author claims is that codification is "the natural product of the civil law tradition."²¹

Even this much he has trouble showing. The reasons he gives for the emergence of the earlier codes have little to do with a "civil

¹⁹ Watson himself acknowledges the significance of human resources. He considers "the always unexpected presence of a human genius" to have been "[t]he vital factor" in the continental natural law movement. *Id.* at 89.

²⁰ *Id.* at 100.

²¹ *Id.* at 104.

law tradition." By the eighteenth century, he explains, there had appeared in various places in Europe elementary handbooks describing, not Roman law, but the law of these localities. Their language, he says, was copied by the draftsmen who prepared the codes because it proved, as Justinian's *Institutes* had also done before, that law could be briefly and simply stated.²² The reassurance given by these handbooks was reinforced, Watson says, by the conviction generated by eighteenth century rationalism that law ought to be the embodiment of reason and in being written down could be improved.²³ Some earlier advocates of codification had urged that codification could make law more intelligible by reducing its volume and complexity, but Watson rejects this explanation, reasoning that although English law in the eighteenth century was wholly unintelligible to the general population, codification was not even thought of in England.²⁴

There follows an informative and useful account of the methods by which the drafting of the national codes was organized, the personalities engaged, and the procedures by which the texts produced were eventually approved.²⁵ Where the texts were newly prepared and not merely copied from a code already in force elsewhere, the efforts required were extremely laborious, vastly more than copying phrases from a handbook. These efforts could be prolonged—eighty-seven years in Prussia, and thirty-seven for the German Code of 1900.

Adoption of a civil code, accompanied usually with satellite codes of commerce, procedure, etc., brought drastic changes in the materials and methods for ascertaining and applying law. This "new beginning," as Watson rightly describes it,²⁶ meant that as to almost all issues dealt with by a code the rules previously in force were entirely displaced and the learning that had extended and refined their meaning was suddenly made to seem obsolete. Some perspectives and habits of thought were too firmly implanted to disappear, but if their influence was to persist channels had to be found for them to filter in through the condensed language of the codes. The codes were drafted at different times by nationals of different countries; even where there were borrowings from another

²² *Id.* at 103. See generally *id.* at 65-82.

²³ *Id.* at 103-04.

²⁴ *Id.* at 101.

²⁵ *Id.* at 104-30.

²⁶ *Id.* at 131.

country's code (the French has most often served as a model) there were deviations in both the language adopted and the readings it later received. Some of the codes came into force a century or more apart and those entrusted with applying them had had experience that differed radically, an extreme example being the Germans and French. Watson concludes that codification as it occurred in Europe "brings to an end the unity of the civil law tradition."²⁷ The regret this evidently inspires in him will not be shared by those who do not agree with his view of how much unity ever existed.

One lasting contribution of Roman law after its rediscovery in Italy he justly emphasizes: the need it created in Europe for a sizable group of learned men who could understand and transmit this great heritage.²⁸ The society governed by Roman law had long since faded from memory; the clarity and economy with which its rules were expressed were all too often deceptive, disguising the complexity of the connections between them and the obscurities and contradictions revealed by closer analysis. Roman law studies nevertheless had a high prestige and produced ideas that were useful enough so that talented persons made the needed investment. For centuries persons of learning and high intelligence maintained roles of leadership and conducted a lively and profitable interchange. From this form of "unity" in the Roman legal tradition the lasting gains are great.

But we should remember that in the societies in which this interchange went on, daily life was regulated by rules of more homely origin for which the complexities preserved and magnified by academics had not much relevance. The local law that was not displaced by the cosmopolitan learning varied enormously in context and extent not only from country to country, but even from district to district. Thus the shift to codification in order to achieve an acceptable fusion of these multifarious elements does not seem to need any explanation resting on a "propensity," hidden in the inner recesses of Roman law and emerging late, to condense all private law into a code. For the countries that led the way in codifying I would ascribe the impulse not to a kind of "unity" produced by the borrowings from Roman law but to just the opposite: a legal inheritance that was too diversified and abundant to be managed otherwise.

²⁷ *Id.* at 137.

²⁸ *Id.* at 24-26, 171-72, 177.

III

So the main theses advanced in this survey seem to me unconvincing, but those familiar with Alan Watson's work will not need to be told that the supporting argument throughout is presented with care, skill, and an impressive command of historical sources. One is left with the question how much profit there is in these ascents to some high place to secure an overview of the "civil law" in Europe. The main object, of course, is to estimate how much difference it has made that countries on the Continent were exposed for 700 years or more to influence from Roman law, to a degree that England was not. This must be a fascinating question, for so many have sought to answer it.²⁹

The view that I have tried to sketch here is that Roman law as preserved in the *Corpus Juris* was for centuries altogether too advanced, also too voluminous and diffuse, to be used otherwise than in selected segments—"blocks," as Watson calls them. Receptivity toward Roman law varied not only from place to place, but from time to time and especially with the topic involved. So it is not surprising that countries now classified as followers of the civil law have differed greatly as between themselves, just as there has emerged a deep and widening gulf between England and the United States, two countries that are followers of the common law. Most prominent by far, it seems to me, are the differences. Fortunately it is the differences that make comparison interesting.

²⁹ See, e.g., F. H. LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* (1955); Cueto-Rua, *The Future of the Civil Law*, 37 *LA. L. REV.* 645 (1977); Pringsheim, *The Inner Relationship Between English and Roman Law*, 5 *CAMBRIDGE L.J.* 347 (1935).