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# Book Reviews: Sources of Law, Legal Change and Ambiguity

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SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY. By Alan Watson.† University of Pennsylvania Press, Philadelphia, Pennsylvania. 1984. Pp. 157. \$22.50. Review by Walter A. Rafalko.‡

This book has been written by one of America's most prolific authors on legal history. It presents an overview of the law-making process from historical, comparative, and jurisprudential points of view and culminates in a provocative plan for reforming our law-making system.

This reviewer has been long under the impression that law schools should focus early on jurisprudence, common law history, and comparative law in the curriculum of the law school and not wait until the last year or graduate law school to offer these three courses as electives. Jurisprudence deals with the important questions of when a legal system begins and ends; how it functions; how society deals with rights, duties, obligations, privileges, and immunities; and what should be included and excluded from the legal system. Since our system of jurisprudence is based on the Anglo-American common law tradition, a study of the development of the common law helps us to understand the function and bases of our own judicial system. Ours is not the only legal system, and we may obtain a different perspective by studying the features of the civil law country systems through a course in comparative law. The three dimensions of jurisprudence, common law, and comparative law offer vantage points for understanding and improving our current legal system. This book takes this three-dimensional approach.

After an introduction, the book is divided into six chapters. The Introduction points out that the term "sources of law" is notoriously ambiguous and contradictory. In Western societies, legal sources included custom, legislation, juristic opinion, and judicial precedent. In relying on these four bases of legal legitimacy, societies have, according to the author, produced laws unresponsive to social, economic, and political factors.<sup>1</sup>

The author uses the term "sources of law" interchangeably with "methods of law-making." The starting point for his inquiry into sources of law is Roman law and Roman jurists. Chapter One is entitled "Sources of Law in Ancient Rome." In early Rome, judicial actions and the science of interpreting the laws were in the hands of the College of Pontiffs, presided over by a patrician,<sup>2</sup> the *pontifex maximus* in 450 B.C.

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1. Some areas where the law was unresponsive, according to the author, included sovereign immunity, spousal immunity, consumer fraud, women's rights to contract, juveniles' rights to fair hearings, and attorneys' rights to advertise. Change came eventually but much too slowly.
2. The people of Rome at the time of the kingdom (753-509 B.C.) consisted of: (a) patricians — the nobility, who were eligible to occupy the country's highest offices; (b) plebians — the poorer non-privileged citizens; (c) clients — those attached to a patrician house; and, (d) slaves — captives brought to Rome by its Army.

It was not until the *lex Ogulnia* of 300 B.C., that plebians could enter the College of Pontiffs, thus ending the dominant position of the College of Pontiffs, whose exclusive membership consisted of the nobility.

During the Empire, juristic opinion began to flourish because of *ius respondendi*<sup>3</sup> and the Law of Citations (426 A.D.). It was during the Principate of Augustus (27 B.C. - 14 A.D.) that the *ius respondendi* was instituted, giving leaders of the state the right to deliver opinions publicly under the authority and seal of the Principate. Under the Valentinian Law of Citations of 426 A.D., the great writings of Papinian, Paul, Gaius, Ulpian, Modestinus, and others were allowed to be cited as juristic authority for early Roman law.

Statutes were an important source of law throughout the Republic (509 - 27 B.C.) and the reign of Augustus (27 B.C. - 14 A.D.), but they diminished in importance thereafter. The two most important statutes were the XII Tables of 451 B.C., which formed the foundation of Roman Law, and the *lex Aquilia* of 287 B.C., which gave rise to actions for injuries done to property and persons under the statute.

With the arrival of the Empire (27 B.C. - 565 A.D.), the *constitutiones* of the emperor were what he determined by *decreta*,<sup>4</sup> *edicta*,<sup>5</sup> *mandata*,<sup>6</sup> and *rescripta*<sup>7</sup> (*epistulae*<sup>8</sup> and *subscriptiones*<sup>9</sup>), and all had the effect of imperial legislation. *Orationes*<sup>10</sup> were speeches introduced into the Senate in the Emperor's name; they also acquired the force of law. Thus, imperial constitutions allowed the emperor to issue general laws. Judges were to follow what the public statutes prescribed, as interpreted by the juristic commentators. However, it was difficult for people to know what the law was. The lack of publicity of the *constitutiones* was solved, to some extent, by the publication of two unofficial collections of rescripts: the *Codex Gregorianus* (291 A.D.) and the *Codex Hermogenianus* (295 A.D.). The general laws (*leges generales*) were published in the *Codex Theodosianus* (438 A.D.) and in Justinian's *Codex* (529 & 534 A.D.), which included *subscriptiones* as well as general laws. Two other sources of Roman law were the *senatus consulta*<sup>11</sup> and custom.<sup>12</sup> Custom

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3. Translated as "the right of replying to questions of law."

4. *Decreta* were judicial decisions given by the emperor when he acted as a judge.

5. *Edicta* were proclamations issued by senior magistrates and the emperor.

6. *Mandata* were commands or instructions to subordinate officials.

7. *Rescripta* were written answers by the emperor on points of law to those who consulted with him.

8. *Epistulae* were the answers to questions submitted by inferior magistrates.

9. *Subscriptiones* were answers to questions submitted by private citizens.

10. Speeches made in the earlier period of the Empire (27 B.C. - 565 A.D.).

11. *Senatus consulta* were decrees of the Senate. By the end of the third century, the Senate had become Rome's policy-making executive, and the *senatus consultum* had the force of law during the period of the Republic (509 B.C. - 27 B.C.).

12. Custom is law established by long usage and represents acceptance by the authorities of what the people do as having the force of law. It is law accepted by consent of our ancestors.

was not, however, of such importance in Roman Law as it was in the later French legal tradition.

Chapter Two, entitled "Europe Before the Reception: The Example of Germany and Northern France," traces the sources of law as they existed historically from the thirteenth through the fifteenth centuries in Germany and northern France, before the reception of Roman law into Europe. It shows how official and unofficial customary laws ultimately merged, to greater or lesser extent, with Roman law. Justinian's *Corpus Juris Civilis* was promulgated in 529 A.D., but disappeared from Europe until the end of the tenth century. In Europe, this body of Roman law was slow to be received and accepted. In Germany, its influence was not felt until the fifteenth century. In northern France, because of the existing customary law (*pays de droit coutumier*), the Reception occurred slowly, though in the south, which already had a body of written law,<sup>13</sup> Roman law was much earlier accepted as customary law.

In Germany, the transplanting of law in this period was reflected in the *Sachsenspiegel*,<sup>14</sup> a law book that gave, in two parts,<sup>15</sup> an unofficial account of customary law. The weakness of the *Sachsenspiegel* was that it gave the law of only one region, Saxony. To compensate, two additional unofficial works were published, the *Deutschenspiegel* and the *Schwabenspiegel*. Although the goal of these books was to state a common German law for the entire country, the books succeeded mainly in perpetuating Saxon law only.

There were two other major sources of German law. A town might adopt or accept the laws of another town's customary law, and this adoption or acceptance was known as *Schoffen*. The *Schoffen* became a body of law finders. If a finding or judgment of theirs was not attacked at one of three annual meetings of all the inhabitants, it was treated as approved. The *Schoffen* also gave responses (*Oberhofe*) to legal questions posed by outside cities. The *Weistumer*<sup>16</sup> was another systematic attempt to establish customary law. It did so through a formal declaration of what the law should be. This declaration was made by the community, summoned especially for this purpose, or by a community representative in reply to a legal question. Its end product could be regarded as a code of all the legal rules for an individual village.

In Germany, customary law disappeared with the advent of the Reception. In France, however, customary law flourished in spite of its disadvantages. At first, individuals prepared unofficial compilations for this locality. Often entitled *Coutumes* or *Coutumiers*, they were a collection of customs, unwritten laws, and forms of procedure. Two unofficial works of special importance in this juridical period were the *Tres Ancien*

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13. *Pays de droit écrit*, translated as "territories of written law."

14. Translated as "Saxon Mirror."

15. The *Landrecht*, or "territorial law," including private law, criminal law, and constitutional law, and the *Lehnrecht*, translated as "feudal law."

16. Translated as "superior court precedent."

*Coutumier de Normandie* (1218-1223) and the *Grand Coutumier de Normandie* or *Grand Coutumier* (1254-1258). Until custom was officially written down, it could be developed in three ways: by contract, by court decisions, and by the writings of jurists.

Chapter Three, "Reception and Partial Reception: Italy, France and Scotland," focuses on seventeenth century Italy. Justinian's *Corpus Juris Civilis* and its interpretations were readily accepted and expounded upon by Irnerius and the Bologna law school in Italy. The main sources of Italian law after the Reception were Roman texts, juristic writings, judicial precedent, statute and custom. The author quotes extensively from Giovanni Battista De Luca's *Il Dottor Volgare* (1673), showing that, apart from statute or local custom and a line of decisions from the local supreme court, there was no established ranking of legal sources. During the seventeenth century, Italy developed the *ius commune*,<sup>17</sup> divided into three categories: the five traditional civil law volumes, the sources of canon law, and the interpretations of legal writers. In Germany and the Netherlands, the situation was the same as in Italy, and Roman law was accepted by the courts.

In France, after the fifteenth century, the redaction of the *coutumes* created a fortress against Roman law in the "pays de droit coutumier," until the French *code civil*. The problem in France was to find the law when local custom failed. The author describes the three methods that Guy Coquille proposed in his commentary on the *Coutume de Nivernais*. The first method was to have recourse to Roman law. The second method was to use the custom of other districts. The third method was to use the reformed *Coutume de Paris* of 1580.

In Scotland, there was only a partial reception of Roman law. Scottish law was developed by Lord Stair in his *Institutions of the Law of Scotland* (1681). Lord Stair divided the sources of law into two groups: those that applied to society generally and those that applied to a particular society. Lord Stair enumerated for Scotland custom and statute. Custom was derived mainly from equity and from Roman, canonical, and feudal law when a custom was not formed. Statutory law, he stated, was created by the Acts of Parliament but was inferior to the ancient law because the statute was more likely to fall into desuetude. Judicial decisions, however, could form a custom and then become binding in future cases. Development of the law was much in the hands of the judges to determine the existence of custom.

Chapter Four, "English Law in the Modern Age," covers the period in England, from the mid-eighteenth century to the present, known as "The Age of Statute Law." The subject matter of this chapter is statutory, judicial decisional, and customary law. Customary law, in the sense of local custom, was a minor source of law. For custom to be accepted as law, it had to be so old that "the memory of man runneth not

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17. Translated as "common law."

to the contrary" — i.e., back to the reign of Richard I (1189). The advantages and defects of statutory law are clearly set forth.<sup>18</sup> In spite of law making by legislation in this period, England is best known for law making by its judicial courts.<sup>19</sup> In fact, the doctrine of *stare decisis*<sup>20</sup> was firmly entrenched. In 1966, however, the House of Lords stated that in the future it would no longer be bound to follow its own decisions.<sup>21</sup> The author lists three advantages for developing law by this kind of judicial decision-making. The first advantage is that the law develops from social and legal problems and is determined by a judge aware of the realities of life. The second advantage is that law developed by precedent has more flexibility than a statute-based system. The third advantage is that judicial decisions build upon precedent and make the law more certain once the *ratio decedendi*<sup>22</sup> is discovered.

In Chapter Five, "Legal Development and Confusion of Sources," the author points to an undercurrent of dissatisfaction with the sources of law, and that reform resulted in codification. Codification, however, did not result in clarity, completeness, or lack of ambiguity. The author illustrates the confusion by choosing an example from the law of delects (torts) from article 1384 of the French *Code civil* of 1804 and an example of problems with keeping the Chilean *Codigo civil* of 1857 up to date after codification.<sup>23</sup> The author indicates that it should not be difficult to devise a system in which the law would be less ambiguous, kept up to date, and still be subjected to judicial, juristic, and comparative criticism that could lead to further improvement.

In Chapter Six, labeled "Two-Tier Law," the author outlines his plan of law-making that would be more satisfactory than those in current use in the Western world. This chapter is the apex of the book, because the author sets forth his scheme of two-tier law and challenges law reformers to devise a better model for improving sources of law.

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18. The advantages of statutory law are many: a statute can set out a branch of law clearly and systematically; drastic reforms can be made; innovations can be introduced to educate the public; and defects once uncovered can be speedily remedied.

A. WATSON, SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY 77-78 (1984).

19. See R. WALKER & M. WALKER, THE ENGLISH LEGAL SYSTEM 131-37 (2d ed. 1970).

20. Translated as "to stand by decided cases."

21. Note, 3 ALL E.R. 77 (1966).

22. Translated as "the reason for the decision."

23. Article 1384 of the *Code civil* reads: "One is responsible not only for the injury one has caused by one's own act but also for that which has been caused by the act of persons for whom one must be responsible or for things that one has under one's care." A. WATSON, SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY 98 (1984). The author lists nine possible interpretations of article 1384 on the issue of liabilities for things under one's care, involving fault, strict liability, and acts of God, whether interpreted by the appeals court or by the commentators. *Id.* at 98-99. The Chilean *Codigo civil* came into effect in 1857 as the most advanced, impressive, and modern of all civil codes. However, by 1900, the authorities were stressing the need for recodification and methods to keep the law up to date after recodification.

The author's two-tiered system would establish first-rank law similar in structure to a modern code of private and commercial law combined, and second-rank law consisting of commentaries on the codes that have the force of law. His proposal would do away with judicial decisions as legal precedents and scholarly commentaries as sources of law. He would create a specially appointed interpretation committee of the legislature to make the second-rank law and to keep it (the commentaries) and the first-rank law (codes and statutes) up to date. The first-rank law could be published every year and the second-rank law every four years and approved by the legislature. Any apparent gaps in first-rank law would be reported to the legislature and gaps in the second-rank law to the appropriate interpretative committees by judges rendering judicial opinions. In the area of public law — constitutional and administrative law — the author would create a public law interpretative committee different from the membership of the private law interpretative committee. He proposes a separate committee because of the special interest the legislators have in these public areas and their unwillingness to delegate these areas to a private law interpretative committee.

The author outlines the appropriate forms for his first-rank law; the structure of the second-rank law; the relationship between the two ranks; the composition of the interpretative committees; several objections to his law-making; the possible extension of other branches of law; and how his system of tiered law fits into the current civil law tradition.

The author's proposal would reduce the need for judicial decisions as legal precedents, and scholarly commentaries would no longer be regarded as a source of law. The reason for these changes is that front-rank law would be similar in structure and detail to a modern European code, that is, it would be supported by a second-rank law similar in depth and treatment to several of the commentaries on the French *Code civil* or the *Bürgerliches Gesetzbuch*. Previously, court decisions in a civil law country had little value as precedent, while scholarly commentaries had great value. Under the author's proposal, the principal functions of the private interpretative committee would be to provide authoritative interpretations of the front-rank law, review issues that have arisen in the courts, and suggest revisions on their own initiative as a law-proposing body.

Under this proposed system, members of the private interpretative committee would always be subordinate to the legislature, which would remain the primary law-making body. The author envisions three possible ways of electing or appointing members to the private interpretative committee. They could be chosen from among academics, judges, and legal practitioners, and would be selected for their technical ability, drafting skills, legal inventiveness, and social awareness. Five members would constitute a suitable working number.

The author recognizes that there will be objections to the system he has proposed and enumerates five of them:

Objection 1. The law-making power of the legislature will be diminished, and it is the elected representatives of the people who, in a democracy, should make law.

Objection 2. The system of first-rank and second-rank law, even restricted to the fields of private and commercial law, cannot be complete; gaps will exist, and serious difficulties will arise in deciding actual cases.

Objection 3. The system of tiered law, like the famous French "*ecole de l'exegese*," will be remote from what the courts actually do, and it is what courts really do that matters.

Objection 4. The system of tiered law, like that of the Prussian code of 1794, the *Allgemeines Landrecht fur die Preussischen Staaten*, is anti-intellectual, and will stifle judicial and academic inventiveness.

Objection 5. The members of the interpretative committee will sit in an ivory tower, remote from the real world, whose problems they do not understand.

The author points out that tiered law does not have to be restricted to private and commercial law. Criminal and civil procedure is suitable for tiered treatment. Also, substantive criminal law may be framed into a successful code, as exemplified by the numerous criminal codes of continental Europe and Latin America.

The author's view is that his tiered law system could be readily adopted by the civil law system. As a precedent, he cites Justinian's *Corpus Juris Civilis* in the sixth century, A.D. The author's law of the first-rank is very similar to modern civil and commercial codes. Current civil law systems have extensive commentaries that are similar structurally and conceptually to the author's second-rank law. The only major innovation for the civil law systems would be to embrace the interpretative committee and the law of the first and second rank as the ultimate source of law.

Sophisticated lawyers and law students will find this book interesting, informative, and provocative. Initiates and neophytes in the areas of legal history, comparative law, and jurisprudence, however, may find the book arid, boring, and at times difficult to comprehend.

There is one major criticism of the book. Since the main focus of the book is the last chapter on the author's *solution* to the problem — two-tier law — a better title would have been "Sources of Law, Legal Change, Ambiguity, and Solution." This reviewer thinks that too much emphasis was placed on the historical aspects of sources of law in ancient Rome and in Europe before and after the Reception in relation to the last chapter — the author's *solution* to the problem of law-making. In the last chapter, the author could have elucidated on how his two-tiered approach has developed in the United States, e.g., through the experience of the Uniform and Model Acts with their comments and the various American Law Institute Restatements and their comments. How effective have they been? Why do the states have difficulty in adopting them?

Would the two-tier system work in the states, as well as in the civil law countries? How would one resolve the problem between state differences over sovereign unacceptability of the two-tiered system? What would be the effect of the Full Faith and Credit Clause of the U.S. Constitution<sup>24</sup> on state judicial decisions? Had a more extensive U.S. comparison been developed in regard to his proposal, a better balance would have been achieved in relation to the first parts of the book.

Nonetheless, there is much food for thought in the two-tier law theory and there is history to support it. The author has issued a challenge to law reformers to come up with a better theory. Until they do, a civil law country may accept some modified version of his proposal. It is a satisfactory improvement over the present situation, and the author makes a very good effort to solve a serious problem in law making. In the United States, the legal machinery currently exists to convert the Conference of Commissioners on Uniform Laws and the State of Maryland Commission to Revise the Annotated Code into the proposed public and private interpretative committees the author envisioned. His proposition is stimulating and merits further exploration and embellishment by the law reformers. Even though the book is small in volume, it is large in achievement.

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24. U.S. CONST. art. IV, § 1.