

The influence of Roman Law on the common law

*Peter Stein**

Until relatively recently, it was an article of faith among scholars of the common law that their law was almost entirely untouched by the Roman law which was recognised to be the basis of the civil laws on the continent. The reason was partly romantic nationalism, but with a political slant; the common law was viewed as the safeguard of individual liberty against any undue interference by the state, whereas the civil law, tainted by such maxims as 'what pleases the prince has the force of law,' was envisaged as the justification of tyranny.

There is, however, another less obvious reason for this underestimation of the influence of Roman law. When the history of the common law came to be studied seriously in the later part of the nineteenth century, its scholars were much influenced by the Germanistik wing of the German historical school. Roman law was sometimes seen by Germanists as a kind of disease, infecting the purity of Germanic law. From this perspective the common law was a Germanic customary law which had somehow managed to retain its purity and resist infection by Roman law at a time when the whole of continental Europe, and even Scotland, were succumbing to the plague. The great historian of German law, Heinrich Brunner, when investigating the reasons for the survival of the common law, observed that when it was given its first systematic statement in the thirteenth century treatise by Bracton, it received an 'inoculation' of Roman law conceptions, which was sufficient to immunise it from a full-scale infection in the sixteenth century.

Today when the common law is losing some of its characteristic features and moving nearer to the civil law, we can look at the influence of Roman law more calmly. In the first place we may note its influence on English legal theory. The strength of the common law has always been in its handling of cases, in finding pragmatic solutions to legal problems; its weakness has been in the theory of law. In particular it has had to face the problem that it is 'a wilderness of single instances' and to find a way of organising the fruits of a series of decisions in a systematic way.

As already noted, already in the thirteenth century Bracton borrowed and

* Prof. dr. P.G. Stein Q.C., F.B.A. is Emeritus Regius Professor of Civil Law in the University of Cambridge.

adapted from Roman law (in fact from Azo) to impose on the embryonic common law a system based on Roman categories. Bracton did not apply these Roman notions slavishly, but he wrote in Latin and when a writer uses a language with technical terms, which already have an established meaning in that language, some of that meaning is bound to be transferred to what the writer is describing. The English ownership that Bracton dealt with may have differed greatly from the Roman ownership but, by discussing it in terms of *dominium* and *proprietas*, Bracton painted it in Roman colours. As the greatest English legal historian, F.W. Maitland put it, from their knowledge of Roman law, Bracton and his contemporaries ‘learned how to write about, how to think about, law and besides this they acquired some fertile ideas, distinctions and maxims which they made their own.’¹

From the time of Bracton onwards, common lawyers have turned for guidance in questions of legal theory to the contemporary version of Roman law on the continent. In the seventeenth century, Chief Justice Hale was inspired by humanist models to suggest an *Analysis of the Common Law*, based on the Institutional system, which was used in the following century by Blackstone as the framework of his famous *Commentaries*. This work formed the foundation of the modern common law, particularly in the early United States, where legal libraries were rare.

In the nineteenth century John Austin presented the concepts of the German Pandectists as if they were universal notions applicable as much to the common law as to Roman law. As legal education in the common law became established in the second half of the nineteenth century, its various components, such as contracts and torts (the common law does not recognise the concept of obligation) were increasingly presented in systems organised around principles, derived ultimately from Roman law. They were viewed not so much as Roman principles as principles of universal validity.

In its detailed rules, in the subtlety of its arguments, the common law has been self-sufficient; but when it was necessary to take a larger view, it was lacking. In particular English lawyers have often been attracted by maxims derived from Roman law, which they have understood as general principles, applicable to all law. These maxims, because they are axiomatic, are taken for granted and do not need to be proved. Some are legal proverbs, perhaps adapted to refer them to the common law rather than the civil law. Sir Edward Coke, who in the early seventeenth century transmitted the substance of the medieval common law to modern times in his *Institutes and Commentary on Littleton*, was very prone to cite Latin maxims, some of which he invented himself or quietly adapted for his purposes. Thus he referred to the maxim *multa in iure communi contra rationem disputandi pro communi utilitate introducta sunt* (*Co. Lit.* 70b). This is taken word for word from the remark of the Roman jurist Julian in D.9.2.51.2, but Coke says ‘*iure communi*’ where Julian said ‘*iure civili*’!

The common law applied by the common law courts was not by any means

1. Select Passages from Bracton and Azo, Selden Soc. v.8 (London, 1894), xxiv.

the whole of the law of England. Its limitations meant that it had to be supplemented by two other jurisdictions, that of the civil law courts and that of the Court of Chancery, both of which were directly influenced by Roman law.

The civil law courts were the descendants of the church courts which applied canon law before the Reformation and of the Court of Admiralty. After the Reformation the church courts continued as the courts of the Church of England, with exclusive jurisdiction over questions of marriage and status and over testamentary dispositions of moveable property. They continued to apply the same law as they had always done and followed the leading continental authorities. So did the Court of Admiralty, which was concerned largely with maritime law. The teaching of canon law was formally abolished in England in 1535, but the teaching of Roman law continued in the two ancient English universities of Oxford and Cambridge (until the nineteenth century they were the only English universities). Indeed these universities did not introduce any teaching of the English common law until the end of the eighteenth century. Common lawyers had no rights of audience in the civil law courts, which were reserved for members of Doctors' Commons, i.e., those who had doctorates in civil law from Oxford or Cambridge. Together with proctors and notaries, they formed a small profession of civil law specialists, which continued until the middle of the nineteenth century, when the jurisdiction, but not the law and procedure, was merged with that of the common law courts.

The civil law courts did not use common law procedure with its lay juries; they followed the Romano-canonical procedure with wholly professional judges and an emphasis on written documents rather than the oral evidence which juries required. Most of these characteristic civil law features were preserved even after the merger and are visible today, particularly in Admiralty cases.

The other route through which Roman law influence has been mediated into English law is through the Court of Chancery, which administered not the common law but Equity. By the later middle ages the common law had become a rigid system, which failed to provide all the remedies that the king's subjects needed. So they had recourse to petitions to the king, as the fountain of justice, to grant them the remedies which justice demanded, outside the jurisdiction of the common law courts. Some of these limitations of the common law were due to its exclusive use of the jury procedure. A lay court, such as the Roman *iudex* under the formulary procedure and the common law jury, which comes into being solely to deal with a particular case and has no continuing existence, is effectively limited to one kind of remedy, namely the award of money damages. Any other remedy, such as order to do something or not to do something, is beyond its powers, if only because the court will no longer be in existence when the time comes to decide whether the order has been carried out or not. Furthermore certain types of remedy, which lay down standards of conduct to be adopted by certain groups, such as guardians, have to be administered in a consistent way in all cases and can only be granted by professional judges.

In such cases the king referred the petitions to his Council. The president of the Council was the Chancellor, who until the Reformation was usually an ecclesiastic, familiar with canon and civil law. Gradually the Chancellor's court, the Chancery, became a separate jurisdiction parallel with that of the common law. It had a wholly professional procedure, influenced by the Romano-canonical procedure. Since the Chancellor acted *in personam* and could imprison those who disobeyed his orders for their 'contempt of court,' his court could issue orders and injunctions. For example, if a complainant alleged that his opponent had obtained a judgment against him in the common law court which was unjust, the Chancellor would investigate the truth of the allegation. Then, if satisfied that it was true, he would issue a 'common injunction' against the other party not to enforce the judgment in his favour, even though it was formally valid, on pain of imprisonment if the injunction was disobeyed. It has been suggested that this procedure was based on the model of the *denunciatio evangelica* of canon law.

Chancery began as a court of conscience but the Chancellors tried to act according to general principles and the civil law offered plenty of apposite principles. Thus when they granted relief in cases of error, fraud or forgery, or when they gave special protection to infants or insane persons, they could find precedents in the way the strict civil law in Rome had been modified according to equitable principles, both by the praetors and by the Emperors. The main institution produced by Equity is the trust, under which property is owned by A on behalf of B. A, the trustee, has the ownership at law and B, the beneficiary, has the ownership in equity. The duties of trustees were worked out by the Chancellors on a case by case basis, but it seems more than likely that Roman law analogues, such as the duties of tutors in relation to their ward's property, were helpful to them in this regard. Once again the late nineteenth century fusion of equity with the common law has not affected these doctrines.

Even in the common law in the strict sense, Roman influences can be recognised in certain parts of the law which were developed after the Middle Ages. For example, English land law, which is based on feudal ideas, seems at first sight most unroman. However the law of easements, rights *in rem* exercisable over one piece of land in favour of another piece of land, was developed later than the rest of the land law and is almost entirely taken over from the Roman law of praedial servitudes. It was found convenient to pretend that on this matter ancient Roman law and traditional English customs were the same.

In the common law states of the southern U.S.A. (Louisiana was, and is, the exception in that it has had the civil law, rather than the common law, ever since its admission to the Union) before the Civil War, cases arose involving slaves. English common law offered no precedents on such matters as the owner's rights in respect of fugitive slaves and they were often decided according to Roman law, just because there was no English decision available. In the period immediately after Independence, the common law courts of the

United States tended to view Roman law more favourably than their English counterparts just because the Roman law was not of English origin.

The influence of Roman law on various aspects of Anglo-American law in the past is undeniable. What about today? In a 1987 case,² the owners of an oil tanker, on which a cargo of crude oil had been loaded, had mixed it with other oil of their own already in the tanker. It was possible to work out precisely the amounts of oil originally belonging to the two parties. The dispute was as to how the mixed oil should be divided up. The relevant contract provided that any dispute should go to arbitration and that English law should apply. The issue of how mixed substances should be divided had been discussed in a number of cases going back to 1594. A case of that year concerned the mixing of two stacks of hay, and it was held that where, as in that case, the mixing was due to the wrongful act of one of the parties, the whole mass should be assigned to the other, innocent, party. More recent cases established that if the wrongdoer had destroyed the evidence by which the innocent party could show what he had lost, the wrongdoer must suffer from the resulting uncertainty and if necessary hand over the whole mass. But where, as in this case, it was known precisely how much had belonged to each party, the authorities did not provide a clear rule.

The arbitrators felt that they were not bound by any common law rule and expressed a preference for the Roman rule of *confusio*, under which the parties owned the whole mass in shares proportionate to their contributions. In the appeal against this ruling, the judge observed that 'it is not the function of civil justice to award the victim more than he has lost, 'and that even though the arbitrators found that when the ship-owners mixed the oil, they were engaged in wrongdoing, that did not justify the application of a different rule in the civil action. As he said, 'in the days when corn and hay were to be found in heaps which could not be measured accurately, when such disputes were tried by jury and witnesses might be illiterate or ignorant, a rough and ready rule... may have been the best they could find. But a primitive rule is no longer appropriate when modern and sophisticated methods of measurement are available.' The judge felt himself free to apply 'the rule which justice requires' and proceeded to apply the Roman rule, adding only that if the victim had suffered any loss, such as in respect of quality, as a result of the mixing he could claim damages therefor.

The judge could, of course, have referred to modern civil law (e.g., the French code civ. 573 and 574), but by referring rather to the rule of Roman law, he was recalling an English legal tradition. That is to treat Roman law, and in particular those rules of Roman law which are said to be 'dictated by natural reason,' as if they expressed general principles of law accepted by all civilised peoples.³

2. Indian Oil Corporation Ltd v. Greenstone Shipping Co. SA (Panama) [1987] 3 All ER, 893 (Staughton, J.).
3. For some remarks on the structural similarities and differences between Roman law, traditional common law and modern civil law, P.G. Stein, 'Roman Law, Common Law and Civil Law,' 66 Tulane Law Review, 1992, 1591-1603.