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The Influence of Roman law on European (particularly English) law

Roughly 2/3rds of the world live under a civil law system and 1/3r d under the English common law system. To put it another way, of the 320 or so jurisdictions in the moder n world, at least 280 stem from one of these ideologies to a greater or lesser extent. As a rule of thumb, for mer English colonies have a common law legal system and all other countries have a civil law legal system. A deÀnition of common law is judge made law. Historically, this is the great dividing line between civil and common law. In a civil law system with a law code, all law must come from legislation .

1. Why was Roman law abandoned when the Romans left Britannia (England & Wales up to Hadrian's Wall) in 409 AD?

2. How did Roman law come back to Western Europe, and in particular England, in the 12th Century?

3. Why were the origins of Roman law concepts in English law covered up?

1. The Roman occupation of Britain in 43 AD to the expulsion of the Romans in 409 AD. Prior to the Roman Conquest of Britain in 43 AD, Roman law was well developed, for example the 450 BC law code of the Twelve Tables hammered into bronze, as there was no paper during the whole of Roman civilization. The Romans kept the former Celtic tribal boundaries but changed them into Civitates (provinces) and established an administrative centre or Civitas in each Civitates. There were Basilicas (Town Halls where the local curia met doubling up as Law Courts) in every Civitas or Public Town which were similar to mini Pompeii's

In 77 AD. Vespasian appointed a Legatus Juridicus or Law OfÀcer as a deputy to the Governor, Agricola, to oversee the setting up of a national legal system in Britannia. By 400 AD Britannia was as Romanized as any other Roman province and very prosperous- more than a dozen Public Towns with baths, fora, basilica, curia, theatres, amphitheatres, etc- and more than a hundred small towns. The population is considered to be about 3 m.

2. The expulsion of the Romans in 409 AD to St. Augustine's mission to Britain in 597 AD. In 409 AD, the few remaining Roman administrators were expelled from Britannia, according to Zosimus writing in Constantinople 100 years later. Civilization lingered on but just after 430 AD, it collapsed in Britannia and shortly afterwards (but less severe) in the rest of Western Europe. This included the complete collapse of the money economy and the abandonment of the cities in Britannia and Western Europe. Civilization collapsed in the Eastern Roman Empire at the end of the 6th Century. This collapse resulted in a huge decrease in education and knowledge. Roman law was simply too complex and clever for barbarian societies to understand. It was abandoned. Further, like the common law today, it was not user friendly at the time. There was no written Roman Code

but the law was to be found in thousands of jurists' opinions.

By 597 AD when St Augustine came to England, nothing remained even in memory of Roman Britannia. Contrast the position in Gaul. For over 100 years, 10,000's of Germans served in the Roman legions and at least one became emperor. Large chunks of land in Gaul were handed over amicably by treaty to the barbarians. Unlike in Britannia, possibly because the Western German barbarians admired Roman civilization-they just wanted to be in charge, they were much more assimilated to the Roman way of life. Examples of this are that French and Spanish are based on Latin. Visigoth, Burgundian and other European law codes (called "Vulgar Roman law") were inÁuenced by Roman law in a way in which the Anglo-Saxon

legal codes were not. Due to this historical memory, continental legal systems were much more receptive to the reintroduction of Roman law than England in the 12th Century.

I doubt the North German and Danish Anglo Saxons knew much about Roman civilization when they invaded Britannia in the 5th Century. There was about 200 years of intermittent Àghting between the Anglo-Saxons and the British (but no genocide) with no land handed over amicably by treaty. This may account for the severity of the collapse of Roman civilization in Britannia and the birth of "Englishness". The result was that English is not based on Latin. However, it would still have been possible for the English legal system to be based on Roman law, as all countries from where the Anglo-Saxons came from, have a civil law system.

3. Justinian's Digest Between 529-534 AD in the Eastern Roman Empire in Constantinople, Justinian produced in Latin the Corpus Iuris Civilis (Body of Civil law) on papyrus comprising Justinian's Digest, the Institutes (student textbook), Codex (Imperial Enactments) & later Novels (Imperial enactments from 534 AD).

By far the most important was the Digest. Justinian's jurists distilled (and discarded where superÁuous or repetitive) 1,000 years of Roman law contained in jurists' opinions by reducing them from 1,500 (about 30 times the size of the Bible) to 50 books. Even after this, the Digest was still 1.5 times the size of the bible. The Digest contains statements of principle and actual and theoretical case studies in which jurists work through legal concepts, fairly similar to a standard English legal textbook. The Digest is like the leading English textbooks on the law of Contract, Tort, Land and Succession (including Trusts) all rolled into one. These are the four core subjects which, with Criminal law, make up our law.

If the computer had been invented 2,000 years earlier, Roman law could have adequately coped with computer law-indeed many of the principles are still used today in computer law. The "Vulgar" law codes were far too simple to cope with (say) computer law.

Roman law had the concept of Fideicommissa (Trusts) but a trust created only by will and not during the settlor's lifetime. The Àduciarius is similar to the trustee in English law. So the word "Àduciary" as in the Àduciary relationship between the trustee and beneÀciary which is the cornerstone of the law of trusts, clearly comes from "Àduciarius" and can be found in Justinian's Digest.

4. St. Augustine's mission in 597 AD to the Norman Conquest in 1066 AD In 597 AD St Augustine came to England. From then onwards, the church started to acquire land, often by gift, during the lifetime or on the death of the transferor, eventually owning a quarter of all arable land in England after the Norman Conquest.

To show good legal title to land, the concept of the deed which came from Roman law (and can be found in the Vulgar law codes), was re-introduced to England.

From the end 6th CAD to the 11th C AD, Justinian's Digest and the rest of Corpus Iuris Civilis were lost in Western Europe so customary law took over for 500 years. As can be imagined with lawyers, after Justinian's Digest was re-discovered, there were constant arguments as to whether customary or Roman law applied, particularly where there were gaps.

5. Discovery of Justinian's D igest The Reception (i.e. the receiving back in Western Europe) of Roman law started to take place from the time a 6th Century copy of Justinian's Digest was discovered in about 1070. It is now in Florence.

This copy was either produced after Italy was recaptured by Justinian in the 6th Century or was brought over by scholars from Constantinople, Áeeing from the Turks. The same applies to the three other parts of the Corpus Iuris Civilis. Generally speaking, all the world's civil law and Roman law concepts in the common law ultimately come from the Florence Digest. A copy was "glossed" or annotated by the glossators at Bologna University with a glossed full version appearing around 1100. As F.W. Maitland said "but for the Digest, Roman law could never have reconquered the world".

6. The Common law incorporates certain Roman law concepts Roger Vacarius (circa 1120-1200), a student at the Bologna law school, came to England in

1143 and brought with him, later supplementing, from Bologna, the whole of the Corpus Iuris Civilis.

A history of Oxford University, written in 1773, states "the n o v e l t y " o f [Va c a r i u s '] lectures from 1149 onwards "drew many to hear him" and their popularity were so great that he produced the Liber Pauperum which became a leading textbook at Oxford. The Liber Pauperum is a nine-volume summary of the Digest and the Imperial Enactments. A nearly complete manuscript of this work is to be found in the library at Worcester Cathedral.

The 1773 history also provides a clue as to why Roman law is not a source of English law when it states:-

"The study of civil law [introduced by Vacarius] advanced so fast that [some] lodged their complaints to the king; alleging, amongst other reasons, that it was an innovation, ... that it was very unÀtfor the English constitution or genius.

Yet some eminent lawyers are recorded about this time amongst whom... [the] attorney general says of him "He [Vacarius] was a great honour to the age he lived in, whether one looks at his religion or learning."

Thus there was a big argument between those in the elite who wanted English law to be based on Roman law following Justinian's Digest and those who wanted a totally unique law based on cases. English law and "Englishness" were already very precocious and did not like Roman law because it was foreign.

You have to call it the English genius because those arguing for a case based law won but compromised by borrowing those principles from Roman law which they liked whilst surreptitiously covering up their origins. The result is that by developing certain cases and ignoring others, judges can Ànd a practical solution to a problem very quickly. This would not be possible with a rigid principles based law founded in legislation. It has made English law the envy of the world and has been of enormous beneÀt to business. Our self-conÀdence is quite staggering. We are the only country in the world to refuse to accept a user friendly comprehensive civil law code. However, much of English law's architecture has been strongly inÁuenced by Roman law. The four core subjects of English private/ Roman law from Gaius' 161 AD Institutes; the concepts of contract and conveyance for the transfer of legal title in land and goods and contract and assignment for the transfer of legal title in intangible assets. Recent work in devising a European law of contract found no real problems in reconciling common and civil laws of contract except for the conÁict between the principles of caveat emptor and good faith. Roman delict is similar to our torts.

Peter Stein's summary cannot be bettered when he says "Roger Vacarius' legacy was the conception of the civil law as a universal jurisprudence whose ideas underlay all systems of law."

7. Trusts in equity, not common law In 12th Century AD the concept of the inter vivos trust was created in England. The

Crusades certainly played their part in that, before a knight departed, fearing he would not come back alive, he transferred his property to another person to provide for his relations. When he did come back, sometimes the person did not transfer the property back to him but relied on common law legal title. The knights petitioned the king who gave the problem to the Lord Chancellor to sort out. So the Lord Chancellor's court, the Chancery Court, held that in accordance with equity, the person with common law title held the property on trust for the knight based on a Àduciary relationship.

Today, 90% of trusts in America are commercial. Just about all the shares and bonds traded on American exchanges-$37 trillion, about half the world's GDP- are held in trust.

8. Unjust Enrichment Just like we experienced the greed from globalization, so did the Romans with the huge expansion of their empire. The Romans had devised the principle of unjust enrichment which again we borrowed. The Romans and ourselves should have developed the principle of unjust enrichment so as to claw back the ill gotten wealth based on Àctitious proÀts which the bankers paid themselves. At the moment, the principle is too restrictive to allow this claw back though the challenges in retrospectively breaking a valid contract are formidable.

9. The Napoleonic Code 1804 In 1804 the Napoleonic Code was established and was followed by written law codes in all other civil law countries except for Scotland, South Africa and a few others. The signiÀcance of a code is that it resolves the continuous conÁict as to whether an alleged legal principle has been "received back from Roman law" or whether customary law prevails. No court can refer to an authority earlier than the date of a code. Thus in France, Justinian's Digest cannot be referred to in court though it can be in Scotland.

Following the French Revolu- tion in 1789 and anarchy, Napoleon wished to re-establish French law on a sound basis and on one which was not founded on absolute authority as with the over thrown monarchy. The solution. Civil law based on Republican Roman law.

J. A. Fisher on 13 November 2017.

10. Limitation on the inuenceofRomanlawonEnglishlaw The big difference between common and civil law systems is land law. We can also see that many principles of Roman law could never be introduced into English law. An example of this is the need for a notary to “authenticate documents.” Once a document is authentic-ated, it is hard for a civil law court to challenge the formalities of the execution of the document because the notary must exercise his duties independently as, in effect, a public ofÀcial.

Everything militates against the adoption of the concept of authentication into English law. It is so obviously foreign as is the role of the notary; it ousts the scrutiny of our common law courts and as such “it was very unÀtfor the English constitution or genius.”

11. Donoghue v Stevenson In Donoghue v Stevenson (1932), Mrs Donoghue appealed to the House of Lords as the Ànal court of appeal for, inter alia, Scotland. Lord MacMillan, the senior Scottish judge, wrote a draft judgment which referred to the Lex Aquilia of 286 BC and cases in Scots law based on Roman law in Ànding in favour of Mrs Donoghue. We have a copy of this draft judgment. However, Lord Atkins, as chairman of the bench, asked him to re-write it, deleting all references to Roman law, as he wanted to establish a tort which would apply through out all common law jurisdictions and not just Scotland. Instead, he artiÀcially changed a passage from the bible about loving your neighbour into a duty of care towards your neighbour.

Does anyone dispute that Roman law is the 8th and greatest wonder of the Ancient World? .

An abridged version of a talk given to Cambridge University by