The Evolution of Law: Continued

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

Repository Citation
Alan Watson, The Evolution of Law: Continued (1987), Available at: https://digitalcommons.law.uga.edu/fac_artchop/494
The Evolution of Law: Continued

Alan Watson

In my book *The Evolution of Law*¹ I sought to give a general theory of legal evolution based on detailed legal examples from which generalizations could be drawn, offering as few examples as were consistent with my case in order to present as clear a picture as possible. I was well aware as I was writing that some critics would regard the examples as mere isolated aberrations and for them and for other readers who, whether convinced of the thesis or not, would like further evidence, I want here to bring forward a few extra significant examples.

I

In the first chapter I wanted to show that it is, above all, lawyers thinking about law, not societal conditions, that determines the shape of legal change in developed legal systems. I chose to show as the main example that it was the thought pattern of the Roman jurists, rather than conditions in the society at large, that determined the origins and nature of the individual Roman contracts, and that the jurists were largely unaffected by society’s realities. Of course, social, economic, political and religious factors, did have an impact but to an extent that was very much less than their general importance in society. What was true for one main—perhaps the most original and the most important—branch of law, developed over centuries by jurists in one of the world’s most innovative systems, is also true it will now be argued, for law in general developed over centuries by judges, in another of the world’s innovative secular systems, the English medieval common law.

In contrast to my handling of the Roman law of contract I do not want to produce a radically new theory of the development of the common law. That is why I omitted this example from the book. Rather I want to demonstrate that my general thesis is implicit in standard accounts of the growth of the common law, especially as exemplified by the best-known modern account,

Alan Watson is University Professor of Law, University of Pennsylvania.

I am grateful to my friends, Stephen B. Burbank, John W. Cairns, Michael H. Hoeflich, and Peter Krause, who criticised drafts of this paper.

S. F. C. Milsom, *Historical Foundations of the Common Law.* I would not want to accuse Milsom of sharing my viewpoint on legal evolution but, on very many pages on individual points and in the picture contained overall in his book, his argument strikingly confirms my thesis; assuming, of course, he is correct in what he tells us of the history of English law.

Thus, in discussing feudal tenures—and for long feudal law was at the heart of the English legal system—he can say: ‘The military tenures, of uncertain value as a provision for warfare, brought with them a logic which was to generate anachronisms throughout our history.’ After the Norman Conquest, almost all those who held land directly from the King held it by knight service which entailed the obligation of providing a fixed number of fully armed horsemen for forty days per year. The cavalry was so recruited for almost a century — though the military disadvantages of such a system are obvious —but eventually money payments called scutage were substituted. Though knight service was abolished in 1660 many of the incidents of the tenure resulting from its military origins remained until this century.

Again, at the low legal level of manor courts and manor law Milsom writes: ‘Some of this law was to perish, some to live to a sad old age as what came to be called copyhold.’ Of the defects of copyhold many have written, but much of the land of England was held by copyhold until 1925. ‘Although copyhold now [in the early 17th century] had equal protection, it retained its separate identity for three useless centuries, providing a measure of economic obstruction, traps for conveyancers, and puzzles for the courts. These puzzles concerned such matters as the entailing of copyhold, and they were of absorbing legal interest. Today their only value is as an object lesson in the great intellectual difficulty a legal system can encounter when it seeks to rejoin matters which became separated for reasons which are extinct.’ On the evolution of land ownership he remarks: ‘It is hard to say which story is the more extraordinary: the evolution of the fee simple as ownership, with only its name and its necessary words of limitation to remind us of its tenurial beginnings; or the series of seeming accidents which produced the fee tail. But this juridical monster, beyond the desires of donors seven hundred years ago, beyond the intention of the legislator and far beyond

3. Ibid. at 20.
reason, is with us yet.'8 ‘The settlement, by which an owner of property can divide the ownership in time between beneficiaries who will take one after another, is the most distinctive creation of the common law, and perhaps the most unfortunate . . . For the historian the special interest of the development is its repeated demonstration of the strength of purely legal phenomena. Results were reached which, although absorbed and exploited, cannot have been desired.’9

Examples can also be taken from the law of torts. Milsom points out that in the fourteenth century a suit in the royal courts against a blacksmith for negligence in shoeing a horse had to allege breach of the king’s peace, and that this situation was remedied around 1370 when writs were issued which did not allege such a breach.10 But the vi et armis writ for cattle trespass ‘had been extended to the case of straying animals when wrongs still could not come into royal courts unless contra pacem was alleged; and in this case the writ was never modified as was the smith’s to make an honest action on the case. Nor was this a curiosity without consequence: in the twentieth century the defendant owner would still be liable without the affirmative showing of fault which became necessary in an action on the case.’11 And again writing of the period before 1370: ‘Or consider the sale of a diseased horse deceitfully warranted sound. As early as 1307 a buyer had sued in the king’s court, but again only because he was on the king’s service. The ordinary plaintiff could hardly represent the wrong as contra pacem: but it might seem capricious that he could not get to the king’s court when the smith’s ill-used customer could.’12 Slightly further on: ‘Trespass, then, lost its original sense by being identified with trespass vi et armis and distinguished from case. It was from that distinction that the modern sense of trespass grew; and to hindsight the process seems perverse. When contra pacem lost its jurisdictional importance about 1370, its importance in the matter of process unhappily survived; and a chance of reuniting the law of wrongs was missed. A second chance came in 1504, when the same process was extended to all trespass actions. Contra pacem was thereafter without consequences in the real world except for a nominal fine to the king. But it was too late. The two categories existed in lawyers’ heads, as the statute itself shows. It was certain there was a distinction even if nobody knew what it was; and a distinction is never without consequence in a law court.’13

Discussing the system of civil judicature as it was around 1300 Milsom writes: ‘The system was to make some sense until the sixteenth century, to last until the nineteenth, and to leave its imprint in every common law

8. Ibid. at 177.
9. Ibid. at 166.
10. Ibid. at 290f.
11. Ibid. at 291.
12. Ibid. at 292f.
13. Ibid. at 308f.
Significantly for us, as we shall see, he adds: ‘But it was not devised as a national system of civil judicature. It was an accumulation of expedients as more and more kinds of disputes were drawn first to a jurisdictional and then also to a geographical centre. One result was to invest the machinery which controlled jurisdiction with an importance that was to outlive and to overshadow its reason.’ And on the fact that, in general, courts could not act without special authority, namely a writ from chancery in each case, he says: ‘This jurisdictional accident was to be of growing consequence. In the middle ages it hampered the expansion of the common law by restricting the kinds of claim that could be brought before the court. If ordinary private disputes had continued to come before a jurisdiction like that of the eyre, to which plaintiffs had direct access, the common law could have reacted directly to changing needs; and in particular it could have continued to admit kinds of claims familiar in local courts but at first regarded as inappropriate for royal judges. But plaintiffs could not get to the court without a chancery writ, and the formulae of the writs, most of which were highly practical responses to the needs of thirteenth-century litigants, became an authoritative canon which could not easily be altered or added to. Important areas, some new but many older than the king’s courts themselves, were in this way cut off from legal regulation, and they could later be reached only by devious ingenuity in the common law courts, or by resorting to the chancellor’s equitable jurisdiction, to which once more the litigant could directly complain . . . . All this was no more than the constriction of red tape. But so complete did it become that in the eighteenth century it engendered a purely formalistic view of the law and of its development which has lasted until our own day.’

Speaking specifically of ‘trespass’, but his meaning can be generalized, Milsom wrote: ‘The law itself was seen as based, not upon elementary ideas, but upon the common law writs, as consisting in a range of remedies which had as it were come down from the skies. If a case fell within the scope of one writ, then in general no other writ could be proper.’

Many other passages could be cited to the same effect. Whether an action was available depended on a system (of writs) which had lost its meaning centuries before; whole parts of the law remained in effect though the societal structure at their base had disappeared centuries before; the scope of a remedy—whether for instance fault was an essential of a particular tort—depended and may still depend on devices and dodges invented centuries ago to meet difficulties dead centuries ago. Of one distinction, as we have seen, Milsom remarks that it ‘seems capricious’. So it does, and so does the legal result in the other instances quoted; but only if we look at the law from society’s point of view, from a consideration of the economic and social realities. It is not capricious if we look at law from the point of view of the

14. Ibid. at 33.
15. Ibid. at 36.
16. Ibid. at 309.
legal elite, in this instance the judges, making the law. 'But practitioners and judges do not normally give a pin for legal development. Their duty is to these clients and the proper disposition of this case', says Milsom.\(^\text{17}\) Precisely. Judges cannot dispose of a case just as they wish. They are boxed in, especially in a system based on precedent, by former decisions whether relating to jurisdiction or to points of substantive law. Writing specifically of land settlements Milsom declares: ‘The rules under which so much of the wealth of England was held for so much of its history were made and unmade by these processes, so extraordinary when looked at as a whole and backwards, so reasonable step by forward step.’\(^\text{18}\) In the attempt to give a decent remedy in a particular situation the judges may make matters worse both by complicating the law and by directing its course for the future.\(^\text{19}\) In judge-made law, the input of society at large—both in terms of the views of the inhabitants and of economic interests—is different from what it is in jurist-made law. At the very least the case comes before the judge only because there is a problem, and the issues are put vehemently—as vehemently at least as the system allows—by the interested party. But society’s input is not matched by the outcome. That is determined by the judges’ view of the law. It cannot surprise that there are rules of judging, that judges are blinkered by law that they see as existing in its own right, even if they can at times twist it to a rather different shape. If there is any cause for surprise it is—as with the Roman law of contract—the acquiescence in this type of legal evolution by the ruling elite and society at large. But, then, if there was not this acquiescence most of the time, law would not evolve as largely autonomous, involved with its own culture, in the way that I claim.

The nature of legal evolution in England by judicial precedent leads to a fundamental question (which will not be answered here). Because of its emphasis on development by precedent and in ignoring Roman law, English law came eventually to be unique in Western Europe with different legal rules, divisions of law, legal structures, systematization, and hierarchies of law-makers. What does this tell one about society in general and the ruling elite? Was England really different in social structure and values from the rest of Europe? And if it was, what were the significant social differences? Saxony, for example, taking the other route of building upon the *Corpus Juris Civilis*, was by the middle of the nineteenth century the possessor of a much more sophisticated, systematic, analytical system of law than England then had. Does this tell one anything except about law? I doubt that it does until someone documents the differences in the societies that account for the difference in legal approach. What is one to make of the fact that for a long time, from 1714 until the death of King William IV in 1837, the king of England was the king of Hannover in Germany where a very different

\(^\text{17}\) Ibid. at 77.

\(^\text{18}\) Ibid. at 199.

\(^\text{19}\) For a particular example see Watson, *Evolution*, supra note 1 at 35ff.
legal system prevailed? Even then Ernest Augustus, Duke of Cumberland, became King of Hannover and reigned until 1851. And was England, by avoiding the Reception of Roman law, more innovative in law than were the other Western European states? If it was, what meaning does this have?

Law has, as Martin Krygier emphasizes, a ‘pervasive traditionality’, that to a considerable extent the legal past is a normatively and authoritatively significant part of the legal present.20 As he puts it, ‘In every complex tradition, such as law, what is present at any particular time is the currently authoritative or persuasive residue of deposits made over generations, recording and transmitting inconsistent and often competing values, beliefs and views of the world. Current law is full of elements caught in and transmitted by legal tradition over generations. Dig into this diachronic quarry at any particular time, and the present will be a revealing mixture of fossils, innovations of the long gone, and recent deposits.’ This incoherence is very obvious, as we have seen, in a system such as that of England built up by judicial precedent. It also appears with astonishing clarity in a federal country where neighboring provinces or states, having much in common, build up over centuries very different legal rules on matters of fundamental concern. The law of the Swiss cantons at the time of the preparation of the Swiss Civil Code, Schweizerisches Gesetzbuch (ZGB), is a good example. Virgile Rossel (who prepared the French translation) was one of the two rapporteurs for the French language at the debate of the Conseil National in 1905 on the draft code of Eugen Huber, and he emphasised that the differences existing between the cantonal laws then in force had, almost always, origins that could not be explained by religion, language or even by race. Then he continued:

What is, for example, the matrimonial regime that is the nearest to that of the canton of Neuchâtel? Do not search too close by: go, on the contrary, to the extreme eastern frontier of Switzerland, in the canton of the Grisons! Perhaps you think that the matrimonial regime of the canton of Thurgau and even the whole economy of its civil legislations is strongly attached to the neighboring canton of Zurich? The analogies are much more striking between the code of Thurgau and the code Napoléon than between the same code of Thurgau and that which Bluntschli drew up. Gentlemen, I borrow some other perceptions, no less characteristic, from the message of the federal council of 24 November 1896:

‘The cantonal law gives the advantage to the sons to the detriment of daughters in the cantons of Lucerne, Fribourg, Zug and Thurgau. Schaffhausen and Neuchâtel give to ascendants and collaterals the right of property return according to the origin of the goods. Appenzell, Argau, Basel, Fribourg and Solothurn make no distinction between the paternal and the maternal lines. Geneva, Thurgau, the Bernese Jura, Sankt Gallen, Vaud, Fribourg, Ticino and Solothurn make of ascendants a special class of heirs. Fideicommissary substitutions are forbidden in Geneva, the Bernese Jura, Lucerne, Glaris, in the Grisons and in Zug. Geneva, the Bernese Jura, Neuchâtel, Appenzell, Aargau, Valais, Bern, Vaud, Glaris and Fribourg give the illegitimate child a share in the inheritance to his father. Zurich, Geneva, Thurgau, Soleure, Ticino, Neuchâtel, Sankt Gallen and the Bernese Jura have permitted adoption. Bern, Thurgau, Aargau,

Geneva, Soleure, Neuchâtel, Fribourg and Ticino give the mother, on the father’s death, the paternal power and the guardianship of the children. Geneva and Nidwalden have instituted the family council whose task is to look after the tutor’s administration. In the realm of the law of property, we find a land registry in Basel-city, Soleure, in the canton of Vaud, in Schwytz and Nidwalden . . .' I cut short my quotation. But is that not the best demonstration of what is artificial and fortuitous in our Swiss law? This mosaic, which seems the result of fantasy and chance at least as much as of ethical or moral influences, ought not to fill us with such veneration that we do not dare to lay hands on it.21

(Here we are concerned with the fact of the incoherence of legal rules in neighboring cantons or states in a federal nation, not with explaining the causes of the differences. But investigation would show that many of the differences had their origins in particular events which were not deeply rooted in local consciousness. An individual dispute might require court resolution. And the court’s decision might be followed in subsequent cases as being the best evidence of local custom, whether or not any local custom existed. A similar neighboring state might reach a contrary decision, possibly for reasons inhereing in the particular case, and that decision in time

might be treated as the basis of local custom. Or at the time of the codification of cantonal law a new rule might be adopted without much thought from an outside code, whether of a different canton or of a foreign state like France which at the time had general prestige. And, once accepted for whatever reason, a rule lives on.\textsuperscript{22}

As the example of England also makes abundantly plain, legal development is greatly affected by the sources of law that are available. And here I want to point out one aspect of development by juristic opinion that has been understressed, namely the ability and power of jurists to react against the existing tradition and in part create a new one. They are, of course, still bound by what they know, but jurists can attempt to reject much of what has gone before. Much more freely than judges, they can decide whom they wish to regard as authoritative and whom they will despise. They do not have to give a ruling that will be acceptable in a particular case and, to be effective, they need not cause a change in accepted dogma or methodology at once. They can have long term aims. The prime example of jurists adopting a new influential approach must be that of the great Humanists of the Renaissance, such as Cuiaci and Donellus, with the rejection of the methodology of the Glossators, Post-Glossators and, above all, of the Bartolists. To assess the extent of their impact would require volumes but that need not detain us here.\textsuperscript{23} What needs to be emphasized is only that jurists can powerfully affect the tradition. In this regard, naturally, the Humanists do not stand alone.

One other example of the power of jurists is significant. It comes from the Kingdom of the Two Sicilies, and more particularly from Naples, from the late seventeenth well into the eighteenth century.\textsuperscript{24} There was a change in attitude among the law professors, away from the traditional authorities to other international figures. Their works contain references to philosophers such as Bacon, Hobbes, Locke, Montesquieu and Descartes, as well as to jurists such as Cuiaci, Donellus, Hotman, Brissonius, Bynkershoek, Pufendorf, Stryk and Grotius.\textsuperscript{25} The \textit{Praelectiones ad Institutiones

\textsuperscript{22} For demonstration of such developments in particular cases see e.g. Watson, \textit{Evolution}, supra note 1 at 28ff, 43ff (and especially at 58f).

\textsuperscript{23} But I have argued elsewhere that the Humanists, by showing that to a great extent the \textit{Corpus Juris Civilis} was not of classical origin, weakened its authority and thus academics could more respectfully pay attention to other aspects of local law. This was an important factor in the codification of civil law systems. See A. Watson, \textit{The Making of the Civil Law} (Cambridge, Mass., 1981) 71f. There are implications for ‘schools’ of jurists in D. Osler, ‘A Star is Born’, 2 \textit{Rechtshistorisches Journal} (1983) 194f.

\textsuperscript{24} See G. Manna, \textit{Della Giurisprudenza e del Foro Napoletano della sua Origine fino alla Pubblicazione delle nuove Leggi} (Naples, 1859) 186f.

\textsuperscript{25} Examples of such book are F. Rapolla, \textit{De jure regni neapolitani Commentaria in ordine redacta} (Naples, 1746); C. Fimiani, \textit{Elementa juris privati neapolitani in duos libros redacta} (Naples, 1782); M. Guarani, \textit{Syntagma romani juris ac patrii secundum seriem Institutionum Imperialium} (Naples, 1773); G. Maffei, \textit{Institutiones juris civilis Neapolitanorum} (Naples, 1784); G. Basta, \textit{Institutiones juris romani neapolitani} (Naples, 1782); O. Fighera, \textit{Institutiones juris regni neapolitani} (Naples, 1782).
Justiniani (1779) of M. Guarani may serve as one particular instance. The book contains, among legal citations, references to local case law and statute. Of references to foreign authors I made the following count: Noodt 30; Bynkershoek 22; Grotius 20; Stryk 19; J. Gothofredus 17; Vinnius 16; Cujacius and Donellus 15 each; Heineccius 14; U. Huber 11; Pufendorf 10; and fewer than 10 to many others. To Italian writers I find: Doctores 12 and Glossa 3; Baldus 5; Bartolus 4; Irnerius, Accursius and Julius Clarus 1 each. Astonishingly, given the Spanish connection, I find to Spanish jurists only two references to Gomes and one to Covarruvias; and more surprisingly still, none at all to the famous Neapolitan De Lucca. This rate of citation seems very lopsided. This new approach was slow to have an impact but was eventually powerfully felt as can be seen from the writings from the most important writer on the practice of the time, the advocate Giuseppe Sorge.26

This Neapolitan phenomenon is quite typical of what happens when jurists wish to change the existing tradition. To begin with, works which previously were treated as authoritative are either not cited or are cited only to be summarily dismissed; in either eventuality the opinions contained in them are not properly considered. Then some other jurists are continually cited, to an extent that to an outsider seems extreme—it still seems astonishing that the Neapolitan Guarani cites the Dutchman Gerhardt Noodt more often than anyone else (apart from himself), and that he cites ten ‘foreigners’ each more often than ten times and no Italian (other than reporters of cases) more often than five times. Finally, it should be noted that it takes time for their approach to have a practical impact.27

II

It is usually said that custom becomes law (in a system which has regard for customary law) when people obey certain norms in the belief that they are the law. I argued in the second chapter of The Evolution of Law that (in such a system) so-called customary law is declared by judicial decision (even where in general precedent has no binding force) and becomes law thereby whether there was or was not an existing custom, whether if there

---


27. An example closer to home, and equally typical of development by juristic interpretation, is provided by the group in the contemporary U.S. known as Critical Legal Studies scholars. They, too, attempt to reject much of what has gone before, though they are bound by what they know. A glance at the footnotes in their writings will quickly reveal whom they wish to regard as authoritative—references to Roberto Unger and Duncan Kennedy are de rigueur—and whom they will despise. Indeed, some writings of the masters are always, in all contexts, treated as of the greatest relevance. A true believer reveals his faith by referring to these writings favorably in the opening pages of his own piece. For the group see the bibliography of Critical Legal Studies by Alan Hunt in 47 Modern Law Review 369ff (1984).
was one the judge followed it, and that frequently the rules of so-called customary law are borrowed from elsewhere. Customary law derives its validity from official recognition, I claimed, not from past popular behavior.

In some instances the traditional view is clearly wrong. ‘Fueros’ is the name given in Spain to collections of local municipal law, often containing particular privileges. These are usually classed as short (‘breves’) or extended (‘extensos’). The majority of the former date from the eleventh and twelfth centuries, the majority of the latter a little later. It is a peculiarity of the fueros that the most successful were, totally or partially, granted to or borrowed by other municipalities. The main outlines of the transfer of fueros from town to town are well-known; in fact Ana Maria Barrero García in her *Fuero de Teruel* publishes a map with arrows showing the direction, and dates indicating the time, of movement of fueros from municipality to municipality.28 So long as fueros are regarded as containing customary law, it is hard to see how their movement can be regarded as consistent with the traditional notion that customary law emerges from norms people obey in the belief that they are law. Yet F. Tomás y Valiente, the most highly regarded of the younger generation of Spanish legal historians, writes: ‘Because they contain the customary law, alive in that place; because they are in part the fruit of the municipal autonomy and at the same time its guarantee, given that they contain the privileges on which this autonomy is based and the rules for the choice by the locals of judges and town officials; and because of the complete and self-sufficient nature of the order contained in them, the municipal fueros were considered by the towns and cities as their own property and very important, and accordingly were defended against other types of law (that of the king and that of the learned jurists because, as we shall see, both began to develop in the 13th century).’29 With no apparent awareness that he is contradicting his first clause, his next sentences run: ‘Just as happened with short fueros, the extended fuero of one town was often enough granted directly to another. At times the redactors of the fuero of one city utilized as a model the already written text of the law of another.’ The rest of his first passage just quoted is more convincing for the importance attributed to fueros. Inhabitants defended their fuero because it granted them privileges; not because it contained the good old norms derived from their habitual behavior.

Nor was this movement of municipal customary law from town to town confined to Spain. It occurred frequently elsewhere; in Normandy for example. Thus, Eu borrowed the privileges of Saint Quentin, at Les Andelys the rules were copied from those of Mantes, and in general the rules of Norman towns derived from those of Rouen.30

There is another problem with the traditional view: the spatial limits of customary law coincide with the political frontiers. Robert Besnier, writing of the Coutume of Normandy, puts it this way: ‘The political framework becomes fixed at the moment when the necessity of a coutume imposes itself upon the Normans. Hence comes the parallelism between the creation of the institutions and the elaboration of the law. The limits of the dukedom and the jurisdiction of the custom coincide: the latter is essentially fixed by the repetition of identical acts in similar situations, it develops everywhere, simultaneously, as well in the courts of justice as in daily relations or in the presence of officers charged with administrative, military or financial matters. At a time when functions are not yet clearly specialized there are no organisms which do not play their role in this slow elaboration.’ This spatial coincidence is more easily explained, as I argued on other grounds, if one says that where customary law is recognised it is created only when it is officially recognised or accepted, and this recognition is signalled by court decisions. Court jurisdictions and political boundaries then necessarily coincide.

I also argued that a difficulty for believing that customary law rested on a general conviction that it was law was that often the custom was difficult to find even when it could be said that there was something that could be designated as the custom. A striking instance of the difficulty of knowing the custom even when there was one is given by the Coutume de Toulouse. This was written down in the ‘livre blanc’ which was kept in the town hall, but it was written in Latin! Cazaveteri published an edition in 1545 with short notes but still in Latin. François-François in 1615 published selected titles with commentary, this time in French, but the work contained less than half of the Coutume. In the eighteenth century very few copies of these (long out-of-print) books were to be found in lawyers’ offices or at booksellers. Only at the very end of the 18th century was the whole Coutume translated into French and published by Soulages with the express intention of making it accessible to lawyers and others.

Toulouse was by no means the only place whose custom was written in Latin; the same occurred elsewhere, for instance in Spain. Thus, the customs of Lérida which were the first redaction of local laws in Catalonia were written in Latin in 1228 by Guillermo Botet. Subsequently they were turned into Catalan but significantly that version has not survived though there are five manuscripts of the Latin. And if one accepts, as I think one

[hereinafter cited as Coutume]. If, as often the privileges of one town were granted to another by the ruler then the result is statute, not customary law. Nonetheless, as with the redaction of coutumes in France in general, the written redaction was regarded in fact as containing customary law.

31. Ibid. at 22.

32. Soulages, La Coutume de Toulouse (Toulouse) ix. The work is not dated, but the latest reference is to 10 November, 1769.

33. See P. Loscertales de Valdeavellano, Costumbres de Lérida (Barcelona, 1946) 10ff.
should, that fueros ought to be regarded in part as containing customary law then one should include as customs written in Latin those of, for instance in Extremadura, Calatayud (1131), Daroca (1142), Teruel (1177) and Cuenca (1188 or slightly thereafter).

Of course, often in a customary system law is needed where there is no law or, if there is, it cannot be found. The law has to be created. To give one further example: King Liutprand of the Lombards in several years of his reign issued a number of laws. In some of the preambles he expressly states that the laws that follow are enacted precisely because the custom is not known or, if it is, is not wanted by persons other than him. Thus, for his thirteenth year (725 A.D.): ‘Because I remembered that subjects of ours coming into our presence brought causes in controversy among themselves which we were not certain how to bring to an end according to custom nor were provided for in the body of the Edict.’34 The Lombards were fortunate that theirs was a society with statutory law as well as custom; otherwise a custom would just have been imagined to exist.

Also, as I maintained, the whole notion of customary law being what people do is undermined by the usual approach in medieval and later France of accepting the law of somewhere else, usually of Rome as the law was set out in the Corpus Juris Civilis or of Paris as the law was to be found in the Coutume de Paris, as subsidiary law when the local coutume failed to give the answer. Whichever was chosen, conditions in early Byzantium or the capital of France were very different from those, say, in parts of Brittany or the Auvergne. And there is no doubt that gaps often had to be filled in the local coutume. But what is the standard doctrine of customary law to make of the fact that just before the French Revolution (which was to put an end to local custom) it could still be questioned in general whether recourse was to be had to the Corpus Juris Civilis or the Coutume de Paris?35 In circumstances such as these one cannot even say that in the absence of a custom it was the custom to look at the custom or other law of some other particular place!

Apart from any other considerations, there is one reason that I should like to mention that will make it very difficult for my thesis on the nature of customary law to become acceptable. The reason is very practical. No society that accepts a system of customary law can operate it on the open basis that I postulate. The law would lack authority. Such societies operate in law by a myth. In general they have no legislation, do not accept judicial decisions as binding precedent, either have no law books or do not see them as authoritative. How then do they resolve disputes? The legitimate answer for those living under such systems can only be that they look for the norms of

34. ‘Dum memorassem quod venientes homines nostri, in praesentiam nostram, adduxerint causas, inter se altercantes quae nec per usum fuimus certi ad terminandum, nec in Edicti corpore anteriori incerto.’ See also for slightly different issues the preambles from his fourteenth (726 A.D.) and fifteenth (727 A.D.) years.

35. See., e.g., Soulatges, La Coutume de Toulouse, supra note 32 at xiff.
practical behavior that are generally regarded by the populace as binding. There cannot be open recognition that there may not be a custom, that a rule may be accepted as law simply because it exists elsewhere, or that a judge is just making up a rule. But a myth to live by is to the outsider no less a myth.

To illustrate the preceding paragraph we can turn again to the Costumbres de Lérida. Botet lists at the beginning of the work the sources of law in Lérida and he includes mores, customary behavior. But he says he was urged by his fellow consuls and other citizens to write down the custom and he explains in the opening paragraph why he did so: ‘I Guillermo Botet have put in some little effort in order to collect in one place and set out in writing the various and different customs of our city in order to take away the opportunity of evil-doing from some people who declare, when a custom is in their favor, that it is the custom. If it is alleged against them in a similar case they insist that it is not the custom. Hence, proof of customs delays the progress of law suits and thus litigants incur severe costs.’

If the difficulty of finding and knowing the custom can plausibly be given by Botet as his reason for writing down the customs then in fact he incidentally gives the lie to the notion that customary law arises from normative behavior which occurs because people believe it is the law. Yet, as we have seen, Botet himself says that in this connection it is the mores which are law. He also tells us in paragraphs 168 and 169 that among the sources of law ranking after customs are inter alia Visigothic law then Roman law. Visigothic law is seldom followed, he says, but Roman law often is especially in matters which do not arise every day. In effect he is saying that in the absence of custom, custom assumes that Roman law will be assumed to be the custom. There is no other basis for accepting that Roman law is authoritative.

Equally significantly, the fuero of Cuenca—as do many other collections of customs—gives as the justification for their redaction into writing: ‘Because therefore human memory is transient.’ Again, if customs cannot be remembered they cannot be obeyed because of a consciousness that they are law. Even if the transience of memory is not a reason for the redaction of custom it is significant that it is given.

36. ‘Ego Guillelmus Botetus dedi aliquantulam operam ut consuetudines ciuitatis uarias et diuersas in unum colligerem et scriptis comprehenderem ut aufferretur quibusdam occasio malignandi qui quando erat pro eis consuetudo et esse consuetudinem affirmabant. Si contra eos in consimili casu allegabatur non esse consuetudinem asserebant. Unde processus causarum probacio consuetudinis retardabat et litigantes inde dispendia grauia senciebant.’

37. ‘Quoniam igitur humana labilis est memoria nec rerum turbe potest sufficere ob hoc cautele sagact actum est arbitrio leges autentice institutionis et iura civica, que consulta discretione ad sedendam seditionem inter cives [et incolas] de regali auctoritate manarunt, litterarum apicibus anotari, ut majori, quia regali tuicione munitas, malignantium versucia nullatenus possint infringi, vel alciuus subreptioris molestia deiniceps eneruari;’ to be found in R. de Urefia, Fuero de Cuenca (Madrid, 1935) 111. Of course, since the compilation is official it has become statute and the fuero does contain legislative materials but that does not affect the issue.
In the third chapter of *The Evolution of Law* I sought to explain what happens when legal systems of very different levels of sophistication come into powerful contact. Above all I wanted to show that the Reception of Roman law in Western Europe, far from being one of the most difficult problems of history, corresponds to cultural patterns of development. A mature legal system in writing can easily be used as a quarry even by societies with very different economic and social structures. Each society takes what it wants, when it wants, and there is no great desire to search for the most appropriate rule. Who in particular does the taking and who in particular does not want to search too far is obvious: the law making elite. The developed system in writing is above all accessible, with rules that can be used to fill gaps in the other systems. Such a Reception presents difficult problems only for those—and they are many—who believe that there is a very close correlation between the law of a society and the life of the society.

I did not go beyond explaining the Reception of Roman law. That great example illumines others. But it is worth examining one modern phenomenon to show that it, too, corresponds in great measure to the pattern. The phenomenon I mention is the taking over in whole or in large part of a modern western code by a ‘third world country’ with the specific aim of modernization.

The example I wish to discuss is Turkey which in 1926 took into its civil code virtually all of the two Swiss codes, the *Schweizerisches Gesetzbuch* and the *Obligationenrecht*. Turkey in the same year promulgated 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 four 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. The first was that 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. The second was that the recognition of such an odd system of justice, namely that three kinds of law applied through three kinds of courts, could not correspond to the modern understanding of the state and its unity. The third and most important was that 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 there were only completed 200 articles on a law of obligations, the sections on succession, guardianship, formation of marriage and divorce of a civil code, of a criminal code between seventy and eighty articles, and even the code of land transactions was only a torso. Consequently after various systems were looked at, the two Swiss codes were virtually adopted in their entirety.

Though 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. The creation of new autochthonous law is difficult, it is much easier to borrow from an already existing, more sophisticated system which can be used as a model, above all where the donor system is accessible in writing. By this time, of course, there were various excellent codes which could have provided a model, notably the French, German and Swiss all of which were 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 the—to him, overriding—importance of the last factor. In any event, there is no reason to think that somehow Swiss law was more adapted than were French or German law to the society that Turkey wanted to become.

Hirsch stresses the nature of such a reception. What is imported, he insists, is neither foreign law nor foreign codes, but foreign cultural property which only after its linguistic and systematic transformation finds the appropriate external form, and only in the act of legislation is it fixed as a binding legal rule and comes into force. Even after such legislation a reception is not a once and for all act, but a social process extending over many years. The result will not be Swiss law in Turkey, but Turkish law that owes much to Swiss legal culture, concepts and rules.

To continue with Turkey as an example. Some Swiss rules will not be accepted at all and others will be changed. For instance, the legal regime in Switzerland for spouses’ property is community property (ZGB 178), in


41. Hirsch, Rezeption, supra note 38 at 11f.
Turkey it is separate property (*Turkish Civil Code* 170); the surviving spouse’s right to a usufruct is smaller in Turkey (*TCC* 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) but not in Turkey (*TCC* 139 §1); desertion as a ground of divorce must in the former country have lasted at least two years (*ZGB* 140), in the latter at least three months (*TCC* 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 will be accidentally mistranslated and the final result need not be that of the donor nation. Others will be deliberately given a different value in the translation. Still others will 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 will 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.

A little more must be said on this last point. To begin with, any new law resulting from such 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 Ernst E. Hirsch, to teach the new law and to send budding lawyers and law professors to study law in Europe. Secondly, aspects of traditional social life, such as marriage, will 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 consequences of compulsory civil marriage as ‘disappointing, to say the least’. In 1978, June Starr reported that, in a particular village which she had studied, she

---

44. *Annales de la Faculté de Droit d’Istanbul* 5 (1956) [hereinafter cited as *AFDI*].
45. *Fünfzig Jahre Türkisches Zivilgesetzbuch*, *ZSR* 95 (1976), 217ff.
46. Kurt Lipstein, ‘The Reception of Western Law in Turkey’, *AFDI*, supra note 44 at 6, 3ff at 18.
found little evidence ‘that villagers are lax in obtaining state marriage licenses’.47

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 recall 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 heart.’ (‘Das Gesetz muss aus den Gedanken des Volkes heraus gesprochen sein. Der verständige Mann, der es liest, muss die Empfindung haben, das Gesetz sei ihm vom Herzen gesprochen.’)48 And Virgile Rossel, declared ‘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.’ (‘En particulier si l’on a pu dire du code \( Napoléon \) qu’il était la ‘raison écrite’ nous avons cru travailler dans le sens de l’esprit national en moralisant notre droit autant que faire se pouvait, et nous serions heureux si l’on disait un jour du code civil suisse qu’il est un peu la conscience écrite.’)49 Yet the same Virgile Rossel, as we saw in the first section, 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, geographical and climatic circumstances. Turkey under Atatürk is a prime example not only of legal transplant but of revolution in law.50

To the picture in chapter three I have nothing more directly to add, but it is frequently suggested to me that if the Reception was so natural then I

47. June Starr, Dispute and Settlement in Rural Turkey (Leiden, 1978) 276.
48. Eugen Huber, Erlauterungen zum Vorentwurf des Eidg. Justiz- und Polizeideparte-
mentes (Bern, 2nd ed., 1914) 2.
49. Virgile Rossel, Amtliches Stenographisches Bulletin der Schweizerischen Bundes-
versammlung, Nationalrat (1905) 438.
50. See Watson, Evolution, supra note 1 at 116. For an illuminating example of largely inappropriate rules being borrowed ‘Just because they were there’ see S.B. Burbank,
Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and
ought to explain why it did not also occur in England. What follows then is a preliminary attempt at that explanation.

A first point that should be stressed is that within the areas most affected by the Reception there were particular reasons for accepting easily the authority of Roman law. For the Italian states there was no problem in their seeing themselves as the direct descendants and heirs of the Roman legal tradition. Moreover, even during the period of personal rather than territorial law Roman law remained powerful: the Catholic Church in particular was governed by it. It had also had a powerful influence on Lombard law, both on the codifications and on its subsequent development, and the Lombard lawyers at the University of Pavia used Roman law as a universal subsidiary system to fill gaps.51 In France, the Reception was powerful in the South, the *pays de droit écrit*, from a line on the coast just west of the Île d’Oléron, proceeding roughly eastwards along a line just north of Saintonge, Languedoc, Lyonnais, Maconnais and Bresse. Apart from Poitou, Berry and Haute-Bourgogne which were territories of customary law, this territory was, in earlier times when personal law flourished, precisely the land of the Burgudians and the Visigoths who issued for their Gallo-Roman subjects the *lex Romana Burgundionum* and, more particularly, the highly prized and influential *Breviarium Alaricium*.52 In these circumstances it is not surprising that Roman law was treated as the law of the land, but as law by custom; and in force only in so far as it was not replaced by a subsequent, dissonant custom. As for the Holy Roman Empire of the German Nation, that was regarded as a continuation of the Roman Empire from as early as the twelfth century; indeed the notion that the German empire was a continuation of the Roman Empire appears as early as the Carolingian period.53 In fact, some legislation of the Emperors Frederick I and II was interpolated into the *Corpus Juris*, and some doctrines of Roman law were seen as favoring the Emperor. In 1165 Frederick I spoke of ‘the example of our divine Emperors who are our predecessors’. [MGH Const I, n. 227, 322 c.3]54 In a constitution in the *Libri Feudorum*, 2.27, he describes himself as ‘*Romanus Imperator*’; and in another constitution recorded in the same work, 2.52, dated 7 November, 1136, Lothar calls himself the third ‘*Imperator Romanorum*’.

Present-day Netherlands and Switzerland also experienced the Reception. But precisely at the most significant time, that of the *translatio imperii*, they formed part of the Holy Roman Empire.


54. Ibid. at i: 234.
Secondly, it is easily overlooked that for a very long time England was by no means an exceptional case. The Reception even where the soil was fertile, was, as we shall see in the case of Germany and France, not fast. Thus, despite the ‘theoretical Reception’ in Germany (the notion that the Holy Roman Empire was a continuation of the Roman Empire), the ‘practical Reception’ (the actual acceptance of Roman legal rules as living law) came much later. No sharp distinction can really be drawn between the ‘theoretical’ and the ‘practical Reception’ but, for the latter, 1495 is usually regarded as a significant date when the Reichskammergericht was created as the supreme court of the Holy Roman Empire and when it was enacted that half of the judges of it should be doctores iuris, that is, judges trained in Roman law. Despite the enormous boost given to the Reception of Roman law in Germany by the theory of the continuation of empire, the real Reception in the sense of actual acceptance in practice is to be dated to the fifteenth and sixteenth centuries. It was then that the Corpus Juris Civilis so far as glossed —‘Quidquid non agnoscit glossa, non agnoscit curia’— was accepted as a whole as law, though indeed only as subsidiary law which was displaced by local statute or custom.

The so-called ‘Lotharian Legend’, that the Emperor Lothar of Supplinburg had expressly received Roman law as statute in 1135, which was apparently the invention of Phillip Melanchthon, was refuted by Hermann Conring in his De origine juris Germanici of 1643. Thereafter, both Italy and Germany had need of new theoretical answers to the question why the Corpus Juris Civilis was given authority. Into these we need not go. The Reception had already basically occurred.

In France, in the pays de droit coutumier, the progress of the Reception was even slower. The various local coutumes were eventually to be reduced to writing (and converted into statute law) as a result of Charles VII’s Ordonnance de Montil-les-Tours which was dated April 1453. The slow redaction of the coutumes was virtually complete by the middle of the 16th century. These written coutumes were influenced to various degrees by Roman law but in none did it appear as the predominant element. Much for the future was to depend on the outcome of a doctrinal battle which was mentioned in the preceding section. Some authorities, notably Pierre Lizet (1482–1554), First President of the Parlement of Paris, wanted Roman law to be the common law of France as lex scripta but this was opposed

57. For more detail and references see, e.g., A. Watson, Sources of Law, Legal Change, and Ambiguity (Philadelphia, 1984) 47ff [hereinafter cited as Watson, Sources of Law].
58. In fact he inserted much Roman law into the customs he drew up, such as that of Berry; see R. Filhol, Le premier président Christofle de Thou (Paris, 1937) especially at 67.
vigorously by others such as Christophe de Thou, (1508–1582) also First President of the Parlement of Paris, Guy Coquille (1523–1603), Etienne Pasquier (1529–1615), and later by Nicholas Catherinot (1628–1688) who wanted Roman law treated only as *ratio scripta*. The distinction was crucial. If Roman law was only *ratio scripta* then, in the absence of a rule in the coutume, it would have authority for a judge only if it were in harmony with the principles of the coutume, only if it appeared just (and then for the judge its authority was precisely because it was just); and the judge could prefer the authority of another coutume such as the *Coutume de Paris*. But if Roman law were *lex scripta* and was thus the law in force in the absence of a contrary custom, then the judge would have to apply it. In the event, in accordance with the spirit of the *Ordonnance* of Phillipe-le-Bel of 1312, Roman law was treated only as *ratio scripta* in most of the pays de droit coutumier.\(^5^9\) The main exceptions, where the coutumes expressly adopted Roman law in the absence of a relevant provision, were the Coutumes of Berry, Haute-Marche, Auvergne and Bourbonnais which were adjacent to the pays de droit écrit, the Coutumes of Burgundy, Franche-Comté and les Trois-Évêchés which were close to the territory of the Holy Roman Empire, and some of the coutumes in Flanders.\(^6^0\) This apparent influence of geography is very revealing.

The debate on the nature of the authority of Roman law may be seen as part of, or related to, a larger issue, namely the unification of the coutumes. This was above all the great desire of Charles Dumoulin or Molinaeus (1500–1566), who was to have a preponderant influence in future development, though not perhaps in a way that he envisaged. The *Coutume de Paris* of 1510 was very short and incomplete. In 1539 Dumoulin published his treatise on fiefs, which was the beginning of a commentary on this *Coutume*. Here he expressed his criticisms and proposed new approaches, most of which were adopted by the Parlement of Paris. Consequently there was disaccord between the *Coutume* and the case law which led to the promulgation in 1580 of a much larger and improved *Coutume de Paris* under the guidance of Christophe de Thou. The Parlement of Paris operated in effect as a court of appeal for many other towns; its ‘ressort’ covered the jurisdiction of fifty municipal and local coutumes. Etienne Pasquier, who had participated in the preparation of the new *Coutume de Paris* held that in these fifty jurisdictions the *Coutume de Paris* should be known and followed ‘because’, as he put it, ‘Paris was in this kingdom what Rome was in the Empire’. This called forth the wrath of Guy Coquille who believed that other coutumes should be used equally with the Coutumes de Paris to supplement the local law.\(^6^1\)

In fact the Coutume de Paris was to prove very acceptable in other

---

60. See above all, E. Chénon, *Histoire générale* 2 (1929) 331f.
61. See above all, ibid. at 317ff; Watson, *Sources of Law*, supra note 57 at 70f.
jurisdictions. A significant step in that direction occurred in 1747 when Francais Bourjon published *Le Droit Commun de la France et la Coutume de Paris*. The opening paragraph of this work seems obscure until one realizes that he is treating the common law of France and the *Coutume de Paris* as the same thing. This in itself is indicative of the success of the *Coutume* but in its turn Bourjon’s large and clear text spread the message that the *Coutume de Paris* was the law of France.

But one must not exaggerate the extent to which there had not been a Reception of Roman law in France, on the eve of the Revolution. First, of course, there was a full Reception in the pays de droit écrit. Secondly, this Reception had a continued effect on the pays de droit coutumier because through it Roman rules and solutions were known since books on the law of France set out the law in the pays de droit écrit as well as the provisions of the various coutumes. Thirdly, even when a jurisdiction looked to the *Coutume de Paris* or some other coutume to fill gaps, when a solution was not found in that way recourse was still had to Roman law. And even the reformed *Coutume de Paris* had many gaps, with only 372 articles. Fourthly, French jurists, even those most addicted to their coutumes had deep knowledge of and great respect for Roman law. Roman law is prominent in their works. The influential Robert Pothier (1699–1722) may serve as an example. Fourthly, many books, including that of Bourjon, show the influence of Justinian’s *Institutes* on their structure. This is especially true of institutional writings62 such as Gabriel Argou’s *Institution du droit français* which was first published in 1692 and reached its eleventh edition in 1787. The structure of the French *code civil* is similar to that of the works of Bourjon and Argou. Thus, the Reception, even in favored locales such as Germany and France, was slow.

A third point that is frequently downplayed is that much Roman law was actually borrowed by English law. Around 1600 Thomas Craig, in his *Jus Feudale*, at 1.7.22,3 puts it this way: ‘The Civil Law is rarely used in England, and although among the English are found very learned men in every branch of learning, still there are few who devote themselves to the Civil Law, they are content with a bowing acquaintance with it, since native institutions and customs are more in use with them: hence the learned say that the English use municipal law when the Scots are governed by the Civil Law. But so little are they free from the Civil Law in their judgments, that reasons and decisions of it, as if living sparks, are found in all matters and controversies which they, however, prefer to ascribe to their own men than to owe to the ancient jurists. In the event a great dependence on the Civil Law shines forth in all controversies to such an extent that an expert in Civil Law understands that the greatest controversies of English law can be

decided according to the sources of the Civil Law and the replies of the jurisdictional courts or Emperors, as often appears from the reports of Plowden and Dyer.' As elsewhere, Craig exaggerates: his motivation is to indicate that the differences between Scots law and English law are not so great as are often supposed. And yet, without some considerable admixture of Roman law into England, his claim would have appeared simply ridiculous. Accuracy, in the state of the evidence, is difficult to attain, but what can surely be stated is that the influence of Roman law in England varied from time to time and from type of court jurisdiction to jurisdiction.

In this instance it is perhaps sensible not to begin at the beginning. Writing of formularies, of collections of writs, Milsom claims:

In one respect the most illuminating of these formularies was that which acquired the title *Brevia Placitata*. Dating from soon after the middle of the thirteenth century, it is a conflated formulary giving both writs and counts. But the writs, which in real life were always in Latin, are here translated into French, the language in which counts, at any rate in the king’s courts, were actually spoken, the ordinary language of the upper classes. This collection was for the use, or more probably the instruction, of professional men, literate men, but men not at home in the Latin tongue and not interested in the riches to which it gave access. The common law had started its career as an alternative learning, cut off from even the legal learning of the universities which until the eighteenth century taught only Roman and canon law.

Almost at the same time as the counters’ modest *Brevia Placitata* Bracton gave final shape to a much larger and more ambitious book; and it is one of the important facts in the history of western thought that the former was to prove fruitful, the latter sterile.63

By the last sentence of his first paragraph, Milsom means, I think, not that the origins of the common law lay in an alternative learning, cut off from the universities, but that it was at this time around the middle of the thirteenth century that the common law cut itself off from the universities and became an alternative learning. If this interpretation is correct then Milsom’s position, I suppose, would be that in England, as elsewhere in Europe in, say, the eleventh century, the local law was more or less free from Roman influence but that influence began to be felt in England as elsewhere, though not necessarily so early or so powerfully, until it was disrupted in the age of, or succeeding, Bracton.

Thus, the law book written apparently shortly before 1118 which is known as *Leges Henrici Primi*64 cites for instance Salic and Ripuarian laws and Frankish capitularies; hence it is significant as John Barton, the leading expert on Roman law in medieval England, observes that there are so few traces of Roman law.65 No attempt was being made by the author to Romanise. Another private work of the time, the *Leis Willelme*, contains some Roman law, but of this Barton endorses Maitland’s judgment: ‘It

63. *Foundations*, supra note 2 at 40f.
shows us how men were helplessly looking about for some general principles of Jurisprudence which would deliver them from their practical and intellectual difficulties.66

The treatise written in the 1180s and which goes under Glanvill's name is a very practical work based on what was happening in the royal courts. 'The author is writing of matters which are in regular use and within his own experience. If there are cases which the King's court is not prepared to deal with, he says so. He is under no temptation to fill the gaps with matter borrowed from Salian or Ripuarian Franks or, for the matter of that, from Roman law. By the same token, when he does borrow from the civil law, this is a very much more significant circumstance than the use of a few maxims by the author of the Leis Willelme.'67 Some use is made of Roman terminology though not always with the Roman meaning,68 and book ten which treats of the English equivalents of Roman contracts shows some acquaintance with Roman law. But despite the use of the Roman contractual terms the substantive law looks very different: 'The most striking feature of this book of the treatise is the conflict, if this be not too strong a term, between the form and the substance.'69

Henry of Bracton was a royal judge who died in 1268. The treatise, De Legibus et Consuetudinibus Anglie, which goes under his name shows very considerable knowledge both of Roman law directly and of the learned continental jurists, notably Azo.70 The arrangement of the work also owes much to the structure of Justinian's Institutes. What is not so easily determined is the extent to which Roman law had influenced the substance of English law. As Barton puts it, at times Bracton Romanises but at other times he is clearly anglicizing. How far Bracton accurately depicts the common law and the extent to which English rules in resembling Roman rules betray their origin are questions too difficult to be resolved here. What concerns us more is the likelihood that, because of the Romanised appearance of the De Legibus, if Bracton's treatise had been influential and if he had been followed on the Bench by others trained as he was, England would have undergone a Reception. But as Milsom noted, it was the Brevia Placitata that was to prevail.

Yet, to contrast England with continental states of the period, one should not ignore the success of the unromanised works such as the Brevia Placitata. After all, not so long before—certainly before 1235, probably between 1221 and 1224—had been written the enormously successful

66. History, supra note 64 at 1, 102; quoted by Barton, Roman Law, supra note 65 at 8.
67. Ibid. at 9.
69. Barton, Roman Law, supra note 65 at 11.
70. See above all, ibid. at 13ff.
Sachsenspiegel.\textsuperscript{71} Originally in Latin it was rapidly turned into low German, probably East Saxon, by its author, Eike van Repgow. It was in turn translated into other German dialects, Dutch and back into Latin. Of its two parts, over 200 manuscripts survive of the ‘Landrecht’ and nearly 150 of the ‘Lehnrecht’. Its influence was great well beyond the confines of the area whose customary law it described. And, in France too, even much later than Bracton, books such as the \textit{Très Ancienne Coutume de Bretagne} of 1315 were to prove influential. The clue to the different development that is taking place and will continue lies not in the use made of Roman law in these works. In England, France and Germany alike, there were books very much influenced by Roman law and books which were very much less so. Both existed side-by-side. But whereas books such as the \textit{Sachsenspiegel} and French works on customary law set out the substantive law, the English works such as the \textit{Brevia Placitata},\textsuperscript{72} \textit{Novae Narrationes},\textsuperscript{73} \textit{Placita Coronae},\textsuperscript{74} and the \textit{Court Baron}\textsuperscript{75} are formularies setting out writs and pleadings. The successful English works are geared very narrowly to aiding the practising lawyer to bring the suit in the proper formal manner. This was to be the direction for English law in the succeeding centuries. And here Roman law had no role to play.

Bracton may be regarded as the high-water mark of the influence of Roman law in medieval England. The attitude to Roman law in medieval England, as in Scotland and continental Europe, corresponded to that described by the present writer in a general account of the Reception of Roman law: customary systems of law are very much disposed to borrow from a mature, detailed system in writing even when the latter is constructed on very different lines and was created for very different social, economic and political conditions. But the borrowings may be very slow and piecemeal. The reasons are not hard to find.

What is in issue here, in fact, is not that England did not borrow from Roman law when others were doing so—it also did—but the question is why England alone did not come to accept the \textit{Corpus Juris Civilis} as authoritative. We have already seen part of the answer. Lands prominent in the Reception had particular reasons for accepting the \textit{Corpus Juris} as authoritative. And for a long time England was not so different from other territories. But more must be said to explain why, in the result, England was the odd-man-out.

Before we do that, though, a word must be said about Roman law in later

\textsuperscript{71} For this see in English, A. Watson, \textit{Sources of Law}, supra note 57 at 28ff.


\textsuperscript{75} F. W. Maitland, ed., \textit{Court Baron}, Selden Society, 4, (London, 1890).
England. In the sixteenth and seventeenth centuries there was an upsurge of the influence of Roman law, particularly in substance. It is this which lends some credence to the paragraph of Craig set out at the beginning of this section. But after Bracton there was never a danger of a Reception in the sense of the *Corpus Juris Civilis* becoming authoritative.76

A fourth point to be emphasized is that, before the *Corpus Juris Civilis* is treated as the law of the land or as directly and highly persuasive, Roman law is influential and infiltrates other systems by filling the gaps. The greater the gaps the greater the potential for Roman law influence. As Craig (1.2.14) puts it: ‘In Scotland there is the greatest scarcity of written laws and therefore, naturally, in most matters we follow the Civil Law. Not because we are learned or well-grounded in it, because to this point no one—so far as I am aware—were professors of law who taught law publicly (which is of course to be regretted), but almost against our will, since we are deprived of our own written law we are led there by the sole beneficence of nature or the worth of that law.’

Here we are, of course, speaking of private law, the sphere in which lay the achievement of the Romans. But English private law developed precociously. Statutes were very important for private law from an early date. Thus, Henry II (1154–89) can be characterized as ‘a great legislator’77 and Edward I (1272–1307) was responsible for some of the most important laws in English history.78 Maitland, indeed, goes so far as to say: ‘The vigorous legislation of the time has an important consequence in checking the growth of unenacted law.’79 This consequence, he believes is revealed both in the check to the further advance of Roman law which had been growing in importance under Henry III (1216–72) and in hampering further development by case law. And early there was developed a system of King’s courts, applying the same law through the country. National courts, as distinct from local courts, apply to far more people: there are more cases and relevant law is more readily established. And, as we shall see, precedent was regarded early on as important in England for fixing the law.

The mention of the King’s courts brings us to a fifth point, the writ system which has Anglo-Saxon roots.80 The need to have a writ to bring the cause before the court meant that high priority was centered on that and on proof,


78. Ibid. at 18ff.

79. Ibid. at 21.

rather than on systematic development of legal rules. S. F. C. Milsom goes so far as to claim that from, say, the thirteenth to the early sixteenth century the lawyers did not see the law as a system of substantive rules at all, and he contrasts them with Bracton and his kind who ‘were accustomed to think in terms of substantive law’. But Bracton’s was the last English law-book for centuries to be written with such terms in mind. With such a framework the infiltration of Roman law would be no easy matter. It could either take the citadel by storm—which did not happen—or leave the field.

And the emphasis in England on what happened in court led early to the high practical standing of precedent. Craig (1.7.20) says: ‘If nothing is settled by the principles of the common law or by custom (general or manorial) then in similar cases the authority of previous decisions, especially of the King’s Bench, prevails. And now disputes are settled primarily in this way if it is shown that it was previously decided otherwise. Nor is there any defense to this form of judging unless the case can be distinguished for it very often happens that the whole situation of fact for the decision is changed by minute circumstances of fact. Hence come the many volumes of cases (for so the situations of fact are called) in Plowden, in Dyer and others.’ And he demonstrates the rather lower value of precedent in Scotland (1.8.13,14,15). Yet Scotland, along with England, were the main countries where institutional writers cited precedent as authority for propositions of law. This is as true of Lord Stair, Institutions of the Law of Scotland (first edition 1681) as of John Cowell, Institutiones Iuris Anglicani (first edition 1605). But even much earlier, Bracton’s De Legibus et Consuetudinibus Angliae of the thirteenth century (now thought to have been written in the 1220s and 1230s and brought up to date by Bracton in the 1240s and 1250s) contains about 500 references to decided cases. Case law was an important source of legal growth in the reign of Henry III (1216–72) and the first Year Books, the earliest English law reports, date from 1292.

The use of precedent also militates against the infiltration of Roman law. First, there are fewer gaps to be filled. Secondly, gaps can be filled by analogy with previous cases. Thirdly, where judges are given the high social status of lawmakers—even if they talk as if their role was that of law-finders—they will bolster their own position and prestige by relying on the authority of other judges rather than looking elsewhere for authority.

One final factor which is by no means the least important and which perhaps deserves pride of place for England being different from the other states of western Europe in its attitude to Roman law is feudalism and the different standing of feudal law in England.

To begin with, feudalism by its very nature ought to operate as a powerful

81. Foundations, supra note 2 at 43f.

82. But elsewhere, too, an institutional writer might refer to precedent. A notable example from southern France is Claude Serres, Les Institutions du droit français suivant l’ordre de celles de Justinien (Montpellier, 1753).

83. See, e.g., Baker, Introduction, supra note 76 at 101.
barrier to the encroachment of Roman law. The law flowing from feudalism affects the most powerful interests. Landholding is central to the feudal system, and land was the basis of wealth in the Middle Ages. The feudal relationship was primarily knightly and military. Wealth and high social status go together in ensuring that legal rules deriving from feudalism will have a major impact on law in general. But the concepts and categories that flow naturally from feudalism into feudal law cut across those of Roman law to such an extent that they make Roman law seem irrelevant within their sphere of influence. Thus, firstly, by its very nature feudal law makes no distinction between public and private law, partaking of both, whereas the foremost distinction in Roman law is into public and private, with the stress almost entirely on the latter. As Maitland puts it, ‘we may describe “feudalism” as a state of society in which all or a great part of public rights and duties are inextricably linked with the tenure of land, in which the whole governmental system—financial, military, judicial—is part of the law of private property’.

Secondly, for the law of persons in feudal law the most important division is into lord and vassal, a division that has no place in Roman law. Thirdly and more importantly, fealty, a central element in the feudal system, is an obligation or one side of an obligation or partly an obligation. But it does not fit neatly into Roman notions: looked at from a Romanist point of view it is in some sense a contract but it has very different effects from contract. Moreover, the other contracts which are so familiar from Roman law have no role to play in feudal law. Fourthly, Roman law, especially as set out in the Corpus Juris Civilis, made scarcely any distinction between land and moveable property. But for feudal law, only land was usually relevant. Moreover, the feudal grant of land in England was for an estate in the land, a time in the land, and not of ownership. The whole doctrine of estates as it was to develop was unknown to Roman law. In addition the acquisition of an estate involved a formal ceremony, of fealty, and such ceremonies were unknown to the Corpus Juris. Fifthly, the nature of the feudal grant had an automatic impact on the law of succession. Since originally an estate in land ended on death there would be no feudal succession to land. Gradually, it came to be expected that the lord would renew. Still, this would mean in the case of land that there would be no testate succession: the lord would not want the vassal to have a right of choosing the next vassal. Also it would mean that primogeniture would be favored: the lord would not want the vassal’s obligations to him to be divided among a number of people. And there would be a preference for males: the main obligation of the vassal was military service which could not be performed by a female. These characteristics are very different from those of Roman law, where testacy was freely permitted, where no distinctions were drawn for inheritance between land and movables, where there was no primogeniture and where for the most part male and female were equally entitled to inherit, both under a will and on intestacy. Thus, in

84. Maitland, History, supra note 77 at 23f.
all branches of substantive law, feudal law presented a very different face from Roman law. In addition, in all feudal relations the superior retained the power of jurisdiction over his vassal. The more important feudal law was in a society, the greater the obstacle it presented against the Corpus Juris becoming authoritative.

But feudal law was bound to have a greater impact in England than elsewhere. On the one hand, it was only in England that land holding involved the doctrine of estates that resulted in so much convoluted legal reasoning and learning. Such was the overwhelming importance of this subject that it is scarcely surprising that Milsom can say that ‘Littleton could write his Tenures, which can properly be regarded as a text-book of land law, nearly four centuries before text-books were written on other branches of the law’. But such massive emphasis on a topic where Roman law was irrelevant would reduce the general authority of Roman law. And borrowing is often from a system which has achieved general respect. Moreover, pride in one native English achievement would increase the native self-confidence to go it alone in other fields of law. On the other hand, England, with Normandy and Brittany following hard upon, was the only territory where all of the land was held in feudal tenure. Where land is allodial, or not in feudal tenure, non-feudal principles will determine ownership, transfer, rights of succession and so on. Another system will have to apply, and Roman law is an obvious resource. On this argument it is not surprising that at the time of the French Revolution, Normandy and Brittany had received relatively little of Roman law. And it is consistent with this argument that Friesland whose law was notoriously more Romanized than the other United Provinces had relatively more of its land held allodially than had the others.

In a very different way feudal law would be more of a barrier to the penetration of Roman law in England than elsewhere. The Libri Feudorum are the greatest monuments of the feudal law and seem to have been composed mainly in Milan in the first half of the twelfth century. A second version contained constitutions of the Emperor Frederick I, dating from 1154 and 1158. Hugolinus, the Bolognese jurist, completed a third version and the books acquired a semi-official status when he inserted it in the volumen parvum which contained the Institutes and the Authenticum (a version of the Novellae) of the Corpus Juris. In fact it was treated as an appendix to the nine collationes of the Authenticum and hence was even called the tenth, decem collatio. It was glossed like the parts of the Corpus Juris Civilis—that name is later—and the gloss was accepted into the Glossa Ordinaria of Accursius. Its fate and fortune was thus linked with those of the Corpus Juris. It was even taught along with it, and the same celebrated

85. See, e.g., Craig, Jus Feudale, 1.9.3.6.
86. Foundations, supra note 2 at 3f.
87. See, e.g., General Survey of Events, Sources, Persons and Movements in Continental Legal History by various European authors (Boston, 1912) 74 (by C. Calisse).
European scholars like Cuiacius, Baldus, Julius Clarus, Hotman, wrote on both.

But this linking of the *Libri Feudorum* with the *Corpus Juris Civilis* would restrict the impact of feudalism to feudal law. To begin with, the elements of the *Corpus Juris*, in particular the *Digest* and *Code*, had such a high status and were so detailed that the *Libri Feudorum* could scarcely encroach. Then again, the *Libri Feudorum* were much less detailed, and treating them with the *Corpus Juris* would result in the gaps, inconsistencies, ambiguities in the *Libri Feudorum* being resolved or filled by the *Corpus Juris*. Craig, 1.9.36 puts it this way in discussing the nine characteristic qualities of feus (1.9.36): ‘Third, any point in relation to a feu which is not expressly settled in the *Libri Feudorum* ought to be decided by the *Jus Civile* or the law of the Romans. Feudal decisions, on the other hand, have no relevance except in relation to feudal questions.’

Again, and even more significantly, with this continental attitude towards the *Libri Feudorum* and feudal law, when feudalism as a social system declined, as it began to do early with the decline of knight service, there would be no obstacle from feudal law to using the rules and categories of the *Corpus Juris* to develop the local law.

But the *Libri Feudorum* were used in this way only in continental Europe and in Scotland: not in England. There is no trace of their ever having influence on English law, and no sign of any knowledge of them in English works such as Littleton on *Tenures*. But where the *Libri Feudorum*, restricted and reined in by the *Corpus Juris*, were not used, there were not these obstacles to feudal law dominating the legal scene and hindering legal growth on other principles, and to remaining dominant long after feudalism itself had declined.

As we have seen, there is a strong tendency for legal rules, structures and concepts to continue in life long after the social structure has died. So it was with feudal law in England after the death of feudalism. And feudal law was the dominant part of English law, and its ideas were very different from those of Roman law.

Feudal law was thus a major factor in preventing the *Corpus Juris* from becoming authoritative in England while being much less of an obstacle elsewhere. I am tempted by a paradox: it was above all the failure to receive the *Corpus Juris Civilis* as authoritative in England that led to the failure in England to accept the *Corpus Juris Civilis* as authoritative. The steps in the paradox are: failure to receive the *Corpus Juris Civilis* as authoritative involves the failure to receive the *Libri Feudorum* as authoritative: at a certain stage in Western European history feudalism, and with it the legal rules relating to the feudal system, is very potent for development; rules of feudal law cut across the notions of Roman law; for the rest of Western Europe the most important ideas of feudal law are contained in the *Libri Feudorum*; where the *Corpus Juris Civilis* is treated as authoritative, the *Libri Feudorum* are appended to it and treated as subsidiary; it is this relationship which keeps feudal law to its proper sphere, and causes its decline when feudalism declines.
In the fourth chapter of *The Evolution of Law* I tried to show how the themes of the three preceding chapters—the importance of the legal tradition itself for legal development, the nature of customary law and the Reception of Roman law—come together in Western legal history, choosing as an example a single Scottish case of the seventeenth century in which the legal discussion centered on the corresponding provisions of Roman law although they were not economically appropriate and were not a necessary part of Scots law. Judging is rooted in the legal tradition to the neglect of local societal conditions. No legal case, I maintained, can be understood as law in action if one neglects the legal tradition that sets the parameters of debate. The tradition is not noticed by the actors who live it, and they are unaware of its impact. They know not what they do.

Elsewhere I have given examples from other systems where to outsiders judges acted in an extreme way and obtained inappropriate results, but where the judges thought of themselves as good judges acting out the rules of the judging game according to their own particular tradition.\(^88\)

Naturally enough, courts such as those in Scotland and South Africa, do not always show themselves to be unaware of changed circumstances when they reason from Roman or Roman-Dutch law. But even then the legal culture may also emerge clearly. I should like to cite an example from Scotland, *Halkerston v. Wedderburn* of 1781:

Mr. Halkerston, thinking his garden at Inveresk injured by a row of elms, the branches of which hung over it from the garden of Mr. Wedderburn, applied to the Sheriff for redress. After various steps of procedure, the cause was moved to the Court of Session by advocation; when the following abstract question came to be considered, viz. Whether a person is bound to allow his property to be overshadowed by the trees belonging to a conterminous heritor?

**Pleaded** for Mr. Wedderburn; The climate of Scotland is such as has induced the legislature to encourage the planting of forest-trees in hedge rows, for the sake of shelter; and, for some time, it was even imposed as a duty upon every proprietor; act 1661, cap. 41. This, however, would have been an elusory enactment, if the common law permitted a conterminous heritor to lop such trees, whenever their branches extended beyond the line of march. By the common law, an heritor may plant so near the march, *in praedios rustici*, that the trees will protrude their branches into the air, over the adjacent ground; nor is there any thing in that law, which authorises the conterminous heritor to lop off such branches, unless he can qualify a material damage arising from their protrusion.

In England, as well as in Scotland, the highways are understood to be vested in the King, for behoof of the public; yet in both kingdoms, statutes have been found necessary to authorize Justices of the Peace, Way-wardens, &c. to cause prune trees hanging over the road; which could not have been the case, had the common law allowed any such power to a conterminous heritor.

In like manner, though the Roman law allowed the proprietors of a *praedium rusticum* to prune such trees to the height of fifteen feet, yet this was not a right inherent in him upon the principles of common law, but was derived from the laws of the twelve tables.

and confirmed by an edict of the Praetor; L.I.§7, 8, 9. D. De arb. caed. And this very limitation of the right shews, that the Romans did not think the protrusion of branches in itself any encroachment upon the right of property; except so far as it obstructed or impeded the immediate exercise of it. They considered the air as a res communis, incapable of appropriation; and thought, that no encroachment upon it afforded a proper ground of challenge.

Answered for Mr. Halkerston; It is understood to be a general rule of law, that no person is entitled to encroach upon the property of another, unless he can show a right of servitude to that effect. One may dig a trench upon his own property, though the effect of it may be, to cut the roots, and destroy the whole of his neighbour’s trees. He may raise his wall to any given height; and, in doing so, he may cut down every branch that stands in his way. While a branch from his neighbour’s tree does him no harm, he will allow it to remain, upon the same principle of good neighborhood, that he allows him to hunt over his fields, or to angle in his stream. But the moment this branch does him a real or an imaginary injury; whenever, in short, he wishes to remove it, the law entitles him to do so, in the same manner, and upon the same principles, that it entitles him to protect his property from any other kind of encroachment.

The regulations for the encouragement of planting and inclosing, introduced by the act 1661, can never apply, with any propriety, to two contiguous gardens in the village of Inveresk; and it is not very obvious how the powers given by statute to the public officers entrusted with the care of high-ways, at all derogate from the private right of parties to demand what they are empowered to do.

Neither does the argument on the other side derive any support from the Roman law. The edict referred to, related only to praedia rustica; but, where a similar encroachment was made upon a praedium urbanum, as seems more properly to be the case here, another edict of the Praetor authorised the whole tree to be cut down; L. I. § 2. D. De arb. caed. At any rate, it is nothing to us, in what manner the Romans chose to limit the natural right now contended for. Under an Italian sun, it might probably be thought, that there could not be too much shade; but the same idea can never be entertained in a northern climate; and, accordingly, the learned Groenwegen, in his treatise, De legibus abrogatis et inusitatis, in Hollandia vicinisque regionibus, says expressly, 'Si arbor fundo, vel aedibus alienis impendeat, nostris et Gallorum moribus, non totam arborem a stirpe exscindere sed id quod super excurrit in totum adimere licet; tit. De arb. caed.'

The Court had no doubt upon the principle; and, therefore, adhered to the Lord Ordinary’s interlocutor, 'Remitting the cause to the Sheriff, with this instruction, that he find Mr. Wedderburn is bound to prune his trees in such a manner, as they may not hang over the mutual wall, and thereby be of prejudice to Mr. Halkerston’s fruit and garden.'

As is usual for the time the advocates’ arguments are given much more prominence than the judges’ reasoning. For the defender maintaining his right to have his trees overhang and overshadow the pursuer’s garden it was argued that there was no obstacle thereto at Roman common law; though it was conceded that by statute, namely the XII Tables, the aggrieved neighbor could prune such trees up to fifteen feet from the ground, and that this was confirmed by edict. This distinction between common law and statute is based on the notion that statute is an encroachment and ought to be interpreted strictly. The notion itself came into Scots law from England and was unknown to the Romans. The argument is a blending of the two foreign elements in Scots law: the scope of a Roman rule should better be

89. Halkerston v. Wedderburn (1781) M.10495.
determined by Roman principles, not by much later English ideas. In fact
the XII Tables, the codification of the fifth century B.C., was regarded as
the foundation of all Roman law. Thus, the defender wants to give as
restricted a scope as possible to the Roman rules, but never does he argue
that they ought to be treated as irrelevant. Yet Roman law was not the law
in Scotland, though it could be treated as of great authority.

The argument for the pursuer is of more interest for us. First it is claimed
that in fact under the edict, the overhung neighbor had full right to cut down
the offending tree. Then comes the argument from changed circumstances.
Even if, it is suggested, the Romans did restrict the right to prune or cut
down overhanging trees, that is of no relevance for Scotland: 'Under an
Italian sun, it might probably be thought, that there could not be too much
shade; but the same idea can never be entertained in a northern climate.' Yet
the presumption that Roman law applies has to be rebutted by legal authority
and since there was none for Scotland the pursuer looks to Holland and
France: 'If a tree overhangs another's land or buildings, then, by our and
French custom it is not permitted to cut out the whole tree from the root, but
to remove completely what overhangs.' This quotation he takes very
significantly from Groenewegen, De legibus abrogatis et inusitatis, in
Hollandia vicinisque regionibus, (1649) a work which as the title shows is
dedicated to setting out the Roman rules which were not accepted or were
abrogated in Holland and neighboring territories.

V

The conclusions of this paper remain those that I drew in chapter five
of The Evolution of Law. Legal change comes about through the culture of
the legal elite, the law makers, and it is above all determined by that
culture.

But law is not the culture of the legal elite alone and it is not the only
culture of the legal elite. As to the first of these, law is also the cultural
heritage of other lawyers and of society at large. But to effect change, other
lawyers and other members of society have to operate on and through the
legal elite, whereas the elite can initiate change on its own.

As to the second of these, the law-making elite also partakes of the
general culture of society. Thus, where the society as a whole or its ruling
elite is cosmopolitan or innovative, the law making elite will tend to be

90. See e.g. D. 1.2.2.6; Cicero, de oratore, 1.44.195.
91. On the paucity of Scottish authority see J. Rankine, The Law of Land-ownership in
92. For a South African case in which changed circumstances—this time of law—were
taken into account see Simons and Others v. Board of Executors 1915 C.P.D. 479.
93. See already A. Watson, 'Legal Change: Sources of Law and Legal Culture', University
cosmopolitan or innovative. The general culture has many strands and many roots, resulting from geography, history, economics, politics, religion and so on and it is as part of the general culture that these factors influence law making. But what has to be stressed is, as we have seen, the very powerful role that the legal culture itself has on law making. The law-making elite comes to regard law as existing in large measure in its own right, as an end in itself, as having its being distinct from other institutions of society.

Legal change also comes about by organized pressure from outside of the legal elite. But when it does, the emerging law is still given its contours by the law-making elite.94

Two restrictions on all of the above should be set forth right at the end of this paper so that their importance should not be ignored. The first is that the argument here is not that the law-making elite is never aware of, and fully responsive to, wider societal conditions. It may well be, and the legal rules on a particular topic may well be entirely satisfactory for those making use of them. It may be for instance that at times the business community will have such close contacts with some part of the legal elite in the shape of academics whom it hires as consultants that their concerns are very much the same, and a view of law is proffered which is in harmony with commercial interests. Even then, of course, in a developed system that view of law put forward by academics will prevail only if it is also adopted by judges and the legislature who, in their turn, are also of course blinkered by their own part of the tradition. My point is only that it is the legal elite who shape the legal rules, that they are fixed within their cultural tradition, and that to a very considerable extent the rules often do not meet the needs and desires of those who use them and that that is not a matter of immediate concern to the legal elite. No better illustration of this can be found than in English land law which for centuries until 1925 (at the earliest) was very unsatisfactory for land owners and was beneficial to no one (except practising lawyers). Those who had no property had no concern with the rules, those who had were also those who as judges and legislators were in a position to change the rules. But (in Oliver Cromwell’s phrase) the ‘tortuous and ungodly jumble’ of English land law was to prevail for centuries.95 A glance at the confused and unsatisfactory state of the law (for those using it) in the contemporary U.S. on copyright infringement with regard to the fair use of factual works96 should point a warning to those who believe American law is in harmony with the needs of law users.

The second restriction ought not to need mentioning; I am concerned with the development of the legal rules themselves, not with how the legal rules

95. For the argument see A. Watson, Society and Legal Change (Edinburgh, 1977) 47ff.
rules operate in society. For reasons at least partly connected with the wider society, the same legal rule may operate to different effect in different societies. The present paper is written on the premise that actual legal rules, as authoritatively set forth, have themselves an impact.97

97. See already Watson, ‘Legal Change’, supra note 95 at 1138f.