Aspects of Reception of Law

Alan Watson
University of Georgia School of Law, wawatson@uga.edu
ALAN WATSON

Aspects of Reception of Law

In most places at most times borrowing is the most fruitful source of legal change. The borrowing may be from within the system, by analogy — from negligence in torts to negligence in contract, for instance — or from another legal system. The act of borrowing is usually simple. To build up a theory of borrowing on the other hand, seems to be an extremely complex matter. Receptions come in all shapes and sizes: from taking over single rules to (theoretically) almost a whole system. They present an array of social phenomena that are not easily explained: from whom can one borrow, in what circumstances does one borrow? Still, one serious obstacle to understanding should be stressed: students and scholars are hesitant to accept the obvious fact of massive borrowing and to consider its implications. I am often told, not only in print and even by close friends, that I exaggerate. On the contrary: I believe I, too, have been unwilling to recognize the scale of borrowing and of legal autonomy.

In this paper I want to look at four aspects of legal transplants and of legal autonomy, all presented in terms of particular examples. The examples are chosen because they are striking (I think), cause reflection on borrowing, and indicate some difficulties for building up a theory. They are not chosen because they are extreme.

I. Extreme Practical Utility

It goes without saying that practical utility is the basis for much of a reception of law. It is simply economically efficient to borrow: often not, I should like to stress, for the borrowing state as a whole or for its ruling elite, but certainly for the lawmaker who is saved the awful labor of thought. There is no need to insist on utility as a factor in a reception, but sometimes a detail is revealing.

I have a copy of the extremely rare second edition (1694) of Cornelius van Eck, *Principia Juris Civilis*, 'Principles of Civil Law,' which deals with Roman law and which follows the unsystematic ar-

---

2. No copy is known to exist in the Netherlands. Harvard University Library has one, another is to be found in the Faculty of Advocates Library, Edinburgh, and
rangement of Justinian's Digest. The interest of my volume is that it is very extensively annotated. No title is free from annotations, and only D.1.2, De origine iuris, 'On the Origin of Law,' is lightly annotated. But whereas Van Eck's Principia is on Roman law, and his citations are to Roman texts, the references in the annotations are to works of interest to someone concerned with the modern law. The most frequent citations (which I list in no particular order) are to Nicolas Everardus (1462-1532), Consilia sive Responsa juris; Paulus Merula (1558-1607), Synopsis Praxeos Civilis; Johannes Schneidewinus (1519-1568), In quattuor Institutionum Justiniani libros Commentarii; Matthaeus Wesenbeckius (1531-1586), Commentarius in libros quattuor Institutionum juris civilis; Utrechtse Consultatien (1671); Cornelius Neostadius (1549-1606), Utriusque Hollandiae, Zelandiae, Frisiaeque, Curiae decisiones; Johann van der Sande (1577-1638), Decisiones Frisicae; Simon van Leeuwen (1620-1682), Censura forensis; Johann Friedrich Böckelmann (1632-1681), Commentariorum in Digesta Justiniani Libri; Bernardus Schotanus (1598-1652), Examen juris dicum.

The citations are precise, akin to those in a modern textbook. In the book's text, key words are underlined and/or marked with an asterisk and tied in to marginal glosses. On any page the annotations were not all made at the same time because the ink varies. But there is only one handwriting. The question arises, why the annotations, and who and what was the annotator?

It is most unlikely that the annotator annotated in the capacity of a student, because the citations are precise and detailed. He is also not a practitioner of any ordinary type, because virtually all titles are heavily annotated. This is not the work of someone writing a brief or involved in day to day matters, but rather of someone who wants to know or set down Roman-Dutch law. But the most important clue to his identity has yet to be mentioned. Why is it this work that is annotated in this way? It is, to begin with, very surprising that such extensive annotations on Roman-Dutch law appear in a book on Roman law. After all, Ulrich Huber's Heedensdaegse Rechtsgeleertheyt, 'Contemporary Jurisprudence,' whose contents are true to its title, had been published in 1686. Such a book would seem a more obvious choice for annotations of this kind. Again, we can be reasonably certain that the annotator would not go to the trouble of similarly annotating several such general commentaries. It is enough to annotate one. So why is it Van Eck that was chosen? The answer can only be that the annotator had a special relationship with this book. The most likely explanation is that this is the general book with which the annotator was most familiar, probably the one he used as a stu-

the University of Edinburgh Library has an incomplete copy. My ownership of the third complete copy is irrelevant to this paper. So is the rarity of the book.
dent, perhaps even as a student of Van Eck. But these, I have argued, are not student qua student annotations. Even more to the point, the citations are not to Roman law, the subject of the book. It seems extraordinary that someone familiar with the book because it was his standard textbook should annotate it so fully for Roman-Dutch law but not at all for Roman law which was the book's subject matter. Did he perhaps have two copies, one of which (now not known) he annotated for Roman law, the other of which he annotated for Roman-Dutch law? A hypothesis of such a split personality seems implausible. But a slightly more complex hypothesis may meet the case. This is suggested by the fact that this second edition was published in 1694, and was in the hands of the annotator in 1695, as appears from a handwritten inscription on the title page. My hypothesis is that the annotator had studied Roman law with the use of the first edition of Van Eck — that is why this book is the one he knows best — and in which he may have inscribed student annotations on Roman law. He then acquired a clean copy of the new edition by 1695 — the inscription on the title page does not warrant the assumption that he bought, rather than was working on, the book in 1695 — which he annotated for Roman-Dutch law. From this last point we can deduce that in 1695 or some time thereafter he was either making himself extremely familiar with Roman-Dutch law or was teaching it or intending to write a commentary on it, using Van Eck's compend as the backbone. The first of these is by far the most likely possibility. The Principia, which follows the chaotic arrangement of the Digest, does not provide a satisfactory structure for teaching or for writing a textbook on Roman-Dutch law. Much better models are Grotius, Inleidinge tot de hollandsche rechtsgeleertheyd 'Introduction to the Jurisprudence of Holland,' and Huber's Heedendaegse Rechtsgeleertheyt. In fact, the choice of Van Eck really indicates a current or very recent student not yet independent of his attachment.

From the foregoing we have a picture of the annotator. He was still a student or had finished his studies shortly before 1694, was not a typical practitioner, had a particular connection to Van Eck's Principia, and above all was very interested in contemporary Roman-Dutch law which in 1695 he was getting to know thoroughly. The handwritten inscription on the title page appears to read:

Li Drenth
Ao 1695

I assume Ao is an abbreviation for Anno 'in the year,' or much less likely Augusto. "Lucas Drenth Stenovico-Tranisalanus," that is, a Lucas Drenth from Steenwijk in the province of Overijssel matriculated at the University of Utrecht in 1696 when Luca van de Poll was
Van Eck was then Professor. Since students frequently matriculated just before graduation, Lucas Drenth would fit nicely as the owner of the volume. Robert Feenstra suggests in private correspondence that my reading "Li" should perhaps be "L" or "Lu." Lucas Drenth surfaces once again at the University of Utrecht. On June 29, 1696, he made his public promotion, with van Eck as promoter, on the subject, de Jure emphyteutico, 'on the law of emphyteusis.'

Emphyteusis, a creation of late Roman law, and regarded as an element in the development of feudal law, was a good choice of subject for someone who wished to engage in practice.

One matter remains for discussion and that is why the book chosen for annotation was not Huber's Heedensdægse Rechtsgeleertheyd, and why that book is not referred to in the annotations. The explanation cannot be that that book was unknown to the annotator because it had been published nine years earlier, and the annotator was knowledgeable. Nor can any possible hostility to Huber provide any part of the answer.

A more plausible explanation for the absence of reference to Huber is that the annotator knew this work of Huber so well that he did not need to make reference to it, and could always look it up. But that brings us back to the question why he annotated van Eck and not Huber, which seems the more obvious course. This leads on to the point that the annotator, with a strong training in Roman law, preferred to work forward from Roman law. This in turn gives rise once again to the query, why are there no references to Huber?

The full answer is to be found in the nature of the annotations. They are to cases and matters that one would not find easily, off the cuff, because of the arrangement of the works which contain them. The annotator's purpose is to use van Eck as a system to find easily the modern law on any given point. Hence there was no need to refer to Huber: his treatment of any issue could be found readily because his book was systematic. But there was a need to refer to Schneidewin because, since he was a German, a Dutch practitioner was less likely to think of him to support a proposition for Roman-Dutch law. Likewise, the annotator had to make reference to collections of cases because they were not arranged systematically. All in all, the annotator was using van Eck as an index. The index is not

4. Album Promotorum qui inde ab anno MDCXXXVI usque ad annum MDCCCCXV in Academia Rheno-Trajectina gradum doctoratus adepti sunt 63 (1936).
I am grateful to Robert Feenstra who first alerted me to Lucas Drenth, and to Boudewijn Sirks who supplied me with the textual references which were not available to me in Athens, Ga.
arranged alphabetically, but follows the arrangement of van Eck, because the *Principia* is what the annotator really knows. And this index does not merely contain cross-references: in the style of a card index it gives the gist of the matter in the works referred to.

That a textbook on Roman law could be used as the basis of an index for contemporary late seventeenth century Dutch law is a testimony to the enormous extent of the Reception. Even more, it is a testimony to the power of the Reception on a student or recent student's — probably unreflecting — mind.

I mentioned in passing that the arrangement of the *Digest* was chaotic. To the best of my knowledge no one has ever described it as satisfactory. But criticism has been loud. Thus, to cite a few examples, Theodor Mommsen wrote that the "order or disorder" of the praetor's Edict was that of its final redaction by the great Julian in the second century. But the *Digest* retains this "order or disorder." When Jean Domat (1625-1696) wanted to set out the law for France with Roman law as his principal source he significantly called his work, *Les Lois civiles dans leur ordre naturel*. Robert Pothier between 1749 and 1752 produced what is in effect an edition of the *Digest*, in which, although he retained the order of the books and titles, he moved the individual texts around within the titles! That such a chaotic structure was made to serve the function of a card index arranged by subject is a still greater testimony to the power of the Reception on the imagination.

But I must also stress a paradox or apparent paradox. The task the glossator had set himself was not worth doing unless Roman law had been only incompletely received or unless people were skeptical about the extent of the Reception. Otherwise, the existence of van Eck's book would have sufficed. Reference to the cases would have been unnecessary. So the glossator's efforts are at the same time proof of the power a Reception might have and also of the ability within a system to reject a potent and dominating foreign force.

II. Chance

An element that cannot properly be factored in but may still be important in receptions is chance: a particular book may be present in a particular library at a particular time; or it may not. For instance — to take an important example very briefly — at first sight it is surprising that Scots law is a strong influence on the modern law of Botswana, Lesotho and Swaziland. The reason is that in 1966 Edinburgh University began accepting all the LL.B. students from these

---

6. As are such books as Simon van Groenewegen, *De legibus abrogatis* (first published 1649).
8. *Pandectae Justinianeae in novum ordinem digestae*.
countries, each spending two years there, a practice that continued until 1986. That scheme was replaced by one by which faculty members of the University of Botswana, Lesotho and Swaziland pursued advanced study at Edinburgh. Over the twenty year period around 240 UBLS law students studied at Edinburgh. These students, back home, became leading lights in the law: several have become Attorneys-General and Ministers of Justice, and at least three have become High Court judges. But Scots law had become the law they knew best in their formative years. Not only that, but naturally enough, they took back home the books they bought as students, on Scots law. Moreover, there are occasional requests to Scottish lawyers to send books to these three countries, even books that are out-of-date. So Scots law is accessible in an economically poor country in a way that most other systems are not.

Many scholars, not just in law, discount chance. By chance I mean something that could not be predicted. Some even deny the existence of any such thing. But I have an example that I think is irrefutable. Today (when I was writing — late 1994) Roman law is more prominent in South African decisions than it was a decade ago. Roman law, as received in Holland in the seventeenth century, has always been influential in South Africa, but why the upswing?

In 1977 on his way to the airport, Dr. Carleton Chapman bought in New York a copy of Alan Watson's, *Legal Transplants*, without much examination. Dr. Chapman was a physician who was interested in law, and thought the book was about the law relating to medical transplants. Still, he had a life-long interest in legal history, and he enjoyed the book (I presume). He wrote to Watson asking why there was no English translation of Justinian's *Digest*. Watson first thought of not bothering to reply. But he had a visit from Colin Kolbert from Cambridge, who was on his way farther North, who told him to give a response. Watson wrote that there already existed a poor translation, that a new translation would be an enormous task, and that the work involved would carry little prestige, would be unnecessary in the eyes of many, and would be very expensive to produce. Chapman replied that if Watson came up with a feasible scheme for translating he would arrange the funding. Chapman was then the President of The Commonwealth Fund, a foundation primarily concerned with medical research. The outcome was the publication in 1985 of a four volume translation (with facing text) of Justinian's *Digest*.\(^9\)\(^\text{10}\) It is the existence of this translation that has made the *Digest* more accessible to South African lawyers, and ac-

---

10. *The Digest of Justinian*. 
counts for the upswing in its use. The *Digest* is cited in this translation.¹¹

The story contains a large number of elements, the absence of any one of which would have prevented the outcome. To mention just one, *Legal Transplants* was not a commercial success, and it is surprising in itself that it was on view in any New York book store.

Purists will object and say that I am relying on anecdotal evidence. Yes, I am. But that in no way impairs my argument. As I said at the outset of this section, chance cannot systematically be factored into any development. That is inherent in the very nature of chance; and hence it cannot be an argument against its existence. No matter how many examples one adduced of chance influencing legal change, each would itself be anecdotal, and none the worse for that.

A further common feature of a reception which may be attributed to chance is misunderstanding. This is self-evident; I am tempted to call it in Ulrich Huber's terms an axiom. The notion of malicious desertion as a ground for divorce in South African law is a splendidly complicated example. For a time the South African courts followed the views of Dutch jurists, notably Hendrik Brouwer (1625-1683) who may have misunderstood the German Henning Arniaeus (died 1636?) But the courts eventually misunderstood Brouwer, and reverted to the views of Arniaeus.¹² My favorite example, though, is from Huber's theory of conflict of law which surfaces later in this paper. This was accepted in common law jurisdictions but not in the civil law. His third axiom was misunderstood — though not mentioned — in the civilian Louisiana case of *Saul v. his Creditors* (1827) (17 Martin 569.) This misunderstanding was followed by James Kent, then by his friend, Joseph Story, who laid new foundations for conflict of law in the U.S. but based, in his view, on Huber. If Story had correctly understood Huber, the *Dred Scott* case, with all its consequences — whatever they were — could never have arisen because it would have been obvious that Dred Scott was free.¹³

### III. DIfficulty of Clear Sight

The whole American system of conflict of laws in the early 19th century could also illustrate the workings of chance. That system was based on the three axioms of the Frisian, Ulrich Huber. Why? Huber's views were not widely accepted in continental Europe. But American law in this field developed on the model of English law which was primarily the creation of Lord Mansfield, a Scot who made

---

¹¹ But also in Scott's.
¹³ For the argument see Alan Watson, *Joseph Story and the Comity of Errors* (1992).
his reputation at the English Bar by taking Scottish cases on appeal to the House of Lords. Scots law derived from Huber because the Scottish law schools of the 17th century were deemed inadequate; Scottish students studied law in the Dutch Republic and brought home their textbooks, notably Huber's printed lectures, his Praelectiones juris romani et hodierni, 'Lectures on Roman and Contemporary Law.' His three axioms appear at the beginning (1.3) of the second volume which was first published in 1689. Huber's views became the basis of American law because they were accessible in Scotland in the 18th century. In none of the common law American decisions is there the slightest indication that Huber was followed after reflection on his suitability. Nor is there in the English cases.

But I wish to use Huber's axioms in this paper not to illustrate the workings of chance but for a different reason. The center of Huber's developed theory of conflict of laws and where he differs from his contemporaries is his third axiom to the effect that rulers of states so act from comity (comiter) that the rights of each people exercised within its own boundaries retain their force everywhere. For him, as for the others, 'comity' in conflict of laws meant something like courtesy, respect or mutual convenience. The difference was that his colleagues held that states do so act, generally, but are not bound to. For Huber, states were bound by law so to act, with particular limited exceptions. Comity was the reason for the rule but was not the legal basis of the obligation. But Huber did not reach his final position without a struggle. When law is created by judicial precedent it has to wait on the course of events. A doctrine may emerge from a line of cases over a considerable period of time; and the judges in the first case may be quite unaware of the parameters of the resulting doctrine. What is not so easy to perceive is that a jurist, too, may fashion a doctrine in stages, unconscious of what his final result will be. This may especially be the case when the jurist is operating within a system that builds up its law on the basis of another system. For example, in a state that borrows much from Roman law, a jurist who is faced with a new situation may be expected to provide Roman law authority to support his argument. If that authority is lacking he may have to invent it. His brethren will see nothing objectionable in this practice. But the inventive jurist himself may not at once see all the hidden possibilities that will justify his approach. So it was with Ulrich Huber and conflict of laws.

In Appendix A to my book, Joseph Story and the Comity of Errors, I considered the relationship of Ulrich Huber's Positiones Juris, 'Principles of Law,' to his Praelectiones juris romani et hodierni. The account of conflict of laws in the former is primitive by Huber's

---

14. See Alan Watson, id. at 3ff.; 8f.
standards, even in the fourth edition of 1685\textsuperscript{16} which was published just four years before his famous account in volume two of the latter.\textsuperscript{17} In explanation I suggested that Huber perhaps did not attach the same importance to his treatment as subsequent lawyers have.

It now seems to me that my stress in Appendix A is misplaced, and that the real interest in the difference between the accounts is what they reveal about the development of Huber's thinking on comity.\textsuperscript{18}

Huber first published his ideas on conflict of laws in his \textit{Positiones Juris}, the first edition of which appeared in 1682. In § 23 on \textit{D.1.3} he has:

The first and most important rule is: no law has validity beyond its territory, and every law binds those who are found within the territory of the legislator: \textit{D.2.1.20}. This applies even to foreigners: \textit{D.48.22.7.10}, at the end.

What is stated as "the first and most important rule" is really two rules and they correspond to the first two axioms that Huber sets out in his \textit{Praelectiones}. The following section of the \textit{Positiones}, § 24, then runs:

Hence the form for solemnizing a transaction \textit{inter vivos} or \textit{mortis causa} ought to be furnished according to the formalities of the place in which the act is performed, even by outsiders, and thus it is perfect or not, is valid or is void, in every place: Gail, book 2, observation 123; Sande, book 4, title 1, definition, 14.

The conclusion "and thus it is perfect or not, is valid or is void, in every place" scarcely follows from the rules in § 23, and the basis for Huber's assertion does not appear.

He returned to the topic in a roundabout way in 1684 in \textit{De jure civitatis}, 3.10.1.

Among the matters that different peoples reciprocally owe one another is properly included the observance of laws of other states in other realms. To which, even if they are not bound by agreement or the necessity of being subordinate, nonetheless, the rationale of common intercourse between peoples demands mutual indulgence in this area.

He is not here dealing specifically with conflict of laws but discussing the grounds for one state observing the law of another state according

\textsuperscript{16} 1.3.22-24.
\textsuperscript{17} 2.1.3.1-15.
\textsuperscript{18} I was not, as I thought, the first person to notice that Huber's theory of comity differed from that of the other Dutch jurists: see Kahn, "The Territorial and Comity School of the Conflict of Laws of the Roman-Dutch Era," \textit{Huldiginsbundel aangebied aan Professor Daniel Pont} 219ff. (1970); C.F. Forsyth, \textit{Private International Law} 34 (2d ed., 1990).
to international law. There were two well-recognized grounds: the 
subordination of one state to the other; and agreement (treaty). Hu-
ber claims that in addition to these two grounds there is yet another 
ground of obligation: the rationale of common intercourse. Liability 
derives from the *ius gentium*, and the context shows that Huber's us-
age here is *ius gentium* in its non-Roman law sense, namely what we 
call International Law.\(^1\)

He returned directly to conflict of laws in his *Heedensdaegse 
Rechtsgeleertheyt* in 1686. At 1.3.4-6, he gives as binding rules the 
three axioms that we find in the *Praelectiones*. Then comes § 7:

> From that it is clear that the decision of such cases is a part 
of the law of nations, and not, properly speaking, of civic law, 
inasmuch as it does not depend on the individual pleasure of 
the higher powers of each country, but on the mutual con-
venience of the sovereign powers and their tacit agreement 
with each other.

Here, too, the binding force of rule three is expressly international 
law. Again, he gives no authority. Neither in the book of 1684 nor in 
that of 1686 does he explain why this is a rule of international law.

His breakthrough comes with the second volume of the *Praelec-
tiones* in 1689. His three rules are transformed into his three axioms. 
By his definition an axiom, a term drawn from mathematics, is a self-
evident rule that needs no demonstration. This third axiom (1.1.3.2) 
runs:

> The rulers of states so act from comity (comiter) that the 
rights of each people exercised within its own boundaries 
should retain their force everywhere, insofar as they do not 
prejudice the power or rights of another state or its 
citizens.\(^2\)

He has already spelt out the basis of conflict of laws which is what he 
is dealing with in this text. The basis comes from Roman law; not 
from Roman civil law but from the *ius gentium*, this time in the sense 
of that part of any state's law (including Rome) that is to be found in 
every state. For Huber, it is enough to claim that this is the position: 
if the rule is found everywhere it exists in a state even though it is 
never mentioned. As an axiom, moreover, no authority is needed to

---

19. At least, *ius gentium* is not used by the jurists for `international law' except 
possibly in *D.50.7.18(17)*; cf. already Alan Watson, *International Law in Archaic 
Rome; War and Religion* 87, n.12 (1993).

20. The form of the axiom should not mislead: Huber is setting out a rule that he 
regards as binding. Cf. Hans Kelsen: "A criminal code might contain the sentence: 
Theft is punished by imprisonment. The meaning of this sentence is not, as the word-
ing seems to indicate, a statement about a particular event: instead, the meaning is a 
norm: it is a command or an authorization, to punish theft by imprisonment," *Pure 
Theory of Law* 7 (1967).
show its validity. But, to gild the lily — and the gilding was perhaps needed — Huber claims that axiom three has never been doubted.

Thus, the nature of conflict of laws was a problem that Huber puzzled over for years. There are three distinct phases in the development of his axiom three. At stage one he has no basis for his proposition for conflict of laws, and he suggests none. At stage two the proposition has become a rule of international law, a rule for which Huber has no authority. At stage three the proposition, again in the field of conflict of laws, has become an axiom for which accordingly no express authority is needed, but it derives, he says, from Roman law (specifically the ius gentium), and is part of the internal private law of every state.

If the development set out in the preceding paragraph is accurate, then his Heedensdaegse Rechtsgeleertheyt was written before Huber had developed the basis for his version of conflict of law which was different from that of his Dutch confrères. Nonetheless, the examples he gives in that book at 1.3.18ff. of the working of his rules show that his understanding of the binding nature and scope of his rule three was the same as that of his subsequent axiom three of the Praelectiones. Under this system in both works, judges have no discretion. Huber's system of the nature of conflict of laws was fully worked out before he developed the theoretical underpinnings for it, and before he used the notion of axioms and ius gentium in the Roman sense to get around the absence of textual evidence.

More significant for understanding the workings of even a creative legal mind is that even after his breakthrough with axiom three in 1689, Huber did not make any changes in subsequent editions of Heedensdaegse Rechtsgeleertheyt or Positiones Juris. The simplest explanation is that he was not fully aware of the progress that he had made. His main concern was to find authority (that did not exist) in Roman law as the basis of his original thesis.

IV. The Need for Authority

Borrowing is often creative. This creativity may be very open as when Everardus writes a treatise on how to use textual arguments from Roman law to build up a different branch of law: from a law for slaves to a law for monks for example. Or the creativity may be more hidden (but still not obscure or unacceptable to the hearers): as when Bartolus uses a Roman law text on forum conveniens to found

21. The wording remains unchanged even for the 6th edition of Positiones Juris, edited by Zacharia Huber (1733). I am grateful to Boudewijn Sirks for locating a copy of this for me.

22. The work is known by various titles such as Loci argumentorum legales and Topicarum seu de locis legalibus liber. It was first published in 1516.
jurisdiction in conflict of laws on the concept of domicile. My favorite example is Ulricus Huber’s own theory of conflict of laws which he founds, as already noted, on three axioms all ostensibly based on Roman law. For the first two he relies on Digest texts which said something very different in the original context. He has no Roman authority, no matter how fake, for the third axiom (which he says has never been doubted). His argument is wonderful. The rule comes, he says from the ius gentium; in the sense common in his time of ‘law found everywhere,’ or ‘everywhere among civilized nations.’ Huber took the term ‘axiom’ from mathematics, and used it to mean a proposition that is so self-evident that it need not be proved. Thus, his axiom three is from the ius gentium, hence found everywhere so the lack of relevant Roman texts is irrelevant; besides, as an axiom it is self-evident, and needs no proof.

But this very creativity presents us with an apparent paradox. If one is going to change the rules around, why bother to appear to borrow at all? The answer is that all law making, apart from legislating, desperately needs authority. That appears for scholars like Everardus, Bartolus and Huber, as in the instances just adduced. It is also true for judges as the two cases that I want to discuss, from Scotland and South Africa, will demonstrate.

Roman law drew distinctions between types of rivers. A river was to be distinguished from a stream by its size or by the opinion of those who lived round about. Some rivers were perennial, others were torrential. A perennial river was one that flowed all year round (even if it occasionally dried up); a torrent was one that flowed only in winter. Some rivers were public, others private. The jurist Cassius defined a public river as a perennial river: his opinion was followed by Celsus and found acceptable by Ulpian. Some public rivers were navigable, others were obviously not.

As was standard in Roman law there was no legislation on the subject but there were edictal clauses providing interdicts. One read: “Do not do anything in a public river or on its bank nor put anything in a public river or on its bank by which the passage or landing of a boat is or shall be made worse.” Another had: “I forbid the use of force against such a one to prevent him from travelling in a boat or

23. In his comment on Justinian’s Code 1.4 de summa trinitati, gloss Quod si Bononiensis, § 19.
24. Praelectiones juris romani et hodierni 2.1.3. (1689 is the first publication date of the relevant volume 2).
25. For this see Watson, Joseph Story, supra n. 13, at 2ff.
27. D.43.12.1.2.
29. See, e.g., D.43.12.1.12.
raft in a public river or loading or unloading on its bank. I will also ensure by interdict that he be allowed to navigate a public lake, canal or pool.31 The other interdicts are similar: they are concerned with navigation.32 Navigation comprised not only passage by boat but also by raft.

Still, a navigable river is nowhere defined, nor are its characteristics described. Likewise, we are nowhere told what are the public rights in a public — but non-navigable — river, except that there is a right to fish.33 What can be logically deduced is only that there must have been some such rights — otherwise there would scarcely be a distinction between a public and a private river — and that these took precedence over the rights of the riparian owners — otherwise they would not be rights.34

The Roman rules became the basis of the law of both Holland and Scotland.35 The Roman-Dutch authorities, like the Roman jurists, concentrated on navigation rights, and both Johannes Voet36 and Huber37 repeat that anyone can fish in a public river. Likewise the stress in the Scottish sources is on navigation.

The two cases that we will look at are instructive in a number of ways. First, they report that in both Scotland and Holland what had been res publicae had become part of the regalia under feudal law.38 The ruler’s “right in them,” said Erskine for Scotland, “is truly no more than a trust for the behoof of his people.”39 This right was inalienable. Thus, what we are faced with is a common but curious phenomenon, the borrowing from two distinct and very different systems of law, Roman law and feudal law, for the same institution. Feudal law became the basis for land-holding, but the quality of the attributes — the extent of these rights — was taken from Roman law.40 Of course, the class of regalia was wider than that of Roman res publicae, and some regalia such as salmon fishing, were alienable. But we are concerned with the descendants of the Roman res publicae. Yet it

32. D.43.13;43.15.
33. J. 2.1.2.
34. Yet we never find out what these rights are.
36. Commentarius in Pandectas 1.8.8.
38. Libri feudorum 2.56.
40. Cf. Alan Watson, Roman Law and Comparative Law 247 (1991). The importance of salmon fishing as a private right in a public river was recognized before there was much reception of Roman law in Scotland.
is noteworthy that, in contrast to Scotland, fishing was public at Roman law in a public river.

Second, the cases show that in systems that develop by scholarly opinion and judicial precedent, whole areas of law may remain unclear for centuries: from the second century right through to the twentieth. Presumably problems arose but did not interest the scholars or reach a court at a high enough level.

The Scottish case, Wills’ Trustees v. Cairngorm Canoeing and Sailing School Limited,41 involved riparian owners on the River Spey seeking a declarator that they had exclusive rights of navigation in the stretch that ran through their lands, and asking for an interdict to prevent the sailing school company from sailing its canoes on that stretch. For our purposes the House of Lords held that the Spey was a public navigable river, and that the Crown could not have alienated the right of navigation that it held in trust for the public. Thus, the public right of the sailing school to navigate took precedence over the riparian owners’ private right to salmon fishing.

Though there was much citation of old authority such as the Regiam Majestatem, Stair, Erskine, Bankton, and Baron Hume, that authority was extremely vague as to what made a river ‘navigable.’42 Part of the riparian owners’ contention was that to be treated as ‘navigable,’ a river had to be navigable in both directions, and in the days when the Spey was used commercially for floating timber, it was navigable only towards the sea. Baron Hume had drawn this distinction between “proper navigable rivers” and rivers like the Spey; but his discussion does not show in what ways the public rights in them differed in substance.43 Indeed, the whole implication of what he says is that there was no difference.

The relevant facts of the South African case, Transvaal Canoe Union v. Butgeriet,44 were not dissimilar. The plaintiff claimed that it and its members were entitled to paddle their canoes on the Crocodile River. The defendant riparian owner argued that when they paddled over her property they were trespassing (and she had taken extreme practical steps to stop them). The plaintiff maintained that the river was perennial and a res publica; the defendant claimed the river was not res publica.45 The court held that by the common law the river was public, and that Roman and Roman-Dutch writers stressed the

42. For an instructive discussion of the distinctions ‘private’ and ‘public; and ‘navigable and tidal’ and ‘navigable and non-tidal,’ see James Ferguson, The Law of Water and Water Rights in Scotland 99ff., 126ff. (1907).
44. 1986 4 SA (TPD) 207. For simplicity I am reducing the parties to one on each side.
45. It is not significant for us that by the Water Act 54 of 1956 the water in the river was public.
importance of navigation on public rivers. The court also held that it
did not matter that the river was not navigable in the sense under-
stood by the Roman and Roman-Dutch jurists: navigability was a
relative term, and the Crocodile River allowed the passage of canoes.

The judge, Eloff DJP, noted that it was not really disputed that
the river was perennial. Hence, at Roman law the river was public.
The only real issues were therefore (1) was the river navigable and
(2) if not what rights would the plaintiffs have? Much Roman and
Roman-Dutch law was cited but in terms of the issues the great bulk
of the citations is entirely irrelevant. This is true of *Digest* 39.3.19.2
(Ulpian); 43.12.2 (Pomponius); Johannes Voet, *Commentarius ad
Pandectas* 43.12.title; 43.12.sole text; 43.14 title; 43.14 sole text; Gro-
tius, *Inleidinge tot de hollandsche Rechtsgeleertheyt* 2.1.25; Huber,
*Heedensdaegse Rechtsgeleertheyt* 2.1.16,17; Simon van Leeuwen, *Het
Roomsch Hollandsch Recht*, 2.1.12; Dionysius Godefridus van der
Keessel, *Praelectiones juris hodierni ad Hugonis Grottii introduc-
tionem ad jurisprudentiam Hollandicam* 2.1.25. The only relevant ci-
tations were to the works already named of Voet, at 1.8.8, and of
Huber, at 2.1.19, who stated that one can fish in public rivers, thus
showing that navigation was not the only right in public rivers.

The real issue in the case was disposed of very shortly and with
no citation of direct authority:

> It will, I think, be in keeping with this approach [i.e., of In-
> nes CJ] to recognize the right of the public in South Africa to
> make use of the waters of our public rivers for such modest
> and limited forms of navigation as those rivers permit. Nav-
> igability is a relative concept, and it can be said of the Croco-
> dile River that it allows the passage of small craft such as
> canoes. It should furthermore be borne in mind that the
> type of use of rivers which, e.g., *Huber* (supra) and *Voet* 1.8.8
> refer to, indicate that even pleasurable activities may be in-
> dulged in by the public. In my judgment, members of the
> public, such as Dr. Monteith and the canoe clubs affiliated to
> the Canoe Union, have at common law the right to paddle on
> the Crocodile River.

The issue that had faced Innes CJ\(^46\) was very different, namely the
ownership of the river bed and of minerals contained in it. Still, Eloff
quoted Innes with approval:

> The elasticity of the civil and the Roman-Dutch systems has
> enabled South African Courts to develop our law of water
> rights along lines specially suited to the requirements of the
> country. The result has been a body of judicial decisions,

\(^{46}\) Van Niekerk and Union Government (Minister of Lands) v. Carter, 1917 A.D.
359.
which though eminently favourable to our local circumstances, could hardly be reconciled in its entirety with the law either of Holland or Rome. To take a point bearing upon the present enquiry — the definition of a public stream has been extended far beyond its original limits. And the Legislature has set its seal upon the work of the Courts. Every stream is now public, the water of which is capable of being applied to common riparian use, no matter how frequently it may run dry. The Union, therefore, though practically without navigable rivers, is covered with a network of public streams, the majority of quite small size.\textsuperscript{47}

With this quotation we are back to the beginning of this section. Climatic conditions made rivers very different in character in Rome, Holland, South Africa, and Scotland. In Roman terms, some Roman rivers would be public, many private; almost no South African river would be public; very few Scottish rivers would be private. In South Africa the notion of public river was expanded. Still, what would surprise a non-lawyer — and perhaps should surprise a lawyer, too — is the enormous attention paid to Roman law in very changed circumstances, especially when that law itself was very unclear. Attention also focussed in Scotland on old Scots authority where economic circumstances were different; and in South Africa on Roman-Dutch law where climatic conditions were different. The enormous need for legal authority for legal decisions and reasoning is unveiled.\textsuperscript{48} It is this need for legal authority that often lends strength to transplants (or apparent transplants).

V.

The four aspects of legal transplants and legal autonomy looked at here bring out in a particularly vivid way known elements that are often not stressed in discussions of legal change.

First, they highlight the enormous influence of legal education for legal attitudes. Lucas Drenth (?) was so fixated by his training in Roman law that he approached his own system through it. Southern African students educated in law at Edinburgh imported to Botswana, Lesotho and Swaziland some Scots law.\textsuperscript{49} A decline in Latinity means that, no matter the attachment to Roman law and Roman-Dutch law in South Africa, the usefulness of the sources is less in the absence of translations. What would have been the impact on American law if Chancellor Kent had read German?

\textsuperscript{48} But it should be emphasized that modern economic circumstances were stressed in Wills' Trustees, also in Lord Dilhorne's dissent.
\textsuperscript{49} This whole area deserves study.
Second, they show that though patterns of development can be discerned, the future development cannot be predicted. Chance plays too great a role. The role of Roman law in Roman-Dutch and South African law might have been rather different if Lucas Drenth had written a textbook in Dutch with numerous case references. He was apparently capable of doing so. The power of mistake must also not be overlooked.

Third, in the example of Huber's comity, they emphasize the difficulty of formulating theories and ideas in a way that shows full understanding. When foreign law is given high authority, then when new situations arise, jurists may not find it easy to develop new law on the basis of irrelevant or even non-existent sources. Nothing has been directly said in this paper about the difficulty of having new approaches accepted and understood by others, but the notion is implicit.

Fourth, they confirm the central role of authority in law-making by subordinate law makers. Judges cite with all apparent seriousness what are regarded as the appropriate authorities which are unhelpful or irrelevant, and they may seem to follow them when constructing their own route.

I have chosen these examples because they seem to me to be striking. They are not unusual nor do they present anything particularly novel. Even the career of one judge and jurist, says James Kent, may show the same elements. His decisions and writings indicate the impact of his particular education, a proclivity to borrow, unrealistic use of unnecessary authority, and sheer misunderstanding.\(^{50}\)

---
