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Law in Books, Law in Action and Society

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I consider myself a comparative legal historian and range widely over time and space. My interest is in private law. My general conclusions, developed over years, on law in society are three and are interconnected and are as follows:

1) Governments are not much interested in developing law especially not private law. They generally leave this to subordinate law makers to whom, however, they do not grant power to make law: for instance:

(a) The great Roman jurists from the second century B.C. to around 235 A.D. to whom modern private law owes so much were as such private individuals even though many, for instance Julian, Paul, Ulpian and Papinian, were top public officials. Much of their works formed Justinian's Byzantine *Digest* and thus lived on into the modern world.

(b) The great figures in the early and fundamental Reception of Roman law from the 11th century onwards, the Glossators and Post-Glossators such as Irnerius, Accursius, Baldus and, most famous of all, Bartolus, were University professors.

A pattern is already beginning to emerge: law lives on long after the death of the law maker, and in territories distant from his place of business. And it continues to thrive even in very different circumstances and even though misapplied. For instance, the *Ordenaçoes Filipinas* promulgated by Philip II (of Spain) for Portugal under Spanish domination, and confirmed by João IV in 1643 gave subsidiary validity to the opinions of Bartolus. The *Ordenaçoes* applied to the Portuguese colonies and remained in force even when Brazil became

independent in 1822.

(c) The development of English law which was mainly the work of judges whose task was to find the law, not to make the law, is equally unthinkable without the *Commentaries on the Laws of England* (first edition 1765-1769) of William Blackstone, composed when he was the first Vinerian Professor at Oxford from 1758.

The reception of English law in the U.S.A. after Independence is equally unthinkable without these *Commentaries*. There were, of course, numerous American editions with significant changes -- which must not be minimized – but Blackstone remained Blackstone.

The accessible structure of Blackstone's *Commentaries* has been the subject of lively debate but the issue is simply resolved. The *Commentaries* follow the slightly flawed reconstruction of Justinian's *Institutes* by Dionysius Gothofredus (1549-1622). Another example of extreme borrowing.

(Perhaps an even more telling example for survival is William Geldart's celebrated *Introduction to English Law* [first edition, 1911; latest edition, 1995]:

Chapter 1, Statute law and Common law; Chapter 2, Common law and equity; chapter 3, Other bodies of English law; = *J.* 1.1-2:

Chapter 4, Persons and personal relations; = *J* 1.3-26;

Chapter 5, Contracts = *J.* 2.1-25; 3.1-12;

Chapter 6 = *J* 3.13-29;

Chapter 7, Torts = *J.* 4.1-5; *J.* 4-17 on procedure have no equivalent in Geldart;

Chapter 8, Crimes = *J.* 4.18.

Even within a chapter the order may follow that of the *Institutes*. Thus, Chapter 5 begins with the

conception of property, then ownership and possession and ends with succession. *J* 2.1-3.12 begins with the division of things and ends with a final point of succession.

Western law is unimaginable without the input of scholars writing without governmental authority.

2) Even when famous legislators emerge, they are seldom much interested in inserting a particular social message or even certainty into their laws.

(a) Moses and the Ten Commandments. Moses is a leader in serious trouble with his own people who are on the verge of revolt. Moreover, his own father-in-law has just told him that he is wearing himself out deciding lawsuits, and that with God's help he should concern himself with weightier matters (Exodus 18.13ff). God comes to Moses' aid and gives him the Ten Commandments or Ten Words (Exodus 20. 1ff.) Significantly, God insists that Moses be given the laws in private, and far from the people. (Exodus 19.10ff.).

The secular legal provisions are banal in the extreme: no murder (or killing) (Exodus 20.13), no adultery (Exodus 20.14), no theft (Exodus 20.15). What society would fail to have such rules? Moreover, these offenses are not defined. But what amounts to murder, theft or adultery? Some precision is needful, but is not given. But if no precision is to be given, what is the point of stating no adultery and no theft? After all, they are certainly covered by the last Commandment. Adultery and theft are the strongest cases of coveting a neighbor's wife or anything that is your neighbor's.

Even the religious commands leave much to be desired. No work on the seventh day (Exodus 20.8ff). But work is not defined. What amounts to work? We are not told. The resulting

endless debates of the Pharisees and rabbis can be no surprise. Exodus 20.8 tells us that on the Sabbath "you shall not do any work – you, your son or your daughter, your male or female slave, your livestock, or the alien resident in your town." There is a glaring omission "Your wife." Is she permitted to work on the Sabbath? It would be very convenient if she were!

(b) Justinian's enormous codification, the *Corpus Iuris Civilis*. The *Corpus Iuris Civilis* is in four parts: the *Institutes* (533 A.D.) is the elementary textbook, with the force of statute law, for first year law students; the *Digest* (533) is a vast collection of selected texts from the classical jurists; the *Code* (second edition 534) is a collection of imperial rulings; and the *Novellae*, a collection of subsequent Justinianic legal pronouncements.

A dominant concern in Justinian's time and of Justinian himself, was religion. Which form of Christianity was to be accepted, which doctrines were heretical, the treatment of Jews. Yet in the whole body of the *Institutes* and *Digest* there is not one mention, not one, of Jesus, of the apostles or saints or fathers of the church. God is mentioned only once in the *Institutes*, in the very last text, *J.* 4.18.12. Justinian has given a very brief outline of public prosecutions which will be amplified, he says, *deo propitio*, with study of the *Digest*. The *Digest* has twelve mentions of the word 'god', but in none can we tell whether the god is that of the Christians or an old pagan deity. The *Code* has more of Christianity (and anti-semitism). But there is a wonderful twist. The *Institutes* were the subject of first-year study, the *Digest* of the second, third and fourth years. The *Code*, as an object of study appears only in the fifth year. And even if by then the students' minds were not fixed, the fifth year was optional!

Justinian has not brought up-to-date the law of the pagan Latin-speaking jurists of classical Rome to reflect the Christian Greek-speaking lawyers of the very different Constantinople. And

economic conditions had varied greatly from time to time. And if the *Digest* had been in Greek, not Latin, it could never have had much impact in western Europe.

One further example out of many. The ancient Roman law code of 451-450 B.C. contained a provision *Si aqua pluvia nocet*, "if rain water does damage." This was the subject of intense discussion by jurists from at least the second century B.C. to the third century A.D., and it is the subject of a *Digest* title, *D.* 39.3. One issue was settled: an action did not lie when the flow of water onto a neighbor's land was diminished; it was not the water but its lack that caused loss. But what work on your land that increased the flow onto my land could give rise to an action to restore the *status quo ante*? The jurists mightily disagreed. No legislation was forthcoming, the juristic disputes were not settled, not even in the time of Justinian in the very different climatic conditions of Byzantium. Indeed – and this is why I have chosen this example – it was taken over in France. Robert Pothier (1699-1772) took it over in its entirety and cites no other source in his account. Odder still, it was not until the final revision of the draft *French code civil* of 1804 that any fundamental change was made.

3. *Legal Transplants.* Borrowing is the name of the legal game and is the most prominent means of legal change. That this is so often overlooked can only be explained by extreme prejudice brought about by notions such as that "Law is the Spirit of the People" or that "Law reflects the Power Structure of the Ruling Class." But in the previous two main topics in this paper transplants have appeared in almost every situation discussed. So true – and obvious – is this that I will limit myself to only two, more detailed, examples.

But before I come to these, I would like to insist on the intertwining of the factors shaping law in society. Much has already emerged about this intertwining.

A. The lack of interest on the part of government in making law, especially private law.

B. The role of subsidiary law makers who are not given power to make law.

C. The longevity of legal rules whether in the same or a different context, whether in the same or a different state. There has been no need to set this out under a distinct heading. It is self-evident.

Law, as we know it, is inconceivable without these factors. To come at last to the two examples of legal transplants which also inevitably throw still more light on the intertwining of the factors of legal development.

For Frederick the Great of Prussia it is enough to call attention to the first fruits of his attempts to codify the law. *Das Project des Corpus juris Fredericiani, d.h. S.M. in der Vernunft und Landes verfassungen gegründetes Landrecht, worin das Römisches Recht in eine natürliche Ordnung und richtiges Systema nach denen dreyen Objectis juris gebracht*, which was published at Halle between 1749 and 1751. The very title is instructive; "The Project for the Corpus juris Fredericiani, that is, the Territorial Law of His Majesty, Founded in Reason and the Territorial Constitutions, in which Roman Law Is Brought into a Natural Order and Right System in Accordance with Its Three Objects of Law." That is to say, it gives the *ius commune*, and it is in fact arranged in the order of Justinian's *Institutes*. No attempt is made to compose afresh a law peculiarly suited to the Prussian territories. Indeed, some paragraphs of the preface, particularly 15,22,23, and 28, make it plain that for the drafters the impetus for the *Project* was not dissatisfaction with the substantive *ius commune* but with the difficulty of ascertaining the law because of the poor

arrangement of Justinian's *Corpus Juris Civilis* (apart from the *Institutes*) and of the multitude of writings on it by subsequent jurists. In the second section of part 1, book 1, Frederick claims it is only to be regretted that the German emperors when they received Roman law did not always systematize it. Frederick's primary intentions – at least as they were perceived by his famous chancellor, Samuel Cocceii – ought best be revealed by the main thrust of this first production. The fact that, because of the Seven Years' War, it never came into force (which is regarded, for instance, by Franz Wieacker as rather fortunate) is not of consequence here. For later attempts at codification, ultimately crowned with success, with rather different aims, Frederick was indebted to a new generation of lawyers and philosophers.

The other example is Atatürk, who wished to reform and modernize Turkish life in so many ways (and was very largely successful). He promulgated in 1926 the Turkish Civil Code, the *Türk Kanunnu Medenîsi* (*TKM*), which contained virtually all of the two Swiss codes, the *Schweizerisches Gesetzbuch* (*ZGB*) and the *Obligationenrecht*. Turkey in the same year issued its commercial code, which was a compilation of at least a dozen foreign statutes, and issued in 1929 its code of the sea, which is a translation of book 4 of the German Commercial Code (*Handelsgesetzbuch*).

The Turkish Minister of Justice of the time, Mahmut Esad Bozkurt, on the occasion of the *Festschrift* of the Istanbul Law Faculty to mark the civil code's fifteenth birthday, explained the reasons for the codification. First, the Turkish legal system was backward and primitive. Three kinds of religious law were in force, Islamic, Christian, and Jewish, each with its appropriate court. Only a kind of law of obligations, the "Mecelle," and real property law was common to all. (If I may interject a comment, I do not see why it is backward to have separate rules with separate courts to decide on family law and succession. In practice, families with a choice in a unitary system opt

for the structure that fits their beliefs). Second, such an odd system of justice, with three kinds of law applied through three kinds of courts, could not correspond to the modern understanding of the state and its unity. Third and most important, each time Turkey had demanded the removal of the capitulation terms of the First World War by the victorious Allies, the latter refused, pointing to the backward state of the Turkish legal system and its connection with religion. When as a result of the Lausanne Peace Treaty the capitulation terms were removed, the Turks took it upon themselves to form a completely new Turkish organization of justice with a new legal system, new laws, and new courts. Bozkurt said that in one word the system was to be "worldly," The duties undertaken by the Turks under the Lausanne treaty had to be accomplished as quickly as possible. During the First World War commissions were already set up in Istanbul to prepare laws and they had started work. The results were examined in 1924. After seven or eight years the Turks had completed only two hundred articles on a law of obligations; the sections on succession, guardianship, formation of marriage, and divorce of a civil code; and between seventy and eighty articles of a criminal code; and even the code of land transactions was only a torso. Consequently, after various systems had been looked at, the two Swiss codes were adopted virtually in their entirety.

Although the motivation was different from most earlier receptions – drastic modernization of society rather than the filling of gaps in the law – the Turkish reception was otherwise similar. Because the creation of new autochthonous law is difficult, it is much easier to borrow from an already existing, more sophisticated system that can be used as a model – above all, where the donor system is accessible in writing. By this time, of course, various excellent codes would have provided a model; notably the French, German, and Swiss were all greatly admired. Why was Swiss law chosen? Various answers have been given, but three strike me as most important: the Swiss laws

were the most modern; Switzerland had been neutral during the war, whereas French law was that of a former enemy and German law was that of a defeated ally; and Bozkurt had studied law in Switzerland, so Swiss law was most familiar to him. Hirsch, a German scholar who was a professor of commercial law at Istanbul and Ankara between 1933 and 1952, emphasizes what was to him the overriding importance of the last factor. In any event, there is no reason to think that somehow Swiss law was more adapted than was French or German law to the society that Turkey wanted to become.

The Turks did not accept some Swiss rules at all and changed others. For instance, whereas the legal regime in Switzerland for spouses' property is community property (*ZGB* 178), in Turkey it is separate property (*TKM* 170); the surviving spouses's right to a usufruct is smaller in Turkey (*TKM* 444 §2) than in Switzerland (*ZGB* 462 §2); the judicial separation of spouses may in Switzerland be pronounced for an indefinite time (*ZGB* 147 §1); desertion as a ground of divorce in Switzerland must have lasted at least two years (*ZGB* 140), but in Turkey at least three months (*TKM* 132); the minimum age for marriage in the former is for males twenty, for females eighteen (exceptionally eighteen and seventeen), in the latter for males eighteen, for females seventeen. Other rules would be accidentally mistranslated and the final result need not be that of the donor nation. Others were deliberately given a different value in the translation. Still others remain a dead letter because they have no counterpart in Turkish conditions. The Turkish courts in giving flesh to the rules through interpretation may, as they usually but not always have done, follow the interpretation of the Swiss courts. Again, many rules have a different societal value in the two countries, such as those on a minimum age for marriage or on the requirements for a divorce. Finally, such a reception, as fast as Atatürk wanted it to be, will, like that of Roman law and of other systems, be a slow

process, and the speed and the extent of its success – never complete – will vary with circumstances.

Any new law resulting from a massive transplantation has to be learned by judges and lawyers as well as by the people before it becomes effective. In the case of Turkey, where the new legal system was so different from what had gone before but was so closely attached to European models, the solution was to import foreign professors from Germany and Switzerland, notably Andreas B. Schwartz and Ernest E. Hirsch, to teach the new law, and to send budding lawyers and law professors to study law in Europe. Also, aspects of traditional social life, such as marriage, respond only slowly to the pressures of new law, especially in country districts. Significantly, essays in a collection published to mark the thirtieth anniversary of the Turkish codification stress the extent to which the reception had not "taken," whereas those in another collection to mark the fiftieth anniversary accept the reception but emphasize its continuing nature and the fact that it is not, nor will be, complete. In 1956 Kurt Lipstein could describe the extent of acceptance of compulsory civil marriage as "disappointing, to say the least." In 1978 June Starr reported that in a particular village that she had studied, she found little evidence "that villagers are lax in obtaining state marriage licenses."

The success or partial, yet still growing, success of the transplanting of Swiss legal ideas into Turkey gives many insights into what happens when a less "modern" or less "developed" system comes into powerful contact with a sophisticated modern system. These insights become almost blinding when we notice that Eugen Huber, who virtually alone was responsible for the *ZGB*, said that "the law must be delivered in speech out of the thought of the people. The reasonable man who reads it, who has pondered the age and its needs, must have the perception that the law was delivered

to him in speech from the people" And Virgle Rossel declared that "in particular if one could say of the Code Napoléon that it was 'written reason,' we intended to work according to the sense of the national spirit, raising the moral level of our law so far as possible, and we would be happy if it was said one day of the Swiss civil code that it is, to some extent, the written internal moral sentiment". Yet the same Virgile Rossel, was well aware that the differences in the laws of the various Swiss cantons could not be explained on the basis of religion, economy, language, or "race."

Thus, the Swiss codification was intended by those who worked on it to be the written moral consciousness of the Swiss people. The arbitrary rules of cantonal law were to be remedied by federal law appropriate to the conditions of the Swiss. The "Swissness" of the codification is stressed. Yet the Swiss codification could be taken over, almost in its entirety, some years later by Turkey, a country with a vastly different history, legal tradition, religion, culture, economy, political setup, and geographical and climatic circumstances, Turkey under Atatürk is a prime example not only of legal transplant but of revolution in law. Substantive alternative alterations were few and minor. But what is striking is that the two Swiss codes were regarded by their creators as particularly Swiss and in accordance with the Swiss national spirit and moral consciousness. Yet, writing in the context of Turkish marriage law, N.U. Gürpinar can claim that "in addition, after the revolution in Turkey it was urgently necessary to create a law corresponding to the principles of the young Turkish republic. This for civil law was the Turkish civil code taken over from Switzerland." And in a more general context, after explaining the need for a modern Turkish code, B.N. Esen writes:

> That was the situation of fact. Now, Switzerland always was and is the land of democracy par excellence. As a land with a long democratic past Switzerland was quite especially

> called to serve as a model for the civil code. Turkey did not hesitate a single second. And in 1926 the Schweizerisches Gesetzbuch and the Swiss Obligationenrecht were taken over with minor alterations as the statute law of the state. If those codes of foreign origin have been used in Turkey for a quarter century without the slightest difficulty, then it is on this account, because they mirror exactly the spiritual inclination of the social milieu, that they reflect the idea of law and justice of the place in which they are interpreted and used.

Thus, insofar as private and commercial law are concerned, a revolutionary leader seeking democracy in Turkey could find almost precisely what he needed in codes framed for very different conditions in Switzerland, I do not entirely agree with Esen. The making of a civil code for Turkey was proving difficult. So a model was borrowed. Swiss law was not easily accepted in practice. I do not believe that the Swiss code mirrored exactly what was wanted or needed.

For me, one personal example of the practical significance of my arguments is the translation into Serbian of my book, *Legal Transplants* (2000). This work is now a third part of a compulsory first year course at the University of Belgrade on introduction to law, of which the other two parts are from Theodor Mommsen and Sir Henry Maine. A Belgrade law professor, Sima Avramović, wrote to me that in the end examination most students wrote an answer on my work. He asserted that this was very important because the Belgrade students would soon become the top judges and legislators in Serbia. There was, he wrote, a general feeling that to borrow law from elsewhere was a sign of inferiority and that there was a consequent hesitation to borrow. But, he claimed, I had shown that to borrow law was virtually a universal phenomenon, and therefore wholly respectable

for Serbia.

I hope that I have shown that the commonly-made distinction between law in books and law in action is too simple. The distinction is valid, but law in books must be subdivided. Much law in books reflects the conditions, needs and desires of the society in which it operates. But likewise much is accepted because it was borrowed often without much thought, and often without the intervention of any government. History shows that borrowed law, foreign law, is not necessarily to be regarded as unsatisfactory law. It may be as satisfactory as indigenous law.

Law to me is a mystery and to understand law it must not be deprived – brutally – of its mystery. The mystery must be gently unravelled.

(I have not given references for my examples which are taken from previous works of mine.)