THE BIRTH OF LEGAL TRANSPLANTS

Alan Watson*

Legal Transplants, published in 1974 simultaneously by Scottish Academic Press, Edinburgh, and the University of Virginia Press, Charlottesville, was not my first book on law but it marked a new beginning for me. My previous works had been on Roman Law, which had been my main legal interest since I was first a student of J.A.C. (‘Tony’) Thomas in 1956–1957. I had taken Tony’s class in Advanced Roman Law at Glasgow University and had found it fascinating. At the end of the class, during the final oral examination, the outside examiner,¹ and esteemed David Daube, Regius Professor of Civil Law² at the University of Oxford, asked me if I would like a job in Oxford. This was not a difficult question, so I replied that I would and shortly thereafter, I received a letter from Sir Maurice Bowra, the head of Wadham College, inviting me for an interview there. The interview lasted three days and while it was a pleasurable affair, it was actually an opportunity for the dons to see if I could fit into the system of teaching law in a “foreign” environment and also to see if I could fit into “the Oxford way of Life.” Apparently, they thought I could and I was appointed.

Wadham was not one of the wealthy colleges of Oxford and my position was funded only for a three-year period. So I was told initially that this was to be a temporary appointment. Fortunately, though, two years later I was elected Fellow Oriel College,³ with tenure. While this was a real honor because I was very young at the time and there were not many Scots teaching at Oxford who did not have an Oxbridge training, the downside was that I was the sole fellow. This meant that I was responsible for teaching the entire curriculum for the first law degree, as well as for the higher degree of Bachelor of Civil Law.⁴ I solved this problem by working a trade with other

* Retired Ernest P. Rogers Chair of Law and Distinguished Research Professor of Law, University of Georgia School of Law.
¹ In Scottish universities, every legal subject has an oral examination as part of the final examination. There is always an external examiner from outside the university. (I suppose this is to keep the home professors honest.) It was left to the individual professors to find the external examiner.
² At Oxford, Civil Law is Roman Law.
³ This was a full-time, permanent position, and as a Fellow, I was a member of the governing body of the College.
⁴ In Oxford, law is an undergraduate degree, so the first law degree is an equivalent to a B.A. The second degree is the Bachelor of Civil Laws (B.C.L.), which is an advanced
colleges. While I ultimately had to teach a few subjects that held little interest for me at Oriel, I also taught those subjects in other colleges in return for their teaching my students the various subjects of English law that I particularly wanted to avoid.  

In the early twentieth century, the British-born, Oxford educated (Oriel College), South African businessman, Sir Cecil Rhodes died, establishing the famous Rhodes Scholarship under his will. The scholarship enabled students from territories under British rule, or former British rule, to study at Oxford. This meant there was large number of South African students at Oxford. South African private law is based on Dutch law, which in turn was heavily influenced by Roman Law. This system, like Scottish private law, has very much the same roots in Roman Law as understood and taught in Seventeenth Century Holland. South African private law developed in this manner because of the law books taken to South Africa by Dutch immigrants in the seventeenth and eighteenth centuries.

In Scotland, the law developed in much the same way. Though Scottish universities are ancient, law was not taught there in a proper manner until the twentieth century. Since England was a historical enemy of Scotland, the English universities had been closed to the Scots, so they had to study abroad—at first in France, and later with the Reformation in the seventeenth century they went to the Dutch Republic, first to Franeker, then to Leiden. These Scottish students traveled from Scotland to Holland mainly in boats, bypassing England. Hence the law books they brought back with them were primarily small volumes that were easily transportable. To a considerable extent these books devote space to later commentators on Roman Law, who reflected on subsequent interpretations in various European countries.

At Oxford, I was persuaded to teach Roman-Dutch Law, which was, of course, taken mainly by South African students, many of whom were Rhodes scholars. After several years at Oriel, I was offered the Douglas Chair of Civil Law at the University of Glasgow. This position was very attractive to me because the Douglas Chair was restricted to ancient Roman Law. So while in Glasgow, I focused my attention solely on Roman Law. From Glasgow, I went on to the chair of Civil Law at the University of Edinburgh, where my duties included comparative law, focusing notably on Scots law.

While at Edinburgh, I became fully aware of the widespread impact of law in the Dutch Republic, its foundation in Roman Law, and its relationship to Scottish law and the law of South Africa. This led to my disquiet with the

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5 In the end, however, I did have to teach English land law and contracts.

6 I have in my home library more than fifty of such small law books, some heavily annotated (sometimes obscenely).
well known view that “law reflects society” or “law is the spirit of the people.” Of course, law has some connection with the society in which it operates, but it is not a reflecting mirror.

This disquiet was the seed that grew into Legal Transplants, the main premise of which is that law does not reflect totally the society in which it operates. Instead, much of it is borrowed from other systems. I based this not only on Scottish and South African private law but also on a study of European private law, and found that my theories held true.

While my theories currently have received widespread acceptance, to the extend that “legal transplants” has become a part of the legal lexicon, I am still frequently asked “why is law borrowed?” I usually reply with the British mountaineer, George Mallory’s famous expression: “Because it is there!” Borrowing is much easier than thinking. It saves time and effort. Not only that, it helps the new law to become acceptable because it has a recognized pedigree. And once a foreign system is accepted by State A, it becomes acceptable in State B. Acceptance implies respectability. So the law of State A, through the law of State B, becomes the law of State C, and so on, almost ad infinitum.

More important questions, it seems to me, are why has law come to be considered the “Spirit of the People,” and why can private law be adopted so easily? While many people now have accepted my work as establishing new parameters for legal change, I am very conscious that my views represent what has happened in legal development throughout the ages. Thus, I was astonished at the refusal of legal scholars to accept this view for so long.

After I wrote Legal Transplants, I followed my usual practice of sending the manuscript to many friends for review. Some of my closest friends, to whom I attribute the utmost good faith, expressed horror and advised me to hide it. Only my old friend and mentor, David Daube, thought it was brilliant and he told me that I should publish it immediately. Unfortunately, I lacked the self-confidence in the wake of such overwhelming negativity to go forward, so I hid it for five years. I only decided later to publish it after David expressed fury that I, for once, had failed to follow his advice. He

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7 George Herbert Leigh Mallory was a famous English mountaineer who participated in three British expeditions to Mt. Everest in the 1920s. On his third expedition in 1924, Mallory and his climbing partner, Andrew Irvine, disappeared on the North-East ridge. Their bodies were discovered nearly seventy-five years later on May 1, 1999. It is unknown whether they ever reached the top or not. If so, they would have been the first to climb the mountain.

Mallory’s famous quote is attributed to him in a New York Times interview in which he was asked why he was motivated to climb Mt. Everest. However, there is some controversy over the authenticity of the quote. See generally Wade Davies, Into the Silence: The Great War, Mallory, and the Conquest of Everest (2012).

8 My arguments do not address the development of public law.
convinced me to send it to the publishers and I got immediate offers to publish. For years after its publication, though, the book appeared not to make a ripple in the legal world. Then, much to my amazement, it suddenly exploded in different parts of the world at the same time.

One of the most gratifying things about *Legal Transplants*, in addition to its widespread acceptance, has been the many friends that I have made across the world because of it. From Sweden to South Africa to Serbia, *Legal Transplants* has enriched my life through a widespread group of friends and colleagues who believe in this aspect of my work. Some scholars do not live long enough to see their initially controversial work become truly accepted, if indeed it ever is. I am one of the fortunate ones and I am grateful for the privilege.