ENGLISH LAW AND FRENCH LAW

A COMPARISON IN SUBSTANCE

TAGORE LAW LECTURES

By

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R.D.

INTRODUCTION

The distance between England and France is less than 30 kilometres, and every year or so it is reported in the papers that some courageous swimmer has been successful in his or her attempt to cross the Channel. Intercourse between the British Isles and the European Continent has existed as far as memory can recount. A Norman dynasty originating from France conquered England in the year 1066 and still reigns in the United Kingdom. The Kings of England have called themselves Kings of France from 1314 to 1802 and they still keep in our days the title of Dukes of Normandy, a French province. French has been for centuries, next to Latin, the official language of the Kingdom of England, where not until the 15th century it was replaced by English. In all aspects of civilization and in all fields of knowledge developments have been intimately connected and have proceeded at a same pace in England and in France, but to this picture and to this general statement there is one exception: in the field of law England has been a lonely rider. "Comune Ley" (common law) has been developed by the Courts of Westminster and equity by the Court of Chancery by a process of their own and nearly without any contact with legal science and with the practice of the law as it was conceived on the Continent of Europe.

The historical reasons which account for this original development of English law are well known, but it is more difficult to understand how the situation created thus has been allowed to perpetuate and why communications which extended to all fields of knowledge have not been extended to the field of the law also in the course of the centuries. This is however a fact: till a most recent time continental lawyers have remained fully ignorant of English law and English lawyers have likewise ignored the laws

of Continental Europe, an amazing fact when one considers the importance taken by relations of all kinds (personal and commercial) between England and the Continent.

A change has taken place in our days. English and French lawyers have come to meet on many occasions, books have been written, and the value has been realized of a mutual knowledge of two systems — common law and civil law — which are not the laws of England and France only, but which have provided a model, practically, for all countries of the world.

Why the two systems have been developed along different lines in England and in France is a question for legal historians mainly. But it is of interest for practitioners, as well as for academic lawyers, to ascertain the nature and the extent of the differences which do exist at present between the two legal systems; and it is also a matter of interest to compare both systems and to investigate whether one or the other may be better adapted, as a whole or in some of its branches, to work out justice under the conditions prevailing in modern society.

In a first book[1] I have endeavoured to retrace the development of Continental and English law and to show to which extent both systems differ in our time by reason of their sources, of their structures, and of the methods and psychology of their lawyers. In another book[2] I have described the basic data of French law. The present book, written for the Tagore Law Lectures and consequently for Indian lawyers primarily, has a different scope. My purpose is to consider a variety of branches of the law and to investigate in such branches what is, in England and in France, the present state of the law and which differences are to be noted there between the two systems; and it is also to consider what is the prospect of seeing the oppositions of older times be attenuated or disappear in a world where international relations call for more uniformity than ever.

Continental law and Common law: the two expressions designate "legal families", within which it is easy to stress the existence

1 DAVID-BRIERLEY, *Major legal systems in the world to-day*, 2nd ed., 1978 (Stevens, London and MacMillan, New York).

2 DAVID-KINDRED, *French Law*, 1972 (Louisiana State University Press, Baton Rouge, Louisiana).

of many variations. The laws of the United States of America or Canada, of India or Nigeria are in many ways different from the law of England, even in the fields where the English legal tradition and rules have provided a model. The same is true in the Continental law family, if we consider the laws of France and Germany, Japan, Brazil, Iran or Madagascar. To deliver the Tagore Law Lectures, it would have been appropriate to take into consideration French and Indian law mainly. I must apologize for not having done so, due to the difficulty of acquiring a sufficient knowledge of Indian law in a country, France, where Indian law books and reports are practically non-existent. The comparison in this book is restricted therefore, as a rule, to English and French law. Only occasionally other legal systems have been contemplated, when they seemed to be of particular interest, and also for the purpose of bringing to attention the fact that important differences may exist between the various laws classified as Continental law in the Common law world.

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An exhaustive recension of all that has been published in English on French law is to be found in SZLADITS (Ch.): *Bibliography on Foreign and Comparative Law (Books and Articles in English)*, Vol. 4, 1955, 1962, 1968, 1975 and yearly supplements (Oceana Publications Inc., Dobbs Ferry, New York).

For a comparison between French and English law, reference is to be made to the *International Encyclopaedia of Comparative Law,* in course of publication under the auspices of the International Association of Legal Science [J. C. B. Mohr (Paul Siebeck), Tübingen, Mouton, The Hague, Paris. Oceana Publications Inc., New York].

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CONTENTS

CHAPTER I

A LAW OF REMEDIES AND A LAW OF RIGHTS

The opposition between Continental law and English law has its roots in the 12th century. A Renaissance took place at that time, marked in the field of social relations by the constitution and emancipation of towns, the revival of trade, and the formation of Universities. Life ceased to be organised within self-supporting and closed communities as in the feudal time; larger units became important and the necessity was felt for a legal system better adapted to the emerging society, and having in particular a sphere of application broader than the existing legal customs. The judicial system and the procedural devices dating from Anglo-Saxon or from Charlemagne's times were no more regarded as able to effectuate justice. The need was felt for a new law of procedure where judgment would be given on the weight of evidence and dictated by reason, not as a result of irrational devices such as trial by battle, ordeals, or wager of law. The cry was for a modern law, different from the ancient in its techniques as well as in its territorial width of application: the new law should extend to a region broader than local customs, and it should be based on the reason of man.

On the European continent and in England alike this new law was not to be devised by kings or princes mainly. The sovereigns were not properly equipped for such task, nor would it have been held proper for them to accomplish it. Government is one thing and the law is another; this will be easily understood by Indians, to whom the distinction of *dharma* and *artha* is familiar. It was left therefore to the Courts, as a rule, to frame the new law for which there was a demand. But how was this task to be accomplished? England on one hand, France and the other European countries on the other hand have followed in this regard different ways.

The divorce between England and the Continent was not deliberate. The same law came to be taught in the Universities, and was regarded as a model for the Courts. This law was the Roman law, as it had been consolidated under Emperor Justinian, in the 6th century A.D., in the famous *Corpus juris civilis*.[1] The Universities set at work in a first time to explain the meaning of the words used and the scope of the rules there stated (*School of Glossators,* 12th and 13th centuries). In a later development another trend became dominant with the *School of Postglossators* (or *Commentators*) in the 14th and 15th centuries: the attempt was made to adapt the rules found in *Corpus juris civilis* to the needs of the time by a so-called process of "interpretation" which amounted many times to a true distortion. It was sought also to gather and display the rules in a more systematic way, in Treatises relating to different subjects; general principles were thus discovered or advocated, contrary to the original Roman law which bore the character of a case-law, rich in individual rules but lacking in — and perhaps adverse to — principles.

The Universities' purpose was not indeed to accomplish an academic work only, but it was, or came to be, predominantly, a practical one. Their ambition was to disclose what "the law", i.e. justice[2] demanded the righteous man to do, and their expectation was that the Courts in the various countries would accept their lead and abandon, prompted by their teaching, the ancient

1 The expression *Corpus juris civilis* has been in use since the 16th century only. *Corpus juris civilis* consists of the *Institutes of Justinian* (a short textbook), the *Digest* or *Pandects* (an extensive reproduction of excerpts from legal writers of the preceding centuries; binding authority was attached to the pronouncements of such authors, after a selection had been operated and occasional changes, called interpolations, made in their statements of opinion), the *Code of Justinian* (a chronological collection of statutes, called Constitutions, promulgated by the Roman Emperors in the 4th and 5th centuries A.D.) and finally the *Novellae* (Constitutions promulgated after the date of the Digest by Justinian and his successors). *Corpus juris civilis* was written in Latin, with the exception of the *Novellae,* which were in Greek.

2 Saint Thomas, in the beginning of the 13th century, defines the law as being *id quod justum est* (what is consonant with justice).

customs which were unfit for a modern society. The same law was taught everywhere for this purpose, in England at Cambridge and Oxford as well as on the Continent at Bologna, Paris, Salamanca, Prague or Uppsala.

Notwithstanding this common academic approach, practice developed along different paths in England and on the Continent. This divergence was due to differences which arose in the matter of the administration of justice. England was since 1066 a conquered country. The Norman conquerors, foreigners and French-speaking, had promised to be respectful of ancient customs, and they did not interfere therefore with the procedure and rules which were followed and applied in the existing Courts (*County* or *Hundred Courts*). Only in matters of importance they did assert their jurisdiction and adjudicate cases in their own Courts, the Royal Courts of Westminster. The old system thus was not modernized, but it fell gradually into disuse, whilst a new set of rules — the common law of the Realm — was eventually elaborated by the Royal Courts. Given the continuing existence of the traditional Courts and considering the policy professed of maintaining in force the ancient customs, the Royal Courts did never claim to have jurisdiction in all cases; resort was possible to them in exceptional cases only, if the matter affected the King's interests or if it was of enough importance to justify the interference of the King as keeper of the peace in the Realm; a barrier was opposed to an orderly development of the common law by the need to obtain from the Chancellor a writ and to keep within the frame of a "form of action" available in the case. The common law, under such circumstances, could hardly be thought of as constituting a system. The Royal Courts had jurisdiction on account of the circumstances in each individual case; it was bound therefore to be a case-law, since it was a law to be applied by Courts having jurisdiction in cases of a special nature only. The "legal system" taught in the Universities could not provide a model for Courts lacking jurisdiction as a rule. It was of scarce interest for lawyers practising in such Courts; more important for them was ability to persuade the Royal Courts to take jurisdiction in the case, and also to find their way in the procedural jungle, for most rigid formalities had to be observed in the various forms of action. English lawyers

have not looked therefore for guidance to the Universities, and holding a University degree has never been regarded as a requisite for the exercise of the legal profession in England. "Remedies precede rights" has been the basic axiom for the common law. There were a number of forms of action, by which it was possible to bring an action and to proceed before the Royal Courts. No one could tell what would be the outcome of the case, which rules (if any) would be applied, which rights would be recognized before the decision was made: the sense of justice of the Court (and the verdict of the jury, which was omnipresent) were more important for the purpose than any properly "legal" consideration.

The evolution was entirely different on the continent of Europe. No transfer of jurisdiction was operated there from one set of Courts to another. Cases continued to be brought before the traditional Courts, which were not deserted as in England, but were simply subjected to some changes. Their composition was altered, a role of first importance being given henceforward to an officer appointed by the King. The procedure above all was entirely reshaped, with the adoption in particular of a new law of evidence, advocated by the Church and based on a system of rational proof.

Both reforms were closely connected. The new approach to an administration of justice based on reason required an appeal to "jurists", i.e., men who had received a legal education in the Universities. It was held most important that judges and lawyers should have studied to know which rules of substance were appropriate to effectuate justice. Procedure, much simpler and more rational than in England, was regarded as being no more than a servant to the law; it could in no case be allowed to hamper the application of the rules of substance which did appeal to the rational mind. There were no forms of action of the English type, and no effort had to be made in order to decide the Court to take cognizance of a case; neither was there, near the judge, a jury more emotionally than legally minded.

The practice became then, on the continent, to have cases presented and decided in the Courts by lawyers who were graduates of the Universities. Such reform was completed in France as early as the 13th century in respect of judges in

Superior Courts; it was completed in the 16th century for other judges, and advocates had also to be graduates in law (*licenciés en droit*) at an early date. The same rule did similarly obtain in other countries of continental Europe, more or less rapidly, save unimportant exceptions.

The development stated above has been of the utmost importance, for it does account for the unity reigning in the European continental law family. The legal rules taught in the Universities have in no country been applied by the Courts as a whole, but a uniform conception of the law has been received everywhere on the continent, which differs from the conception in England; legal science above all, distinguished from legal practice, has been uniform throughout the continent of Europe. Let us indulge now in more detail on these various points.

Neither the Roman law of the sixth century A.D., nor Roman law as it was taught by Postglossators in the Universities has become the law applied by the Courts in the various countries of continental Europe. Even in countries like Germany or Austria where we are told that a "reception" of Roman law did occur, the application of Roman law has always been excluded if a party could prove the existence of a custom opposed to Roman law or if some Ordinance had provided for another rule; both exceptions were of great importance where local custom had been properly described (as for instance by the *Mirror of Saxony* of the 13th century) and on account of the many Charters which had been granted to the towns and also, at a later date, by reason of the legislation enacted by the princes in various fields of the law (*Constitutio criminalis carolina* of 1532, *Codex Maximilianeus bavaricus civilis* of 1756, *Prussian General Code* of 1794). The same applied in other countries like Italy or Southern France, Catalonia and Upper Aragon in Spain. Romon law was regarded there as the general custom of the land, but it gave way if a local custom or a Charter granted to a township or a princely Ordinance had decreed otherwise. In northern France, in the Netherlands, in Castile and Lower Aragon in Spain, and in Switzerland a different situation prevailed. No authority attached to Roman law as such and the judges were entirely free to disregard it, but Roman law did enjoy a great prestige and the Courts were inclined to apply its rules as