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THE COMMON LAW IS DIFFERENT: TEN ILLUSTRATIONS

If amazement is the mother of science, the continental lawyer's amazement when he is confronted with the English common law must be one of the most powerful factors in the scientific study of the law (to which, after all, the Goodhart professorship is devoted). I shall therefore begin with the presentation of ten legal institutions which exemplify the different approach by English and continental law and, in the course of so doing, present some historical explanations or at least considerations. Many more examples could have been selected, but, whether under the influence of the decimal system or because of reminiscences of the decalogue, ten seemed a fair and not absolutely fortuitous number. As befits a legal historian, I shall be concerned with the historic or classic common law without, however, ignoring altogether various recent changes that seem to be narrowing the gap between the common law and the 'Roman-Germanic family'.

Some readers may themselves be amazed at this amazement: is it not natural that every country has its own laws? In the United States every state enjoys and even guards its own laws, and in some cases even a code of laws! To this the reply can be made that the difference between England and the rest of Europe (including to a large extent even Scotland) goes much deeper than the differences among the continental countries and the states in North America: it is the whole approach to the law and the very way of legal

thinking which is different, and not just the laws on divorce or the maximum speed on the highways.

Nobody will be surprised to find that Chinese culture has produced a distinct legal system, because the Chinese world is a distinct civilisation, not only in law, but in religion, science and morals. The amazing thing about English law is that it is so distinct, although English history and civilisation share with the Continent all its main ingredients in the most diverse fields. England's language is of continental Germanic origin, enriched with continental French and Latin additions. Her religious history, in its catholic and protestant phases, is clearly in unison with the general development of European history, and the same is true of her political institutions: neither the monarchy nor constitutionalism or parliamentarism originated in England, nor were they exclusively English in later times. It is the legal system that is the odd-man-out and here no half measures prevailed: the differences are fundamental.

THE AMBIGUITY OF THE TERM 'LAW'

For the continental lawyer who crosses the Channel the surprises start straight away with the very word 'law'. He soon discovers the irksome fact that this one English word can signify two very different things. It can be used for a whole set of legal rules, whether based on legislation, judgments or jurisprudence (as in the phrase 'the law of the land' or 'the law says'), for which he uses the terms *das Recht*, *le droit*, *il diritto* or *el derecho*. It can also be used specifically for an act issued by the legislator (as in the phrase 'Parliament passed a law'), for which the continental lawyer would use *Gesetz*, *loi*, *legge* or *ley*. However, while he muses on this confusing terminology and smugly realises that his language disposes of two distinct words for

these two distinct concepts, the continental lawyer in all fairness will have to admit that the *fons et origo* of his own law, the legal wisdom of the Romans, was not free from the same confusion: in the phrase *nemo censetur legem ignorare*, *lex* clearly stands for *le droit*, but the *leges* of the emperors clearly are *des lois*. He will also have to admit that continental people use the same word for objective and subjective rights (*le droit* as against *mon droit*), whereas the English use 'law' for the one and 'right' for the other.

But why does the English language use the same word 'law' for two such distinct notions as the sum total of legal norms and a particular enactment?

In the old days the English language used distinct words for 'the law' (in the sense of *le droit* or *das Recht*) and 'a law' (*une loi*, *ein Gesetz*). For the former the word *æ*, well known in several West-Germanic languages for the old, and originally unwritten customary laws of the Germanic peoples, was used;[1] the term was no longer understood in the eleventh century and was replaced in the manuscripts by *lage*. For this same meaning the term *riht* was also used, as in the contrast between *folcriht* and *Godes riht*, i.e. secular and ecclesiastical law. For law in the sense of legislation *dom* was widely used. The two terms, for example, were clearly contrasted in the Laws of King Ine of A.D. 688–95, which distinguish *folces æw* and *domas*, i.e. the traditional law of the people and legislative enactments. In later centuries we find for the latter the terms *gerædnes* and *asetnysse* (and also the verb *asettan*), the latter clearly akin to German *Satzung* and *Gesetz*: thus the Provisions of Oxford of 1258 were called *isetnesses*.

The confusion started with the introduction of the ambiguous Scandinavian term *lagu*, which meant both the total of legal rules (as in *Denalagu* or *Edwardi laga*) and a legislative enactment. It first appears in the Laws of Alfred

and Guthrum (A.D. 880–90) and of Athelstan (A.D. 925–*c.* 936). In course of time *lagu* replaced *æ*, *riht*, *dom*, *gerædnes* and *asetnysse*, and as 'law' stayed in general use with its present double meaning. Thus the Danes gained a minor verbal revenge for their territorial losses in the first half of the tenth century.[2] Linguists could explain how and why all this happened: the legal historian can only express his amazement that useful words are unaccountably dropped by the wayside in the course of the centuries.[3]

One consequence of this English ambiguity is that one is not even certain how to translate such a key expression as 'the rule of law'. Personally I would be inclined to render it as *le règne du droit*, but I have found it translated as *le règne de la Loi*.[4] This is rather amazing since, to my mind, the rule of law refers not only to enacted law but also to the legal rules of various origins on which the court protection of the individual is based.A recent French work on the role of the law in American and French democracy sometimes renders 'the rule of law' by *le règne de la loi* and sometimes by *la règle de droit*, underlining again the perplexity caused by the ambiguous term 'law'.[5]

APPEAL: A RECENT DEVELOPMENT

As soon as the continental lawyer delves somewhat deeper into English history, differences of a more substantial nature reveal themselves. Thus, while reading the history of procedure, he discovers that appeal in the continental (Roman and modern) sense was ignored by the historic common law.The term 'appeal' was familiar enough, but it meant something quite different, i.e. a private criminal accusation which normally led to judicial combat. What is understood by 'appeal' nowadays, i.e. bringing a case before a higher judge in the hope of obtaining a better

sentence, was unknown in classical times and was, in fact, introduced in the nineteenth century. Although it belongs at present to the every day practice of English courts, there are occasional signs that the old aversion from appeal is not altogether defunct. This is, at least, the way I felt when I followed a debate in the House of Lords in 1985 where clause 22 of the Prosecution of Offences Bill (about which more later) was thrown out. This clause provided for a – very weakened – sort of appeal, by allowing the Attorney General to refer to the Court of Appeal for their opinion certain (lenient) sentences imposed by the Crown Court. The historic common law knew only two institutions that bore some semblance to the present-day appeal. One was the accusation of false judgment levelled against the bench or against the jury, the other was the scrutiny of the record of the case in order to discover a mistake (writ of error and writ of *certiorari*), neither the legal principle nor the facts of the case being at stake. The object of the writ of error is apparent from its name. The writ of *certiorari* was originally a technique for informing the higher court, in the course of proceedings in error, about the procedure in the lower court. However, it also came to be used in order to have the records of the case brought to the King's Bench before judgment was given, a procedure comparable to the continental *evocatio*.

The absence of a modern appeal procedure was a characteristic of all European law until about the thirteenth century. English and continental law then began to grow apart, as the former conserved the primeval tradition and the latter began to introduce modern procedure along the lines of Roman-Canonical science (a brain-child of twelfth-century Bologna). However, it would be simplistic to attribute the introduction of appeal solely or even primarily to the shining example and the irresistible intellectual

fascination of Ricardus Anglicus's *Summa de ordine judiciario* (*c.* 1196), Bernard de Dorna's *Summa libellorum* (1213–17), or William Durantis's encyclopedic *Speculum judiciale* (1272, 2nd ed. *c.* 1287). The introduction of appeal is a political event, as it implies the subjection of lower, to the authority of higher courts, which is a question of power politics. The kings of France succeeded in establishing the Parlement of Paris as a court of appeal because the political unification of the kingdom resulted in the subjection of old regional rulers – and their courts – to royal authority: hence it was normal to appeal to the Parlement in Paris against the courts of first instance in provincial places. In England there were no such provincial courts of first instance: all the common-law judges belonged to the king's central courts, so that the hierarchical prerequisite for real appeals was absent. This, much more than the fact that the common law ignored the products of the Bolognese doctors, was responsible for this striking discrepancy between common and civil law. For the parties both the English and the French system had advantages. The fact that one's case was settled definitively in one instance by the senior judges of the realm can be considered a boon. It entailed, however,a truly remarkable centralisation of cases from all over the country which caused inconvenience to parties and witnesses. In France, which was that much larger than England, this might have been an insurmountable obstacle. Hence a system with local courts of first instance and the possibility of appeal, when desirable, to the senior judges of the kingdom was a fair solution.

ENGLISH LAW IS A 'SEAMLESS WEB'

Lawyers who like this sort of delving into the past will be struck by another great divide, i.e. the continuous nature of

English legal development or, in other words, the absence of great catastrophes like that experienced by France at the time of the Revolution. Certainly the lack of interruption in English legal development can easily be overstressed in the deeply conservative atmosphere of the English legal establishment, about which de Tocqueville had the following to say:

> I do not, then, assert that all members of the legal profession are at *all* times the friends of order and the opponents of innovation, but merely that most of them are usually so. In a community in which lawyers are allowed to occupy without opposition the high station which naturally belongs to them, their general spirit will be eminently Conservative and anti-democratic.[6]

Famous legal historians such as Holdsworth were inclined to see every new phase in history not as an innovation, let alone a revolution, but as 'further adaptation' of old institutions. Nor is it surprising that they pay scant attention to such revolutionary phases as the rule of the Puritans and the latter's very innovating and sensible plans for legal modernisation. Thus Holdsworth finds it a waste of time to study their programme, because all their novelties were thrown overboard at the restoration of the monarchy, and Plucknett finds their advances 'premature' and therefore not really worth studying.[7] It all depends on the meaning of 'premature'. Some institutions and rules, indeed, are so totally out of step with the times that they meet a united front of rejection, but others are premature only because of ingrained habits and well-entrenched vested interests: what could be reasonably objected to the Puritan desideratum for the introduction of English instead of law-French in the English courts? And yet, it was thrown out with so much else when the old world returned in 1660.

These reservations having been made, it cannot be denied that to the continental observer, who is used to thinking in

terms of *ancien droit* and *droit nouveau* as two incompatible worlds, English legal development appears as a historic continuum. There is no obvious rupture, no wholesale wiping out of the legal wisdom of centuries, no division of the law into a pre- and a post-revolutionary era. In English law the present is never completely shut off from the past and its historic roots are easily perceived. One might even say that there is no sharp distinction between the law and legal history: the modern law of treason, for example, which is based on the Statute of Treasons of 1352, was applied in the twentieth century. In this English lawyers are very much like their Roman predecessors who, as one authority puts it, 'cite other jurists as authority with no apparent awareness that some authorities lived centuries earlier than others': 'the Roman sources treat law quite unhistorically', without any indication 'that the passage of time and new ideas have any effect on attitudes to legal rules'.[8] With few exceptions 'the Roman jurists were uninterested in and unmoved by history'.[9]

It has sometimes been thought that this aversion to a total break with the past is rooted in the English character. Against this, however, one can point out that no such reservation prevented the English nation from making a sharp break with its religious past at the time of the Reformation. The rupture between the medieval and the post-Reformation Church in England is as deep as that between the *ancien régime* and the post-revolutionary world in France.

The absence of a total break in English legal history over the past eight centuries does not mean that there have been no periods of change: English legal history is not a tale of utter stagnation. In fact there have been periods when change was particularly marked – in the reign of King Edward I, for example, when every year from 1275 to 1290

witnessed important new laws (although there was more definition than creation of law). The legislation of the Tudors was even more considerable and truly innovative,[10] and, while the Puritans had their way, the middle of the seventeenth century witnessed very interesting changes indeed, even though the Restoration wiped out most of their reforms and plans. The nineteenth century, especially in the decade after the Reform Act of 1832, set about the task of modernising the 'old Gothick castle' with great verve, although it is true that procedure and judicial organisation were affected more than substantive law and, as the example of commercial legislation shows, there was more codification than innovation in certain fields of private law.

Yet none of this legislation ever cut off the present from the past, nor was it intended to. Respect for old institutions sometimes overrode the considerations of pure logic. Thus at the time of the Judicature Act of 1873 the general feeling was that the judicial role of the House of Lords would have to go, since there was no logic in creating a High Court and a Court of Appeal and keeping yet another instance of appeal above the latter. Yet, to everyone's surprise and in circumstances that are not yet very clear, when the Judicature Act of 1875 appeared, the House of Lords was retained as the highest instance of appeal, above the Court of Appeal. Nor was its role that of a continental Court of Cassation, which 'breaks' the judgment of a court of appeal and sends the case to another to give judgment: the House of Lords gives its own judgment and it is final (except nowadays for appeals to the courts of the European communities). This construction of the two courts of appeal, one on top of the other, defies logic in continental (and many English) eyes, and can be explained only in terms of veneration for the judicial role of Parliament in the course

of many centuries – in other words, as Justice Holmes maintained, 'the life of the law is not logic but experience'. Another example of this veneration for the past is to be found in the role – or should one say the rule – of precedent. That the common law is based on precedent is the first thing continental students hear in their course of comparative law, but few realise how old some of the precedents are. Their real age is sometimes revealed only by careful research, which may well show how a nineteenth-century judgment was in fact based on Blackstone, who had his case from Coke, who found it in Littleton and so finally in Bracton. This ageless character of English law also implies that disuse of an ancient right does not necessarily lead to its extinction, even though some people convince themselves of the contrary. A good illustration of this point can be found in the grave political conflict which arose at the beginning of the twentieth century, when the House of Lords suddenly threw out a budget from the Commons, although it had not done so for some 250 years and, in the eyes of many, had lost this right through disuse. All this shows that it was safer to abolish old laws *expressis verbis*, as was done in the Repeal Acts which, for example, left only four of Magna Carta's articles standing.[11]

The contrast with the Continent is striking. In the sixteenth century Germany 'received' the civil law, i.e. ancient Roman law and the commentaries of the medieval schools. This was a momentous decision, for it meant the replacement of the medieval customary laws by the 'learned laws' (Roman law and its twin brother, the learned law of the Church) – a move which was deemed to further the political unity of 'the Germanies' and to provide the country at a stroke with the best, or at any rate the most learned, legal system available. Even more radical was the effect of the French Revolution, which not only swept away