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A Common Private Law for Europe?

It is fashionable among some schools of thought to give a special place to the role of the so-called 'mixed systems' in the formation of a common law for the European Union.¹ Others disagree, for one reason or another.² I wish to express hesitations though on different grounds. I want once again to call attention to striking features of law that militate against standard theories of law in society, especially of sociology of law, and that should be relevant for future development. These features are: (a) the prevalence of legal transplants; (b) the longevity of unsatisfactory rules that are detrimental to the interests of the elite that has power to change the law; (c) the scarcity of legislation in many areas of private law;³ (d) the importance of the need for authority to justify law.

My thesis is simple. These striking features must be treated as important for an understanding of the development of law. They are interrelated, and should be considered together.

Thus, legal transplants are a phenomenon resulting from the absence of legal authority in the receiving state. The acceptance of foreign law is not haphazard, but neither is it entirely rational. One system is habitually chosen as the donor whether because it is believed to be similar, or is known to the recipient, or is regarded in general as exhibiting the highest standards. The longevity of rules known to be unsatisfactory is the result first of a failure of rulers to legislate, secondly of a search for authority in one's own system. In the absence of up-to-date legislation judges look to old law. The absence of legislation is because rulers have only one necessary, compelling,

1. The debate has gone well beyond the boundaries of Europe. See, e.g. essays in D. Carey Miller and R. Zimmerman (eds.), *The Civilian Tradition and Scots Law*, (Duncker & Humblot, 1987); Mark Van Hoecke and François Ost (eds.), *The Harmonization of European Private Law*, (Hart Publishing, 2002); Jan Smits (ed.), *The Contribution of Mixed Legal Systems to European Private Law*, (Intersentia, 2001).
2. See, e.g., Robin Evans-Jones, 'Mixed Legal Systems, Scotland and the Unification of Private Law in Europe,' in Jan Smits (ed.), *The Contribution of Mixed Legal Systems to European Private Law*, 39
3. I need scarcely mention that my concern here is with private law.

requirement: to remain in power. For this requirement much of law is irrelevant. Whole areas of private law may thus be neglected for centuries. Even when legislation on the grand scale occurs, it will frequently lack a precise message for law between members of the community. What legislation there is on private law illuminates the need for authority. One example from many, to be discussed shortly, is the Ten Commandments.

My conclusion is straightforward. A satisfactory private law for Europe is not primarily to be sought for in the most common solutions, themselves the result of borrowing. Nor in established rules, themselves the result of longevity, and lack of governmental incentive in innovating. Nor should it be sought in intermediate positions of various mixed systems, themselves the results of the features just above described. Rather it is to be found in the need for authority.

This means that a common law for Europe requires the acceptance of a uniform system of adjudicating differences within a standard framework of the necessary sources of law. Authority is paramount, because it alone can constitute the common element. It will not do if, in the absence of immediate pertinent legislation, French courts refer only to the *Code Civil* and subsequent legislation, and English courts rely on judicial precedents sometimes already several centuries old. Mixed systems will not supply an answer to this need for authority.

II

I will not set out (once again) details of these particular features of private law.⁴ But I wish to exemplify aspects of them by discussion of one instance, the Ten Commandments. My choice of example is dictated first by the extreme importance attributed to the Ten Commandments, secondly by their remoteness from the European Union.

Moses is a leader or ruler in trouble.⁵ God elected him to lead the Israelites from bondage in Egypt to freedom, and appointed Aaron his spokesman before Pharaoh.⁶ With miracles from God, Moses led his people free.⁷ But the Israelites met constant problems and blamed Moses, with Aaron in the background.⁸ The problems never ceased. Moses was wearing himself out, even spending his days to his father-in-law's

4. See Alan Watson, *Legal Transplants*, (University of Georgia Press, 1993); Alan Watson, *Society and Legal Change*, (Temple University Press, 2001); Alan Watson, *Roman Law and Comparative Law*, (University of Georgia Press, 1991).

5. I am concerned not with historical truth but only with the traditional account in Exodus – enough for our purposes.

6. Exodus 3. 7 ff.

7. Exodus 7.14 – 12.32.

8. Exodus 12.21ff.

dismay in deciding lawsuits.⁹ God intervened. Moses, and Moses alone, was to be given the tablets of the laws by God with the people kept distant.¹⁰

Moses descended from the mountain with the laws and the worst had happened. The people, with Aaron in the forefront, had rebelled against God. Moses, with God's support in the laws, prevailed.

The commandments are a paradigm case for my argument. Moses, leader in trouble, needs authority. His existing authority came from God. The new authority comes from God, in the shape of laws. Some laws concern the relationship between God and his people. Others, relations between humans. The former above all bolsters Moses authority with his people. His authority depends on God, the laws support God, and they are detailed. Laws regulating conduct between individuals are of no great concern. Details of these cannot bolster Moses' authority. The laws are banal. No murder, no theft, no adultery!¹¹ So what? The content of the law is not spelled out, nor are the penalties. Even more, there is a law against coveting. Provisions against theft and adultery are thus superfluous. The Ten Commandments, in the Exodus tradition, are a paradigm example of legal development! Laws are needed to bolster the leader's position; beyond that their content is irrelevant. Thus, the rules on humans' attitude to God come first, are more specific and more exotic.

In the Ten Commandments legislation reveals its primary function: it confirms the authority of the legislator.

III

If my arguments to this point make sense then the frequency of legal transplants, the longevity of unsatisfactory legal rules and the paucity of legislation on many subjects, all owe their being to the existence of a need for authority. The need for authority is paramount in law.

For uniformity or harmonization in law, or an approach to such, then the need is not primarily to be met by amalgamating systems through a notion of 'mixed systems', but by authority that can be applied in all systems to all private law matters. If such authority cannot be found the result for unification will be deeply flawed.

I should leave the argument here. It is one thing to contend that one has found the issue, quite another to frame the means needed to achieve the desired result.

9. Exodus 18.13

10. Exodus 19.9 ff.

11. See, e.g. Alan Watson, *Authority of Law, and Law*, forthcoming (Olin Foundation, 2003).

IV

But I would like to make one suggestion. If my argument is correct that a common law for the European Union demands a standard system of authority, then this need can only be met by legislation which alone will be authoritative. A *ius commune* will not suffice. Aggressive action is needed. Despite the usual lack of legislation for private law, a uniform law for Europe demands it. And this can only be achieved by a common civil code. The idea may be unpalatable in some jurisdictions, but it alone is workable.

Objections will be made. One, the system favours civil law jurisdictions. Two, practitioners in common law jurisdictions will be disoriented. Three, the upheaval in practice is insurmountable. Four, the task is simply impossible. I disagree.

One, yes, the system does seem to favour civil law jurisdictions. They already have civil codes. But codification is a recent phenomenon. The French *Code Civil* dates only from 1804, the German *Bürgerliches Gesetzbuch*, only from 1900, the Turkish *Türk Kanunu Medenisi* only from 1925. All these and the other codification's had to surmount enormous obstacles: the proliferation of customary systems in France, the numerosity of states in Germany, the absence of a civil law system in Ottoman Turkey. Similar problems faced other systems that accepted civil codes.

Two, yes, practitioners will be disoriented. But so they were in the countries just mentioned, but the system survived, and for private law seems to have flourished. It must be accepted that adjustment will take time. But even in Turkey with enormous changes the time taken for adjustment was not too long.¹² I would envisage at the outset, no drastic change in the law of procedure of individual countries. Lawyers of the old school could cite precedent, juristic opinion and statute by way of argument. Judges, on the other hand, in their decision would base themselves only on the civil code and subsequent European Union legislation. Their interpretation would be moulded on the arguments adduced. But inevitably legal argument would centre on what was an acceptable interpretation of the civil code. Judges would be bound, advocates would be free. But inevitably advocates would tailor their arguments to the judges' needs.

Three, the upheaval in practice is easily surmountable. History proves this.¹³

Four, the task is very possible. I would make three comments. First, the longevity of unsatisfactory law shows, sadly, that society can live with imperfect law. Secondly, codes, as we all know, can be framed to offer possible alternatives; spouses may be

12. See Esin Örucü, *Considering Paradoxes for Legal Systems in Transition*, (Kluwer, 1999).

13. For an instructive example consider the 1988 United Nations Convention on Contracts for the International Sale of Goods. See Franco Ferrari, *International Sale of Goods*, (Helbing & Lichtenhahn: Bruylant, 1999).

offered a choice of dowry or matrimonial property. Thirdly, while countries may differ in their interpretation of articles of the code a superior European Union court can be envisaged to harmonize the law.

V

Nothing written above should suggest that I do not feel that there is a special place for mixed systems in the future for the European Union. There is. But that place has to be put in context. If the way ahead is by codification then that role is secondary. It lies in drafting articles that mediate between conflicting attitudes and, perhaps, in the structure of the code. If the way ahead is by developing a *ius commune* then the role of mixed systems should be greater. But that way has problems. It will inevitably be slow and incomplete due to a lack of an established regime of authority. But that is perhaps no bad thing. In Islamic law occurs the saying 'Difference of opinion is a sign of the bounty of God.'

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