The Journal of Legal History

ISSN: 0144-0365 (Print) 1744-0564 (Online) Journal homepage: http://www.tandfonline.com/loi/flgh20

A 'revisiting' of the comparison between 'Continental Law' and 'English Law' (16th-19th Century)

Gino Gorla & Luigi Moccia

To cite this article: Gino Gorla & Luigi Moccia (1981) A 'revisiting' of the comparison between 'Continental Law' and 'English Law' (16th-19th Century), The Journal of Legal History, 2:2, 143-156, DOI: 10.1080/01440368108530737

To link to this article: http://dx.doi.org/10.1080/01440368108530737

Published online: 30 Jul 2007.

*A 'Revisiting' of the Comparison between 'Continental Law' and 'English Law' (16th-19th Century)**

GINO GORLA and LUIGI MOCCIA**

The object of this paper is to put forward, by way simply of a general account, some of the main results and conclusions so far achieved of a research dealing, on the one hand, with the development of the true, characteristic features of 'Continental law' in the period from the sixteenth to the first half of the nineteenth century, and, on the other hand, with the development of the relations between 'English law' and 'Continental law' at that time. Along these lines the research aims at tracing the proper historical perspective from which to look at the comparison between the Continental and English law traditions. In this last regard, it may be here anticipated that such perspective is centred on the European juridical culture as it was in that period mostly characterised by the efforts of judges and counsel (the '*forenses*') of various European countries placed in a transnational literary legal tradition (the '*jurisprudentia forensis*') tending to the formation and consolidation of a 'European common law'. As far as the comparison between Continental and English legal systems is concerned, emphasis is therefore put on the resemblances rather than on the differences between the two systems.[1]

It seems appropriate at this point to explain briefly the terms 'English law', 'Continental law', and 'European common law' as they are used here and the reasons why this particular historical period was chosen for consideration.

Terminology

'English law'. This term is used here instead of 'Common law'. It indicates the diverse sources of law which have over the centuries

*This article is a synthesis of previous works of mine, some of which have been already published (see note 1 below), whilst others are still underway. I wrote it in collaboration with Dr Luigi Moccia who is working in the field of researches here dealt with (see also in this Journal the next article by Dr Moccia, 'English Law Attitudes to the "Civil Law"'). G.G.

**Professor Gorla and Dr Moccia, Institute of Comparative Law, University of Rome.

concurred in the formation of the English legal system, by means of common law, equity, and civil law jurisdictions, together of course with customary and statute law.

'Continental law'. This term, commonly used to indicate the group or family of national legal systems which have developed in Continental Europe (and legal systems in non-European countries which are derived from these), refers here not only to the 'Civil law' tradition in a strict sense, *i.e.* one directly deriving from 'Roman law', but also to those branches of law such as Canon law, Feudal law, Commercial & Maritime law, which had grown apart from the *Corpus Juris*, although of course relying, if and where needed and to varying degrees (sometimes fictitiously), on Justinian's compilation.

Moreover, a large and very important branch of 'Continental law', which grew up partly independent of Roman law texts, was the one made up of legislative enactments called *'statuta'* (whence the English 'statutes'), many of which were simply declaring previous customs. The provisions embodied in the statutes governing certain matters often resembled one another throughout Continental Europe or within certain regions (for example, the Italian states prior to the unification of Italy). The resulting interpretation of these statutes was based, in practice, on a uniform pattern (*'communis opinio'*) followed by jurists in various places within the same country as well as in various Continental countries.

'European common law'. This term has not been used here in the sense of *'jus commune'* as generally referring to Justinian's *Corpus Juris* and its adaptation by *'interpretatio'* from the twelfth to the eighteenth century. In this paper the phrase 'European common law' is used to indicate that great cultural phenomenon which occurred in Europe, especially during the sixteenth to eighteenth centuries, consisting basically of the formation of common juridical patterns as well as of common legal rules and principles in the areas and branches of law mentioned above, which spread throughout Continental Europe and England thanks to a transnational spirit of mutual understanding and (to use Walter Senior's words) even 'fraternity' amongst jurists,[2] both law scholars and practical lawyers (*'forenses'*), of each European country.

In particular, the phrase 'European common law' gets its historical justification from close resemblances which existed in past centuries between 'Continental law' and 'English law' as above defined. But of course as this is a point of substance rather than of terminology, it will be better appreciated at the end of this paper.

Chronology

Although there were many reasons for choosing the period extending over the sixteenth to eighteenth centuries (and the first half, at least, of the nineteenth century), three of them should in particular be mentioned. Their relevance to any comparison of English and Continental laws is so obvious as to require only a few words of explanation.

First, this period witnessed the rise of modern states in Europe. At that time the constitutional structures of European countries were adapting to new political, economic, and social situations. In this context, the creation within each state of a system of sources of law, on the basis of which legal rules were to be recognised and applied, was a key-issue. It is precisely under this heading that a 'revisiting' of the comparison between English and Continental laws may start, taking into account such institutional and, generally speaking, cultural factors as the centralisation of courts of justice, their organisation and staff, king's prerogatives and the judicial control over their exercise, legal literature and modes of legal education, etc.

Secondly, in that period the expansion of commerce and trade all over Europe was a basic condition for the development of a 'common law' of Europe in the field of commercial and maritime matters, the '*Lex Mercatoria*' (Law Merchant) as it was then called, universally applied in any European country participating in the community of trading and maritime nations. As England too was then entering that community and was rapidly becoming one of the strongest economic powers in the world, she had to follow suit, so to say, by receiving and applying the Law Merchant in courts of justice. The sixteenth century was a 'golden era' for the College of Advocates at Doctors' Commons in London, and a period during which the Court of Admiralty had a large jurisdiction over commercial and maritime cases (as well as international law cases). Later on, in the second half of the seventeenth and during the eighteenth century, the Law Merchant was 'anglicised', and absorbed in the Common Law of England, thanks to the great English judges who had studied 'Civil (Continental) law'.

The third reason concerns the codification movement which spread throughout the Continent of Europe at the beginning of the last century. In this regard there is a tendency today (especially among comparative law scholars) to consider the codes (above all the Code Napoleon) as not representing a sharp break in the historical evolution of ancient law. Indeed the application of these codes to individual cases continued for a while (during the first half of the nineteenth century) to be based on the forensic literature and authorities ('*jurisprudentia forensis*') of previous centuries. But together with national codes the nineteenth century,

especially its second half, saw the rise of nationalist movements and positivist schools of legal thinking, all of which, as well as other factors, militated in favour of a differentiation and separation into a set of closed 'national' legal systems which rapidly concealed and finally drowned the 'European common law' and those connected institutional and cultural features which had characterised and assisted, as will be seen, its historical development.

The comparison between 'Continental (Civil) law' and 'English (Common) law': traditional views and a critical assessment

As is well known the vast legal literature produced since the end of the last century, at least, on the comparison between English and Continental laws centres around a few basic and accepted propositions whose authority has become so well established and unquestioned that they have virtually taken on the character of axioms. In particular, such propositions emphasise the differences between 'English law' and 'Continental law', and tend to put the former in an 'isolated' and 'unique' position within the European context.

As to the origins of such propositions one may safely state that it was easy for comparative law scholars to extract them from the writings of modern English legal historians, in which the commendation of the 'national character' of 'English common law' and of its 'healthy resistance to foreign dogma' (to use Maitland's words) is predominant.[3]

But to tell the whole truth, it should be added that although these and similar propositions may be attributed to English legal historians, they are really the result of Continental legal writers' and historians' disregard for the actual features which characterised the historical development of 'Continental law', especially during the sixteenth to eighteenth centuries, so far as the 'law in action' was concerned, *i.e.* that one made up of judicial opinions and lawyers' practice which found expression in forensic literature (in the whole, the already mentioned '*jurisprudentia forensis*'). This meant that as these true aspects of 'Continental law' were largely neglected until recently, 'English law' has appeared to Continental jurists to be unique and isolated in the European context. But, when attempting to fill in some of these *lacunae*, as the fog gradually dissolves, one is left with a feeling of *déjà vu*, as he discovers that the true, characteristic features of 'Continental law' at that time were those very features which would have otherwise appeared peculiar only to 'English (Common) law'.

In this regard the results so far achieved are just as striking as they are contradictory, in many respects, to the traditional views on the separateness of English law from the other European legal systems.

Indeed these results clearly show that the time has now come to reconsider those views on the comparison between English and Continental laws in a proper historical perspective, starting with a reappraisal of all the true, characteristic features of 'Continental law' in the period here considered.

Resemblances between 'Continental law' and 'English law': a general account

Before indicating the main resemblances between Continental and English law in the period extending over the sixteenth to eighteenth centuries, it must be remembered first of all that a basic feature of 'Continental law' was at that time its being for the most part a 'judge-made law' or 'judicial law'. In this regard the '*jurisprudentia forensis*', progressing in a cumulative way through lawyers' interpretation and judicial opinions (especially those of the judges sitting in the Supreme Courts of the various states on the Continent), and resulting in a continuous literary legal tradition, was the principal source of law, a far more important one than any other in that same period. Indeed the internal unification of the legal system of each state was achieved, just as in England, also on the Continent, albeit here some centuries later, mostly by means of judicial precedents handed down in the higher courts of justice. Legislative efforts, either in a sporadic manner or in the nature of consolidated acts and, eventually, systematic codification, were actually undertaken in Continental countries, especially during the eighteenth century, by sovereigns who aimed at unifying the law in certain areas of the national legal system.[4] But to become effective such efforts needed of course to be assisted by a uniform judicial interpretation.

Considering this prevailing judicial character of both Continental and English laws during the historical period here examined, one may better appreciate the other resemblances between the two systems in that same period (and up to, at least, the first decades of the nineteenth century). Of course, it is not possible in the small space available here to deal with all of them. We have therefore chosen simply to outline the most significant ones, taking into account especially the experience of the Italian states prior to the unification of Italy.

From the point of view of the general aspects and principles of 'Continental law', as far as Italy and other Continental countries are concerned, some of the main resemblances or even common features of the English legal system, may be conveniently classified under the following headings.[5]

Supreme Courts. The establishment in the Italian states prior to the unification of Italy as well as in other Continental countries, although in a later period than in England, of Supreme Courts as an offshoot of the central political power, that is, directly related to the centralisation process which aimed at creating a modern type of state.[6]

Bench & Bar. The judges sitting in the aforementioned Supreme Courts were not career-judges, but were normally recruited from the upper ranks of the legal profession. The most eminent lawyers were elected. They were appointed, as was often the case (excepting of course the practice of selling of the office), through a selection process formally ending with a sovereign's act but truly corresponding to a co-option system based on strict relationships between the Bench and the Bar of the same courts.

'Judicial control' over the sovereign's acts. The judges at the higher level of the courts' structure of various Continental countries formed, in each country, a body of learned and authoritative men playing a very important constitutional role as a means of balancing the sovereign's powers and prerogatives. Indeed, these eminent lawyers, either in their capacity as judges of the Supreme Courts or as counsellors of the sovereign, were frequently asked, through established procedures, to state their opinion on legislative enactments as well as administrative rulings issued by the sovereign's authority and affecting individuals' rights and interests. In this regard the exercise of sovereign powers encountered certain limits, which in the course of time came to be specified through a series of precedents formulated as judicial opinions or in the nature of advice directly given to the sovereign by his counsellors and usually acted upon by the sovereign himself. Such control focused essentially on two aspects or questions, *i.e.* the validity of the act concerned (*'quaestio potestatis'*), and, on the other hand, the interpretation of the sovereign's (legislator's) will as expressed in the particular act (*'quaestio voluntatis'*). The former was a case about defectiveness of power, eventually leading to the setting aside of the act held void by the sovereign following the advice of his counsellors. The latter was a case of interpreting the act, also a legislative one, so as to apply it with the best possible adherence to and conformity with principles generally recognised (the *'jura naturalia'*, in England re-named 'common rights' according to Coke's version). These principles (many of which will eventually be found in the written constitutions of the liberal age) were at that time acknowledged as a matter of common practice based on precedents followed by judges of various European countries. Their application aimed at safeguarding the rights and interests of private persons (if not common people as such, those who belonged to privileged classes) and communities in general, against the

sovereign's (state) authority. In particular, one of the most important of these principles established by the '*jurisprudentia forensis*' on the Continent is that of the '*citatio-defensio*' (as it was called then), *i.e.* the principle '*audi alteram partem*', which applied not only to judicial proceedings but also to proceedings ending with an act (either legislative or administrative) affecting the interests of private parties. In the case of such legislative or administrative proceedings a right to a hearing was accordingly attributed to interested parties.[7]

Commercial law and the Supreme Courts of Continental countries. In contrast with the English experience it is commonly assumed, among comparative law scholars in particular, that on the Continent the special courts ('*tribunaux de commerce*' and the like), locally held by municipalities and/or merchants' guilds, were the principal agencies of the development of commercial law. But, from a historical point of view, the picture appears to be a different one. Indeed, in the period before the establishment in Continental countries of Supreme Courts, commercial law developed thanks mostly to legal opinions, in the nature of '*consilium sapientis*', given by eminent jurists (as, for instance, Baldo) who acted not as specialists but as experts engaged in the general practice of the law (that is, including '*jus commune civile Romanorum*', '*jus feudale*', '*lex mercatoria*', etc). Following the rise, in the sixteenth to eighteenth centuries, of the Supreme Courts of various Continental countries, the development of commercial law was to a large extent committed to judicial precedents handed down in these ordinary courts of justice (in Italy especially the *Rota Genovese*, the *Rota Fiorentina*, and the *Rota Romana*). Moreover, merchants' juries called upon to sit in the Supreme Courts were confined in their functions to the recognition only of the existence of a particular custom and trading practice. The juries' claim, when spelling out such customs and practices, also to interpret them and determine their application to the merits of the case to be decided, was strongly and successfully opposed by leading members of these Supreme Courts who, like Lord Mansfield and his successors in England, firmly placed the development of commercial law in the judges' hands.[8]

Rule-making power. The Supreme Courts of Italian states prior to the unification of Italy as well as those of other Continental countries had the power to regulate certain aspects of the proceedings before them ('*ritus curiae*').

Form of judgment. With regard to the decision-making process followed by the courts of justice of various Continental countries, there is noticeable the common practice of handing down the opinion or

opinions (*'motiva'*) supporting the court's decisions, separately from the order or decree, this latter being a purely clerical act, that is, the work of an officer of the court. This practice combined with that of reporting judicial opinions as such in collections of cases (see *post*, Law Reports and *'Decisiones'*).

Judicial precedent. A doctrine of judicial precedent was recognised and applied by the Supreme Courts of various Continental countries. In some countries a continuous series of conforming judicial precedents (*'giurisprudenza costante'*) was considered binding. In other countries (as Italy, Spain, and Portugal) the doctrine was such that two or three conforming decisions were considered absolutely binding. More particularly, even a single decision was considered binding in the Supreme Court of the Kingdom of Naples (the *Sacro Regio Consiglio*) in the fifteenth-sixteenth century and, in the period between 1729–1837, in the Senates (*Senati*) of the Sardinian States.

Law Reports and 'Decisiones'. Just as in England, so also on the Continent of Europe a great bulk of legal literature was in the period here considered made up of 'law reports' called *'Decisiones'* in which were collected and reported judicial opinions. The earliest example of this kind of 'forensic literature' is the collection, since the fourteenth century, of judicial opinions handed down in the *Rota Papale* sitting at that time in Avignon. This first Continental example of 'law reporting' had a wide circulation all over Europe (England included) and was adopted in the second half of the fifteenth century by G. Pape (reporting the opinions of the Grenoble *Parlement*) and by De Afflictis (reporting the opinions of the *Sacro Regio Consiglio* at Naples). The *'Decisiones'* of both Pape and De Afflictis also had a very large circulation in Europe (England included). In the sixteenth to eighteenth centuries the *'Decisiones'* together with other kinds of 'forensic literature' (see *post*, Legal Literature) become, as a whole, a most important and authoritative part of the legal literature of the time, especially because of the doctrine of precedent (see *ante*).

As to the types of *'Decisiones'*, two of them may properly be distinguished. In the *'Decisiones'* of many Italian Supreme Courts were collected reports officially issued and signed as such by all the judges forming the Bench in a particular case or by one of them as a delegate of the others. Indeed this type of *'Decisiones'* collecting official reports of cases appears to have been at that time a peculiarity only of Italian *Rotae* and some other Italian higher courts.

In the second type of *'Decisiones'* the reporter, normally a judge, made a narration of cases, based either on his personal and colleagues' recollection or on materials available in private archives and public

record offices, adding notes and observations of his own. This latter type of *'Decisiones'* was equally possessed, in practice, of great authority with regard to judicial precedent.[9]

Personal and dissenting opinions. Both types of *'Decisiones'* are, moreover, conclusive evidence of the common practice followed in various Continental countries of reporting personal as well as dissenting opinions. Indeed this practice is already evidenced from the above mentioned *'Decisiones'* of the *Rota Papale* sitting in Avignon during the fourteenth century. The practice had a very large diffusion on the Continent in the period between the sixteenth and eighteenth century. In some Italian states, as for instance the Kingdom of Piedmont, it continued to be followed until the first half of the nineteenth century (1838).

There had even been enacted in some Continental countries, e.g. the territories of the Aragonese Kings in Spain, a duty for the judges to hand down in writing their personal opinions and deposit them in the office where the records of the court were kept, so as to give the public the opportunity of taking notice of these opinions (although under a formal prohibition for the office to disclose the name of the individual judge concerned).

With regard to dissenting opinions, a special case was that of Tuscany where from the sixteenth well into the second half of the nineteenth century a duty existed for judges to give when dissenting, their opinion in writing, and deposit the text in a public record office where the public was allowed to take notice of it. Such dissenting opinion, called *'voto di scissura'*, had to be argued in a detailed manner (at least, as detailed as the majority opinion), citing authorities and discussing them. The *'voto di scissura'* often consisted of a long and well supported opinion, sometimes even referred to as 'judicial precedent'.

The 'art of distinguishing'. The *'jurisprudentia forensis'* developed on the Continent many and highly refined rules and techniques of interpreting, evaluating, and distinguishing judicial precedents, especially with a view to adapting them to new circumstances.

Legal science. During the sixteenth to eighteenth centuries the Bench & Bar of the Supreme Courts had become in Italy and other Continental countries (in Germany only up to the first half of the seventeenth century) the main exponent of the law as effectively applied and had taken over the leading role from the old *'Doctores'* of the Universities.[10] This fact clearly refutes the traditional and still prevailing view according to which law-professors and scholars teaching at Universities were the 'protagonists' of the 'Civil law' tradition altogether considered. Instead

the opposite and, indeed, a rather different view is borne out by history. During that period, as in England, so on the Continent the great judges and counsel were to a very large extent the true 'protagonists' of the development concerning the 'law in action'. To mention just a few names, there may be mentioned here those of the French Du Moulin and Domat, of the Dutch Grotius and Bynkershoeck, of the Italian Fabro, Ansaldo and Casaregis, etc.[11]

Legal literature. The existence and wide circulation of a 'forensic literature', written by lawyers for lawyers, constituted a most important and authoritative part of legal literature on the Continent during the sixteenth to eighteenth centuries. This kind of legal literature, including *'Decisiones'*, *'Consilia'*, *'Allegationes'*, *'Quaestiones'*, and still other literary works in the nature of 'abridgments' and 'case-books', was just as extensively used as books of authority in judicial practice as for educational purposes.[12]

Legal education. In the same period here considered, particularly in Italy, legal education, so far as the professional training of young lawyers was concerned, no longer took place in the Universities, but in the offices of senior and more experienced lawyers. At that time these offices became the very centres of legal education, where as in a 'master's shop' the *'praeceptor'*, an eminent counsel or judge, educated his *'alumni'*.

Legal reasoning. From what has been said concerning legal science, literature, and education, a further consideration is that the 'inductive method' (or, in this sense, the 'case method') of legal reasoning was a most important one to Continental lawyers during the sixteenth to eighteenth centuries. This method was applied with regard both to 'forensic literature' and theoretical legal writings, such as the *'Tractatus'*, *'Discursus'*, etc. Of course, one need not emphasise here the significance of the contrast with the current views which, precisely because the experience of 'Continental law' as 'judicial law' especially in that same period had so far been largely ignored, could identify the 'Civil law' tradition entirely and exclusively with the 'deductive' (or, in this sense, the 'systematic') method of legal reasoning.

The 'positiones' and the 'art of pleading'. Moreover, in connection with the 'casuistic method' of legal reasoning (based on both logic and rhetoric) one must remember the characteristic structure of Continental civil procedure which had since mediaeval times developed, although mostly under the influence of Canon law, according to its own patterns, especially with regard to the so-called *'positiones'* which had a precise correlative with the 'pleadings' of English civil procedure.[13]

The list of resemblances between 'Continental law' and 'English law' could be extended, having regard to such general aspects as the hierarchy of the sources of law, the rules of recognition of the legal validity of custom (*'consuetudo'*) as a source of law, the rules of interpretation of statutes, and still other aspects.

In addition, many resemblances concerning particular aspects of both adjective and substantive law of the two legal systems, respectively, could be recorded, in the fields for instance, just to mention a few, of contract law, commercial law, civil procedure, the principal and agent relationship, testamentary matters, conflict of laws, and public law.[14]

But what must be stressed above all is that either general or particular aspects, although individually considered, have to be placed in a common framework, as they are really pieces of the same mosaic, so to speak, portraying in all its amplitude and complexity the phenomenon of the 'European common law' as it developed especially during the sixteenth to eighteenth centuries. Indeed the general resemblances indicated here show that the English legal system was not, at that time, in an 'isolated' and 'unique' position within the European context. On the other hand, more particular resemblances in certain fields of the legal system equally show the close relations of 'English law' with 'Continental law' in that same period.

Some conclusions

The development of the 'European common law' broke down on the Continent in a very short period of time, that is, during the last decades of the nineteenth century. At that time the *'jurisprudentia forensis'* ceased to play the role of leading source in the formation and diffusion of common legal principles and rules all over Europe.

With the disappearance of the 'European common law' (due, as has already been noticed, to a concurrence of causes) the differences between 'English law' and 'Continental law' became greater and greater, to the extent to which the latter, entering the path of closed national legal systems, was detaching itself from the experience of past centuries when it had been mostly characterised by the efforts of judges and counsel (the *'forenses'*) towards a mutual understanding based on a transnational spirit of communication among them.

But, whilst Continental legal systems during the last century cut off their links with the 'European common law' tradition, the English legal system, because of the continuity of its historical evolution, kept alive that tradition with regard both to general features and to specific legal principles and rules. Therefore what today appears to be unique in the English legal system (or, generally speaking, in the 'Common law family'

of legal systems) was during the sixteenth to eighteenth centuries shared to a large extent in common between Continental and English law.

Moreover, as to the relations between 'English law' and 'Continental law', it is yet to be noticed that in England Continental law and legal (forensic) literature were widely known among English civilians, of course, and, to a varying extent, also among common lawyers. As a result, a legal literature concerning the comparison between English and Continental laws had developed in England since mediaeval times. As is well known, this kind of legal literature grew under the influence of different cultural as well as professional interests, especially connected with the rivalry between 'Common law' and 'Civil law', taking on a variety of attitudes all through the history of the English legal system. What must be stressed, however, is that English juridical culture as a whole never ceased over the centuries to maintain close relations with Continental law tradition.[15] For English lawyers in general, and in particular for the more instructed among them, the thirty kilometres separating the two sides of the Channel never represented such an insurmountable distance as to prevent them from looking at, and often resorting to, Continental law and legal literature.

On the Continent, instead, apart from very few and well-known exceptions, there was lacking among both law scholars and practising lawyers, until the nineteenth century, a corresponding knowledge of English law, even in such branches of it as commercial and maritime law where there was a greater need and the possibility too of obtaining this knowledge. One may say, indeed, considering the period between the sixteenth and eighteenth century, especially this last as the 'century of enlightenment', that the 'isolation' of the English legal system within the European context was not so much a result of its pretended 'insular' character but rather a consequence of the failure to look at it by Continental lawyers whose restricted cultural attitudes in this respect precisely meant, at that time, the 'insulation' of England (and the English legal system) from the rest of Europe (and European legal systems). When, towards the end of the last century, Continental lawyers began to study English law, they relied mostly (if not exclusively) on the picture of the relations between the two 'families' of legal systems as found in the writings of English legal historians at that time. It has already been seen that such a picture focused on the commendation of the 'national character' of English (Common) law, showing accordingly the 'unique' position of England in the European context.

So far as the comparison between Continental and English laws is concerned, both those circumstances, the one relating to the traditional failure by Continental lawyers in past centuries to look at the English legal system as participating to a large extent in European juridical

culture, and the other relating to the origins on the Continent of comparative law studies concerning England, have in our days led to a still prevailing assumption, based on the 'insular' character of English law, which emphasises the differences rather than the many resemblances and features common to Continental and English laws both considered from a historical point of view.

The foregoing general account of these resemblances and common features, while purporting to delineate the proper historical perspective from which to look at the comparison between Continental and English laws, also intends to promote along the same lines further researches aimed at restoring, so to say, the mosaic of the 'European common law', by putting together its dispersed and (regrettably) broken pieces.

We wish to conclude by expressing the belief that such researches, far from being purely antiquarian, will enhance, together with a better understanding of the historical development of both Continental and English laws, the progress of comparative law studies, as well as their range, over the formation and diffusion, today again, of common legal principles and rules in the European (Western) legal world.

NOTES

1. On this new perspective embracing the comparison of English and Continental law from the point of view of the resemblances between them as well as of the relations of the former with the latter, see generally the following writings by Professor Gorla: 'Unificazione "legislativa" e unificazione "giurisprudenziale". L'esperienza del diritto comune', in *Il Foro italiano*, 1977, V, 1 ff.; 'I Tribunali Supremi degli Stati italiani fra i secc. XVI e XIX, quali fattori della unificazione del diritto nello Stato e della sua uniformazione fra Stati', in *La formazione storica del diritto moderno in Europa* (1977), I, 447 ff.; 'La "communis opinio totius orbis" et la réception jurisprudentielle du droit au cours des XVI^{e} et XVIII^{e} siècles dans la "Civil Law" et la "Common Law"', in *New Perspectives for a Common Law of Europe* (1978), 45 ff.; 'Un Centro di studi storico-comparativi sul "Diritto Comune Europeo"', in *Il Foro italiano*, 1978, V, 313 ff.; 'Prolegomeni ad una storia del diritto comparato europeo', Ibid., 1980, V, 11 ff.; 'Sulla via dei "motivi" dell "sentenze": lacune e trappole', Ibid., 1980, V, 201 ff. (especially at 222-3); 'Introduzione allo studio dei Tribunali Supremi italiani nel quadro europeo fra i secoli XVI e XIX', in *L'Ordinamento giudiziario*, vol. IV della Collana 'Ricerche sul Processo' (1981).
2. W. Senior, *Doctors' Commons and the Old Court of Admiralty: A Short History of the Civilians in England* (1922), 111.
3. F. W. Maitland, 'English Law and the Renaissance', in *Select Essays in Anglo-American Legal History* (1907), I, 168 ff., at 195. On the 'rivalry' between 'English (Common) law' and 'Continental (Civil) law' as a predominant aspect in English legal history see for further observations L. Moccia, 'English Law Attitudes to the "Civil Law"', in this Journal.
4. There may be mentioned here, as examples, the *Costituzioni Piemontesi, 1729-1770*, and the Prussian Code of 1794.
5. Further references and observations concerning such resemblances and common features, with regard to each one of the headings enlisted in the text above, may be seen in Gorla's writings cited *ante*, note 1.

6. These courts of justice were, with the main exception of French *Parlements*, centrally established. All, however, were instituted by the Crown, whence they derived their authority and powers.
7. On these features of Continental 'public' law see for further observations G. Gorla, 'I limiti al potere sovrano nella giurisprudenza forense fra i secoli XVI e XIX', in *Diritto e Potere nella Storia Europea* (Atti del IV Congresso Internazionale della Società Italiana di Storia del Diritto, Napoli, 9-13 Aprile, 1980).
8. Indeed many years earlier than, in England, Lord Mansfield curbed the jury's functions in commercial cases, so to have the merits of such cases decided by Benches following judicial precedents, in Italy eminent judges, such as Ansaldo and Casaregis, had to this same effect already successfully raised strong criticisms of juries' claims to decide the whole case. See Ansaldo (1651-1719), *De Commercio & Mercatura* (1st ed., Roma 1689, and successive editions till 1751), *Discursus LXXII*, nos. 25-26, and *Discursus Generalis*, no. 45; and Casaregis (1670-1737), *Discursus Legales de Commercio* (1st ed., Genova 1707, and successive editions till 1740), *Discursus XVIII*, no. 17.
9. Besides Gorla's writings cited *ante*, note 1, see as to types of Continental 'law reports' H. Coing (Editor), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, II/2 (1976), 1113 ff.
10. Besides Gorla's writings *ante*, note 1, see with regard in particular to Italy M. Ascheri, in H. Coing (Ed.), *op. cit.*, II/2 (1976), 1113-1221.
11. As is well known the period between the 16th and 18th century saw on the Continent the rise of cultural movements concerned with a philological, historical and, more generally, a theoretical approach to the study of the law (*i.e.*, Justinian's *Corpus Juris* as the basis of Continental law tradition). Without ignoring here the fundamental significance of these movements in the development of Continental law during that same period, what must be stressed however is that many of their representatives were not (except in Germany) academicians, but lawyers mainly engaged in the practice of the law. Moreover, the influence exercised by such movements, although relevant in other respects, was indeed a small and limited one with regard to the formation of the 'law in action'.
12. In addition to Gorla's writings *ante*, note 1, see for a detailed panorama of the forensic literature in Continental countries H. Coing (Ed.), *op. cit.*, II/2.
13. On the *'positiones'* of Continental civil procedure, as a creation originally of the judicial *'praxis'* later followed by Canon law, see the classical work by Blasio Michalorio, *Tractatus de positionibus, etc.* (1st ed. 1648), and one deserving indeed to be studied with a view to a comparison with English pleadings.
14. As is well known particular resemblances between 'Continental law' and 'English law', especially in terms of influence by the former over the latter, have already been studied and acknowledged by several writers. Many other such resemblances are becoming apparent to the extent to which the filling in of *lacunae* in the studies concerning the development of 'Continental law' is progressing. A still partial and very sketchy inventory of them may be seen in Gorla, 'Un Centro di studi storico-comparativi', etc., cited *ante*, note 1.
15. On this point see also L. Moccia, 'English Law Attitudes to the "Civil Law"', in this Journal.