The Journal of Legal History

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

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To cite this article: Luigi Moccia (1981) English Law attitudes to the 'Civil Law', The Journal of Legal History, 2:2, 157-168, DOI: 10.1080/01440368108530738

To link to this article: http://dx.doi.org/10.1080/01440368108530738

*English Law Attitudes to the 'Civil Law'**

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This subject will be dealt with by a preliminary account of the internal meaning of 'civil law' in the English legal system, followed by an exposition in two parts concerning, respectively, the main question of the relations of 'English (common) law' with 'Continental (civil) law' as traditionally portrayed by English legal historians and then by comparative law scholars also, and the same question looked at, historically, in a different perspective from the traditional and still prevailing approach.

'Civil law' and the 'national' legal system

According to general acceptance the term 'civil law' is used to mean the established law of every nation, community or political collectivity, a law which is commonly called 'municipal law'.[1] Similarly 'civil law' is understood as the rule of action which every nation, community or political collectivity lays down for itself and which is more properly indicated by the name, again, of 'municipal law'.[2] An identical definition states finally that 'civil law' is here used in distinction to the 'law of nature' and 'international law'.[3]

Against the use of 'municipal law', and, since the end of the last century, also of 'positive law' in place of 'civil law', it has been maintained that the name 'civil law' is the more appropriate and convenient title with which to distinguish the law of the land from other forms of law, being a term derived from the *jus civile* of the Romans, in the exact sense of the law of the *civitas* or, in modern times, of the state.[4]

In a secondary acceptation 'civil law' is used in England to define that part of the national legal system which in the common law countries historically embraces, in the narrow sense, relations between individuals or those in such countries between citizens and the public administration. In this sense the expression is here contrasted with 'criminal law'.[5] In similar but more general terms it has been stated that 'civil law' is also

*This paper reproduces the contents of an article originally published in Italian (L. Moccia, 'Sull'uso del termine "civil law"', in *Il Foro italiano*, 1980, V, 254 ff.). Notes specially prepared for the present version have been inserted together with observations at the end.

used to mean not the entire body of national law but only what remains after deducting some particular part having its own special title.[6]

'Civil law' as rival *of the 'Common law'*

Both the above acceptations are, however, rather unusual. In this connection the prevailing usage is that found where common lawyers use the expression to distinguish, historically, between their own law, deemed to be of native origin, in the sense of an 'Anglo-Saxon' creation, and a foreign, imported, law based on the Reception and interpretation of the *Corpus Juris* of Justinian. Since mediaeval times, as evidenced already from the Year Books and Fortescue's *De Laudibus*, and still more later on, with the consolidation of the profession of the common lawyers, partisans of the achievement of a national law being the exclusive monopoly of their courts, the expression 'civil law' has assumed polemic connotations, above all as a synonym for 'Imperial law' (*jus imperiale*), taking on the character and ideological function of an exponent used to indicate a strange and foreign system, seen, in the negative sense, as 'antagonistic' to the national common law.[7]

Leaving aside the pursuit of this argument for the moment, it must be added that this prevailing usage of the expression 'civil law' has undergone, in a positive sense, the attribution to it of a wide variety of technical nuances, so to say, in a substantial terminological development, not always uniform in nature, which has included *inter alia* such meanings as: the *Corpus Juris* of Justinian; the *'jus commune'* resulting from the interpretation and adaptation of Justinian's text in the twelfth to eighteenth centuries; the complete group of laws bearing a substantial or in some cases only formal imprint of 'Roman law'; the 'Continental law' (here again an expression coined in England) even in those branches of it not influenced by 'Roman law'. One must also mention the well-known definition in Blackstone's *Commentaries* according to which 'civil law', to common lawyers, means 'the civil or municipal law of the Roman empire', as it appears in Justinian's compilation.[8] In this sense, 'civil law' and 'Roman law' refer to the same legal system, in its turn often consequently referred to as 'Roman Civil law'.[9]

Modern English legal historians, led by Maitland (with his scholarly discussion in English law and the Renaissance),[10] have retained in some respects or even emphasised the use of the expression 'civil law' as a note of contrast and rivalry with the English common law.[11]

Today the phrase 'civil law' is commonly used, especially among students of comparative law, to refer to the whole complex of the Roman law tradition. The phrase is therefore understood either in the sense of classical Roman law or in the sense of an intermediary law or in the sense

of the 'common law' (*jus commune*) of Continental Europe in the twelfth to eighteenth centuries. Moreover the same expression 'civil law' is also used to designate the group or family of modern legal systems of Continental Europe (except Socialist countries) and their derivative systems, namely all those legal systems to whose formation Roman law made a fundamental contribution, and in particular the laws of France, Germany, Italy, and of other Continental European and Latin American countries.[12] But there are those who prefer, on the other hand, to speak of Continental European systems as the 'Romano-Germanic family'.[13] The reason for the preference for such terminology is that the Romano-Germanic family, it is assumed, was formed through the common efforts of the European Universities which, from the twelfth century, elaborated and developed, on the basis of the Emperor Justinian's compilation, a legal science common to all Continental Europe. The term 'Romano-Germanic' has then been chosen precisely 'to render homage to the joint effort of the Universities of both Latin and Germanic countries',[14] and to describe those characteristics of the system which would, in a historical and cultural sense, distinguish it from the Anglo-American system.[15]

It is obvious, however, that the historical and historiographic problems of defining the respective identities of each of the two major European law traditions, as well, in certain respects, as their relations, goes beyond mere disputes over names, though including them if it be true that the choice of terminology in itself indicates in a more or less overt and conscious fashion a determined conception (and solution too) of these same problems. On the other hand it is undeniable that the use of short (or, if you prefer, convenient) formulae may be valuable, even at the risk of some ambiguity, to express complex and ramified phenomena which not even long periphrases would perhaps succeed in rendering completely. So that, for these purposes, expressions like 'civil law' or 'Continental law' as commonly used by English-speaking lawyers, or 'Romano-Germanic family' and still others may be regarded as terminologically equivalent.

What must be stressed above all is that the common use of such formulae is to separate and contrast the Continental and the English systems, the latter being the sole system which has remained immune in its historical evolution from a massive Reception of Justinian's texts. It has already been pointed out that this traditional perspective, as brought out in English legal history, is still today the prevailing one when the relations between the two systems are considered.

Indeed English legal history (and historiography) seems dominated by the idea of the autonomous formation and evolution of a 'national law', seen as complementary to its 'insularity', isolated from and resistant to all influences of Continental juridical culture. Two kinds of grounds may

be adduced in this respect. In the first place the early achievement of a national state in England was represented by a similar customary law common to the whole realm and rooted in a sense of national identity and national values. A decisive part was then played by the politico-institutional struggle on a religious and class basis which, in the middle of the seventeenth century, led to the armed clash between the English monarchy and Parliament. Within this conflict a second struggle for power and professional interests went on between the common lawyers and their courts and the English civilians, advocates trained at the Universities of Oxford and Cambridge in the study of the texts of Roman law and its interpreters, and, until the Reformation Parliament (1529–1536), in the sources of Canon law. The English civilians, who were also organised in a professional body called Doctors' Commons, had a monopoly of judicial posts and audience as advocates in some courts of justice (mainly the ecclesiastical courts and Admiralty Court, and as Masters in the Court of Chancery at least up to the seventeenth century). Such courts had in common the fact that a Continental type procedure mainly based on Canon law was followed there and that rules similar to those of Continental *'jus commune'* were applied there.[16]

As is well known the absolutist designs of the Stuarts, whose cause was supported, in particular, by a majority of the English civilians, came to be associated with the concept of Roman (civil) law as an instrument and form of legitimation of monarchical despotism. Thus the opposition of Parliament, on whose side most of the common lawyers were arrayed, came to signify not only a revolt against royal despotism but, at the same time, an ideological refutation of the Roman law (*i.e.* the *Corpus Juris* of Justinian) which was its supposed vehicle.[17] Naturally the results of these political and institutional events, given their enormous and decisive importance in the rise of the liberal state and modern English law, could not fail to be reflected in the field of historiography, both contemporary and subsequent, thus leading to the prevailing attitude, or rather method, of generalised presentation, in accordance with which the complex and ramified problems of the relations between English law and Continental juridical culture were put in the strait-jacket of 'common law'/'civil law' antagonism, that is of the victorious resistance of the English national law to any Reception of foreign law.[18]

Along the lines of this historiographic conception, or rather under its influence, we find the similar attitude of the Continental scholars who, at least since the first decades of this century, laid the main emphasis on the idea of the insularity of English law, or its remoteness (even understood in a mystical sense) from the rest of the European countries. According to the imagery (suggestive on other accounts) of Lévy-Ullmann 'one approaches English law rather like approaching a religion'. And the

same author, further on, speaks emphatically of 'the mystical side of English law, so repelling its understanding by foreigners'.[19] Just as significant, though from a different standpoint, is the reaction of an Italian author writing that 'the law of the countries which do not share the Romanist tradition (such as England) represents for us an impenetrable secret'.[20]

Of course, the progress of the studies of Anglo-American law (following the growth of international traffic and communications) have made such an attitude (one hopes) obsolete, to be relegated to the archives of the pioneering age of the comparison between civil and common law at the very beginning of our century, when interest began to revive on the Continent of Europe for the legal world across the Channel and the North Atlantic.

But, for all this, the idea of a rigid counterposition between the two systems has remained intact. Indeed the direction of studies on the subject has been and continues in the main to be (paradoxically, perhaps, if one thinks that in the meantime the initial difficulties of mutual understanding have become more and more attenuated, almost to the point of disappearance) in the sense of accentuating the differences, and, even the deep (one might be tempted to say ontological) foreignness of the common law (historically, the English national law) with regard to the civil law (historically, the law and juridical culture of the countries of Continental Europe).[21]

'Civil law' and 'Common law' in the framework of 'European common law' (16th–19th century)

A different perspective from which to look at the relations of English (common) law with Continental (civil) law is that delineated in the most recent works of Professor Gorla on the phenomenon, with respect in particular to the Italian states prior to the unification of Italy, of a 'common law' of Europe in the period extending over the sixteenth to eighteenth centuries (and the first half, at least, of the nineteenth century).[22] Such a perspective is centred on the idea of a European juridical culture embracing Continental as well as English laws. According to this approach the emphasis should no longer fall, wholly or partly, as has been seen, on the politico-institutional, and yet limited aspects of the Reception in England of the Roman law of Justinian and of the doctrines of its Continental exponents but on the question, historically broader and more articulated, of the *position*, if and how far isolated or connected, of English law in its many and varied components within the framework of European juridical culture and its historical developments.

If it is taken for granted that one should aim at a classification based on the history of the various systems in contrasting the Romanist and Anglo-American legal systems (civil law and common law according to the dichotomy used in this respect by Anglo-American writers), it follows that the point of view indicated above makes the necessity of verifying (*i.e.* by scientific tests) the received classification obvious for Continental no less than for English and American scholars.

In the field of defining the true, distinctive features of the 'family' of Continental laws great importance attaches to the rediscovery of the experience of 'Continental common law' in the sixteenth to eighteenth centuries, as historically characterised by the pre-eminence of judge-made law as a source of law and other institutional as well as cultural phenomena analogous to those met with in the English experience: *e.g.* the centralisation of justice in the Supreme Courts of continental states, the binding force of precedent, the giving of dissenting opinions, the art and technique of distinguishing cases, forensic literature in the form of series of law reports, etc.[23]

In this regard, bearing in mind this different perspective, the antagonism between 'common law' and 'civil law' appears in a new light, reduced to what it really was, namely an internal phenomenon of English law, reflected by the presence there, up to the second half of the last century, of two distinct orders of jurisdiction and the related bodies of lawyers: *i.e.* the common lawyers and the 'civilians'. Reference has already been made to the fate which brought them into opposition within the sphere of the politico-institutional struggle between the English monarchy and Parliament. This turn of events culminated in the victory of the English common law and its courts of justice, and led, during the seventeenth and eighteenth centuries, to the progressive absorption in these latter (or rather in the Court of King's Bench, the most prestigious among them) of some of the main heads of jurisdiction previously held by the rival courts of the civilians (especially in commercial and Admiralty matters).[24]

But, over and above these events and the lingering polemics at the historiographic level, English law as a whole, including therefore the jurisdictions in common law, equity, and civil law, preserved then, as for the whole preceding and successive phases of its evolution, a position linked with the juridical culture of Continental European countries.

Besides the bond constituted by the existence on English soil of courts made up of jurists trained in the study of Justinian's *Corpus Juris* together with Continental legal ('forensic') literature, and in which procedures were followed and rules applied all of which were to a large extent based on Continental law tradition, other facts appear yet more significant for our purpose. Without being able to deal extensively with

them it may suffice here to allude to just two of them whose importance is as cogent as it is generally neglected.

In the first place, mention has to be made of the existence in the courts of common law of a widespread and long-established judicial practice, still followed by English judges when needed, consisting in resort to 'continental authorities' for the solution of doubtful cases or for want of domestic authority on a point to be decided.[25] Such a practice, that is relying on the law of neighbouring countries for the solution of dubious and difficult issues or in so-called cases of 'first impression', was also followed, until the last century, by judges and counsel of the supreme courts in Italian states as well as in other Continental legal systems. Of course, that was a powerful means through which a 'common law' of Europe developed, especially in the sixteenth to eighteenth centuries.[26] In this context, the recourse had by English common law courts in particular to 'continental authorities', by showing how judges and counsel of such courts were (or could easily become) familiar with texts of the 'civil law' tradition, makes it clear that the English legal system was taking part in and paying attention to European juridical culture, this latter being mainly founded, at least before the advent on the Continent of modern codes, on judicial opinions and corresponding forensic literature circulating among lawyers all over Europe.

In this last respect, a second fact and one which constitutes a relevant piece of evidence for the purpose again of demonstrating the existence of close links between English and Continental legal systems, is represented by the wealth of Continental law books (especially forensic literature) from the sixteenth to the eighteenth centuries then given to the Libraries of the Inns of Court in London.[27]

Some final observations

To avoid any undue pretence to conclusiveness in such a complex and still controversial matter as that of the relations of English (common) law with Continental (civil) law, one might concur with the statement, affirming, perhaps in a somewhat excessive way, that 'the whole story of the influence of the Corpus Iuris upon the growth of English law throughout its development has yet to be written'.[28]

However, between the extreme positions, on one side, of those (the great majority) who maintain the indigenous and exclusive character of English law and, on the opposite side, of those (the minority) who claim a close or distant parentage of almost every English institution from Roman law, a sense of balance could and should be restored to the benefit both of a better understanding of English legal history and of a more correct approach to the method of classifying and comparing 'common law' and 'civil law' systems.

It would be outside the scope of this paper to discuss further this question of the relations of English law with Continental law. But a few points may usefully be made here summing up the foregoing.

The traditional 'antagonistic' attitude of common lawyers towards 'civil law', although it finds an explanation in English constitutional history, must not make us forget the place possessed and the role played historically by civilians' courts in the English legal system. Indeed the case for the purely home-grown complexion of English law on account of its victorious resistance to the Reception does not seem to appreciate at the best the very fact of the existence in England, until the last century, of civil law courts and the contribution made by them in many areas of the English legal system. In addition to this composite structure of the 'English Common Law' resulting from diverse sources, one must still mention the long-established judicial practice of resorting to 'continental authorities' in cases of 'first impression' or doubtful cases, coupled with the large collections of Continental law books, which were to be found, especially during the sixteenth to eighteenth centuries, in English law libraries (such as Doctors' Commons Library and, of course, University and college libraries in Oxford and Cambridge, but also and to a large extent in the Libraries of the Inns of Court in London).

From all these emerges a clear indication, at least, that English law attitudes to the 'civil law', although concealed by the appearance of antagonism and insularity, have in fact, during past centuries, been much more open and sympathetic, so to say, than is usually assumed (especially among comparative law scholars). In this regard, evidence which may be gathered suggests the existence of close relations between 'English law', throughout the whole of its historical evolution, and 'Continental law'. Consequently, if it is agreed that the proper method (or rather historical perspective) for assessing the extent and the importance of the relations between the two systems is that of looking at the *position* of 'English law' in the European context, before entering upon the question of the degree to which Continental law influence operated upon English law, it then follows that any evidence and symptom of communication (and 'participation' too, one might add) between English law and Continental juridical culture in the past (especially from the sixteenth to the eighteenth centuries) could and should be taken as points of reference in the direction of a general reappraisal as to the manner of classifying and comparing 'common law' and 'civil law' systems.

NOTES

1. Cf. *e.g.* Holthouse's *New Law Dictionary* (2nd ed., London 1846), under the heading 'Civil Law'.
2. Cf. Wharton's *Law Lexicon or Dictionary of Jurisprudence* (4th ed., London 1867) under the heading 'Civil Law'.
3. Cf. Black's *Law Dictionary* (4th ed., St. Paul, Minn., 1951), under the heading 'Civil Law'.
4. See Professor Glanville Williams' edition of J. Salmond, *On Jurisprudence* (11th ed., London 1957; 1st ed. 1902), 36-37. It may be appropriate to note here that on the Continent of Europe, during the sixteenth to eighteenth centuries, such terms as *'jus municipale civile'* or *'jus particulare'* were used to indicate a 'national' (or 'local') legal system in distinction to the *'jus commune civile Romanorum'*: see, *e.g.*, G. B. De Luca, *Theatrum Veritatis et Justitiae* (ed. Venice 1706; 1st ed. Rome 1669-73), *Liber* XV, *Pars* I, *De Judiciis, Discursus* XXXV, Nos. 15, 19-20.
5. Cf. Black's *Law Dictionary, ubi supra*, and Radin's *Law Dictionary* (New York 1955), under the heading 'Civil Law'.
6. J. Salmond, *On Jurisprudence* (Glanville Williams' ed.), 36. With regard to this second meaning attached to 'civil law' in the English use of the term it is remarkable, again, to note the correspondence with the main distinction (*'Generica distinctio'*) made on the Continent of Europe, in the sixteenth to eighteenth centuries, between 'civil' (including either private law suits or suits involving 'public' interests) and 'criminal' matters for the administration of justice within each 'national' legal system: see, *e.g.*, G. B. De Luca, *op. cit., Discursus Generalis.*
7. In *De Laudibus* (written between 1468-71, according to the chronology set out in *Sir John Fortescue, De Laudibus Legum Anglie*, by S. H. Chrimes, Cambridge 1942), the phrase 'civil law' (*'leges civiles'*) is described as the law of the Empire (see Cap. XV). In the Year Books the phrase *'lex imperatoria'* appears, meaning Roman law in the broad sense of 'a general law of all Christendom', according to M. Radin, *Handbook of Anglo-American Legal History* (1936), 116. Similarly Sir John Selden in his *Ad Fletam Dissertatio* (1647) speaks of *'Jus Caesareum'*, an expression translated as 'civil law' in English editions. With regard either to Fortescue's or Selden's work and the main opinion expressed there about 'the Laws of England' being 'of earlier antiquity than those of Rome', it may be recalled that Richard Wooddeson in his *Elements of Jurisprudence treated of in the Preliminary part of a course of Lectures on the Laws of England* (London 1783), 80, censured such opinion as one basically, if not exclusively, revealing 'a patriotic zeal for our municipal institutions; but it has too much appearance of partiality and prepossession'.

   The antagonistic feeling towards 'civil law', being a long-established attitude of common lawyers, is again clearly shown during the last century by the words of M. Best, 'The Common Law of England; with an examination of some false principles of law reform', in *Juridical Society Series*, vol. I (1855-58), 419, describing 'the Roman Civil law' as 'our old rival'. And see also note 12 below.
8. W. Blackstone, *Commentaries on the Laws of England* (Oxford 1765-69), I, 80.
9. Cf. *e.g.* Wharton's *Law Lexicon, ubi supra*, Black's *Law Dictionary, ubi supra*, and Jowitt's *Dictionary of English Law* (3rd ed., London 1959), under the heading 'Civil Law'.
10. F. W. Maitland, 'English Law and the Renaissance', Rede Lecture given at Cambridge in 1901 and published in *Select Essays in Anglo-American Legal History* (1907), vol. I, 168-207.
11. The point is well summarised by H. F. Jolowicz, 'Political Implications of Roman Law', in *Tulane Law Review* 27 (1947), 62 ff., at 63, stating: 'There is a long tradition of a struggle between the civil law and the common law that was fostered by Coke, emphasized by Blackstone and discussed by Maitland'. But Jolowicz, explaining the reasons why 'the nationalist opposition to Roman law was never very virulent', comes to the conclusion that that was 'partly for the very reason that the

native system successfully and on the whole easily, *repelled the foreign law*' (italics added), he himself thus paying tribute to that tradition.

With regard in particular to Maitland's lecture and his thesis on the state of 'English law' during the 16th century, see the criticism by H. E. Bell, *Maitland—A Critical Examination and Assessment* (1965), 124–138; and also S. E. Thorne, 'English Law and the Renaissance', in *La storia del diritto nel quadro delle scienze giuridiche—Atti del I Congresso Internazionale della Società Italiana di Storia del Diritto* (Firenze 1966), 437 ff.

12. See, *e.g.*, M. Rheinstein, in *Encyclopaedia Britannica*, vol. 5 (1971), under the heading 'Civil Law'. A general picture of the main components and characteristics of the 'civil law' system, at least those usually so maintained as to differentiate it from and contrast it with the Anglo-American law tradition, may be seen in F. H. Lawson, *A Common Lawyer Looks at the Civil Law* (1953), and J. H. Merryman, *The Civil Law Tradition* (1969).
13. R. David, *Les grands systèmes de droit contemporains* (7th ed., Paris 1978; 1st ed. 1964), and see the English edition by the same author together with J. E. C. Brierly, *Major Legal Systems in the World Today* (1968).
14. R. David and J. E. C. Brierly, *op. cit.*, 14.
15. Indeed the common view pointing at the leading role played by Universities in the development of Continental ('civil') law tradition is one which encounters serious objections with regard especially to the period between the 16th and 18th century: see G. Gorla and L. Moccia, 'A "Revisiting" of the Comparison Between "Continental Law" and "English Law" (16th–19th Century)', in this Journal.
16. On the English civilians and their courts see specially E. Nys, *Le droit romain, le droit des gens et le collège des docteurs en droit civil* (1910) and W. Senior, *Doctors' Commons and the Old Court of Admiralty: A Short History of the Civilians in England* (1922). As to the law applicable in the church courts and in Admiralty as well as in other civilians' courts see, *inter alia*, A. Duck, *De Usu & Authoritate Juris Civilis Romanorum per Dominia Principum Christianorum* (edition of 1689), II, Cap. VIII.
17. The point is clearly made, *e.g.*, by M. Rheinstein, in *Encyclopaedia Britannica, ubi supra*, at 834, speaking of the alliance between the organised bar and the Parliamentary party in the great constitutional struggle of the 17th century, and then adding: 'There was prevented in England a reception of Roman law of continental style, and there were also established that connection between the principles of constitutionalism and individual freedom on the one side, and the Common Law on the other, which has created the image of the Common Law as the legal system of freedom, in contrast to the Civil Law as the system in which the state is exalted over the individual'.
18. See generally Holdsworth, *A History of English Law*, IV, 217–293.
19. H. Lévy-Ullmann, 'Comment un français d'aujourd'hui peut-il aborder l'étude du droit anglais', in *Bulletin de la Société de Législation Comparée* (1919), 64 ff., at 80.
20. V. Arangio-Ruiz, *Istituzioni di diritto romano* (edition of 1927), 4.
21. On a 'gulf which for centuries has divided English law from other legal systems' (*i.e.* Continental ones), see, for instance, H. W. Goldschmidt, *English Law from the Foreign Standpoint* (1937), at p.v (Preface). For the 'insular character' of English juridical culture, see another German scholar, G. Radbruch, 'Anglo-American Jurisprudence Through Continental Eyes', in *L.Q.R.* (1936), 530 ff. As to the 'opposition' civil law/common law, as the basis of the comparison between the two systems, see also: R. David, *op. cit.*; Zweigert—Kötz, *Einführung in die Rechtsvergleichung* (Tübingen 1971), I, 227 ff., at 227, and see the English edition by T. Weir, *An Introduction to Comparative Law* (1977), I, 189 ff., at 190 ('To the lawyer from the continent of Europe English Law has always been something . . . strange'). But it would be useless to mention here other sources of comparative law literature on this point, because of the unquestioned and firm adherence to such views. It may only be added, to complete the picture, that to explain the original and 'unique' character of English law, recourse has been made to 'geographic factors' also. See, *e.g.*, M. Dessertaux, 'De l'influence des facteurs géographiques sur la diversité du droit',

in *Revue Internationale de Droit Comparé* (1948), 217 ff., at 218-22, instituting the equation *'isolement géographique'— 'originalité de droit'*. Most recently a similar approach, concerning in general the influence which would be exerted by 'natural factors', may be found in R. Rodière, *Introduction au droit comparé* (1979), 8-10.

22. See Gorla's writings listed at note 1 of Gorla and Moccia's article in this Journal.
23. See Gorla's writings referred to in the note above. For a detailed panorama of Continental forensic literature in the 16th to 18th centuries see H. Coing (Ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, II/2 (1976).
24. It may be recalled, although in speculative terms only as to its effectiveness, the solicitation which Prynne advanced at that time in his *Animadversions* urging, as Holdsworth puts it (*The Historians of Anglo-American Law*, rep. 1966, 40), 'upon the common lawyers the need to study the continental literature of commercial law, if they were to make the best use of the opportunity which their victory over the court of Admiralty had given to them'.
25. A recent example of such practice is given by *Rasu Maritima S.A.* v *Perusahaan Pertambangan Minyakdangas Bumi Negara* [1977] 3 W.L.R. 518, at 520 ff. *per* Lord Denning, M.R.

    See moreover, among others, the following cases:
    —*Metliss* v *National Bank of Greece and Athens S.A.* [1957] 2 Q.B. 33, at 44, *per* Denning, L. J. (as he then was): 'This is a real difficulty, but I think it can be surmounted by taking a leaf out of the book of Roman law';
    —*In re Ellenborough Park* [1956] 1 Ch. 131, at 163, *per* Evershed, L. J. (on the point of the 'prominence of Roman dicta in the English law of easements, commonly called, indeed, by the Latin name of "servitudes" ');
    —*Knapton* v *Hindle* [1941] Ch. 428, at 432, *per* Simonds, J.: 'When the matter was before me . . . it occurred to me, from a rather hazy recollection, that there was something in the civil law which might perhaps be of some assistance, *for it is the fact that a large part of our law in regard to testamentary dispositions is taken from the civil law*' (italics added);
    —*Cohen* v *Sellar* [1926] 1 K.B. 536, at 545-546, *per* McCardie, J. (about Roman law influence on the common law doctrine relating to breach of promise of marriage);
    —*Durant & Co.* v *Robert and Keighly Maxsted & Co.* [1900] 1 Q.B. 629, and *Keighly, Maxsted & Co.* v *Durant* [1901] A.C. 240 (on the issue concerning the adoption in English law of a doctrine of ratification taken from Roman law sources).

    With regard to past centuries many other cases and examples may be added confirming this long-established practice (and its amplitude and depth) of resorting to 'continental authorities'. According to M. Radin, *Handbook of Anglo-American Legal History*, cit., at 116, the earliest examples can be found in the Year Books. On recourse to 'Roman Civil law' throughout the past and modern evolution of the English legal system see also, *inter alia*: J. Williams, 'Roman Law in English Decisions', in *Law Mag. & Rev.* (1903-1904), 139 ff.; D. T. Oliver, *Roman Law in Modern Cases in English Courts* (Cambridge 1926); J. Mackintosh, *Roman Law in Modern Practice* (Edinburgh 1934); R. Powell, 'Roman Law in Common Law Courts', in *Curr. Legal Prob.* (1958), 19 ff. As a matter of principle, with regard especially to the definition of the sources of law in common law countries, this judicial practice (*i.e.* the resort to 'foreign' authorities) has led to the question of the value, as legally 'binding' sources or merely 'persuasive' ones, attributable to them. On the matter see generally C. K. Allen, *Law in the Making* (Oxford Univ. Press ed. 1964; 1st ed. 1927), 268 ff. But, whatever would be the right position in theory, the practice is, as stated, *e.g.*, by W. Geldart, *Elements of English Law* (rev. ed. by Holdsworth and Hanbury, London 1953), at 13, that: 'In the absence of clear precedent which might govern a question, we find judges relying on such considerations as *inter alia* the law of other modern countries, the Roman Law . . .'.

    Moreover, such judicial practice has represented historically the mainstream through which the influence of Roman Civil law operated on English Common law. It was rather an underground stream as denounced, somewhat ironically, by Thomas

Wood, *A New Institute of Imperial or Civil Law, etc.* (London 1730; 1st ed. 1704), at 86 (Preface): '. . . and that our Lawyers have borrowed the Rules and Reasoning Part from the Civil Law, though many of them are apt to think that it was all their own from the Beginning, because they have Possession, and find it at present in their Books . . . but Fleta and Bracton, and the most ancient of their Writers would look very naked if every Roman Lawyer should pluck away his Feather. Of late my Lord Coke hath frequently, and in express Terms made use of the Maxims of the Civil and Canon Laws, and hath taught the Way of arguing from such Rules to others'. And see also in this regard R. Wooddeson, *op. cit.*, 85–86.

There is finally to add, as stated, e.g. by D. E. C. Yale, 'A View of the Admiral Jurisdiction: Sir Matthew Hale and the Civilians', in *Legal History Studies* (1972) 87 ff., at 97, that between common lawyers and English civilians 'contact was not indeed entirely lacking'. In fact: 'civilians might have audience in Westminster Hall and argue at the bar of a common law court on points raising questions of civil law, and there was a certain (though limited) mutuality among the judiciary'. In other terms, common lawyers used sometimes to have recourse to their 'colleagues' at Doctors' Commons asking them for a sort of *'consilium sapientis'*. See for example: *Carter* v *Crawley* (1681), Sir T. Raym 496; *Anthon* v *Fisher* (1782), 3 Dougl. 166; *Le Caux* v *Eden* (1781), 2 Dougl. 594 note.

26. See G. Gorla, 'Il ricorso alla legge di un "luogo vicino" nell'ambito del diritto comune europeo', in *Il Foro italiano*, 1973, V, 89 ff.
27. Evidence of the wide circulation in England and among common lawyers of Continental law books in the 16th to 18th centuries may be gathered from the printed Catalogues of the Libraries of the English Inns of Court. And see also: W. Senior, 'Roman Law MSS in England', *L.Q.R.* (1931) 339 ff.; R. J. Whitwell, 'The Libraries of a Civilian and Canonist and of a Common Lawyer, An. 1294', *L.Q.R.* (1905) 393 ff.
28. W. Senior, *Doctors' Commons, etc.*, cit., 1. In similar terms, H. C. Gutteridge, *Comparative Law* (Cambridge 1946), 14, footnote 2, strongly avers that 'a complete account of the influence of the doctrines of the civil and canon law on the growth of English law still remains to be written', and then suggests that such influence: 'was, probably, much greater than is commonly assumed. Bracton's work furnished the excuse, if any were needed, for the resort to the civilians in questions to which the common law furnished no answer. *Some, at least, of the English law libraries were well equipped with the necessary books'* (italics added).

For an account of the 'great debt' owed by Anglo-American law to Roman law see, however, the views (perhaps somewhat excessive according to Wigmore's criticism) of C. P. Sherman, *Roman Law in the Modern World* (New York 1924; 1st ed. 1916), vols. I–III.