Comparative Studies
in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

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The Reception of Continental Ideas in the Common Law World 1820-1920

Edited by

Mathias Reimann

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Herausgegeben von

Prof. Dr. Dr. h. c. mult. Helmut Coing

und

Prof. Dr. Dr. h. c. Knut Wolfgang Nörr

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Introduction: Patterns of Reception

The traditional view that the two great Western legal systems, the civil and the common law, developed in virtual isolation from each other is quickly being eroded. The influence of the medieval Roman scholars on English law, the role of continental doctrine in seventeenth and eighteenth century English jurisprudence, and the importance of civilian practice in the English courts have already been explored. Slowly but steadily, these and other connections between civil and common law are becoming general knowledge among legal historians.

The traditional view is still widely held, however, with respect to the nineteenth and early twentieth century. It is telling that even first-rate legal historians who are keenly aware of the historical interrelationship between the two systems can suddenly conceive of "absolute barriers between Continental law and the common law"[1]. The persistence of the traditional view with respect to the nineteenth century is probably due to the particular importance of this time period for the definition of the two systems. For better or worse, comparatists continue to define the common and the civil law mainly by contrasting case law and codification. This contrast was stark (only) between the first modern codes and the rise of the welfare state. Thus, this time period is the classical era of the antithesis between judgemade law and systematic legislation. In that era, the common and the civil law look so clearly like polar opposites that mutual influences are particularly hard to imagine. Only as the twentieth century progressed and as modern social and regulatory legislation blurred the traditional contrast, so it seems, the two systems began to converge.

Astonishing as it may be to many legal historians and comparatists, the exchange of ideas between the civil and the common law culture was lively and fruitful even during the heydey of case law and codification. Some Anglo-American scholars, among them several contributors to this volume, have recently begun to explore this exchange. There are now about two dozen articles in this area. But they are only a modest beginning.

Concrete information is still very sparse. Some aspects of the interrelationship between continental and common law in the nineteenth and early twentieth centuries have been thoroughly researched, aptly described, and lucidly analyzed,

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[1] *R. Helmholz,* Continental Law and Common Law: Historical Strangers or Companions: 1990 Duke L. J. 1207, at 1209; see also *J. Dawson,* The Oracles of the Law (Ann Arbor 1968), p. 505.

but about many other important aspects nothing of value has yet been published. Moreover, the existing knowledge is not widely diffused[2]. This is particularly true for the Continent. While in England and the United States at least some expertise has been developed, most Continental comparatists and legal historians are by and large unaware of any modern connections between civil and comon law. This may in part be due to the lack of access to the Anglo-American publications about the topic.

Therefore, this volume should serve two goals. It should supply further pieces of knowledge about the modern interrelationship between the civil and the common law cultures, and it should help to disseminate this knowledge among a wider audience, especially in Europe. The intention behind the various contributions is not to deny the great disparity between the two legal systems in the nineteenth and early twentieth centuries, but to qualify this disparity by "continuing a tradition which has looked to the connecting, rather than to the deviding elements of the two great legal families"[3].

Needless to say, comprehensive coverage of the topic is neither possible nor desired within this framework. On the contrary, by presenting a diversity of subjects and approaches, this volume should illustrate the richness and promise of the topic as an area of research and instigate further studies by both Anglo-American and Continental scholars.

However, the contributions were not collected randomly buth rather according to specific parameters. Clarifying these parameters will enable the reader better to appreciate the scope and limits of this volume.

On the one hand, the topic was broadly conceived, as the title indicates. The studies do no focus primarily on legal rules but more on legal cultures in general. Hence the essays deal with "Continental" ideas from many parts of the civil law tradition, ranging from classical Roman law to French concepts of codification and German jurisprudence. And hence the volume considers "Anglo-American Law" in the sense of the legal world of both England and the United States, a world which was much more of a cultural unit before World War I than it is today. Furthermore, the "Ideas" discussed do not only consist of legal concepts or rules but also incorporate other elements of a legal culture as well — actors and their roles, sources and their significance, legal thought and its impact.

On the other hand, two limitations have been set. First, the timeframe was limited roughly to the century between 1820 and 1920. It thus by and large excludes the earliest nineteenth century as well as the post-World War I period,

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[2] The standard works on legal history, Anglo-American and Continental alike, contain very little, if any, information about these connections.

[3] Vorwort der Herausgeber in *H. Coing / K. W. Nörr,* Englische und kontinentale Rechtsgeschichte: ein Forschungsprojekt (Berlin 1985); the translation from the German is mine.

both of which present issues so different from the ones addressed here that they are better explored separately[4]. Second, the contributions deal only with the influence of Continental ideas on the Anglo-American legal culture, not vice versa.

Even within these limits the scope and diversity of the contributions is bewildering. They are presented in roughly chronological order according to their subject matter. This is not only because in historiography there is a preference for chronology. More importantly, the chronological arrangment captures a particularly essential feature of the fate of Continental ideas in Anglo-American law — it illuminates the change of focus over time. In the first half of the nineteenth century, the common lawyers were interested in the civil law in a broad sense, then mostly represented by the Roman and French variety. In later decades, they quickly directed their attention almost exclusively towards German ideas. Here again, one can observe a change in emphasis. In the postbellum period, Anglo-American jurists focused mainly on the German historical school and its successor, conceptual jurisprudence. As the century turned, they became more interested in the next, sociologically oriented generation of German jurisprudence, which helped to lead them towards twentieth century legal thought.

Turning to the earlier period first, we find that before the middle of the nineteenth century, Continental ideas had a greater influence in the United States than in England[5]. This was no accident. England boasted a legal culture that had been firmly established for more than half a millenium, and most English lawyers had little inclination to borrow ideas from the European continent. In the United States, by contrast, an indigenous legal system was still in the making. Around 1820 the die was cast against a wholesale adoption of the civil law and in favor of following the common law path, but this does not mean that American lawyers slavishly adhered to English precedent. Civilian ideas were still attractive for several reasons — the prestige of Roman law, the novelty of many questions for which English law provided no immmediate answer, and the elegance of the French codes — to name just a few. The contributions of Michael Hoeflich, Alan Watson, and David Clark deal with this earlier period, addressing the

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[4] Before 1820, they include particularly the politically charged debate about the respective virtues of civil and common law in the early decades of the American republic, i. e. before Kent and Story, and the impact of continental ideas on English agendas of legal reform. After World War I, the previously intense contacts between common and civil lawyers were much diminished. The impact of emigrant jurists in the 1930s and 1940s and the exchanges between the Anglo-American and Continental legal systems after World War II require studies in their own right.

[5] This does not mean that English lawyers were as hostile to continental learning as is frequently believed. Even in the earlier nineteenth century, English jurists often discussed continental ideas; see *M. Graziadei,* Changing images of the Law in XIX Century English Legal Thought (in this volume); see also *B. Simpson,* Innovation in Nineteenth Century Contract Law, 91 L.Q.R. 247 (1975).