

**Comparative Studies
in Continental and Anglo-American Legal History**

**Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte**

Band 18

Anglo-American Law and Canon Law

**Canonical Roots of
the Common Law Tradition**

By

Javier Martínez-Torrón



Duncker & Humblot · Berlin

JAVIER MARTÍNEZ-TORRÓN

Anglo-American Law and Canon Law

**Comparative Studies
in Continental and Anglo-American Legal History**
Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Herausgegeben von

Helmut Coing, Richard Helmholz, Knut Wolfgang Nörr
und Reinhard Zimmermann

Band 18

Anglo-American Law and Canon Law

Canonical Roots of
the Common Law Tradition

By

Javier Martínez-Torrón



Duncker & Humblot · Berlin

Die Deutsche Bibliothek – CIP-Einheitsaufnahme

Martínez-Torrón, Javier:

Anglo-American law and canon law : canonical roots of the
common law tradition / by Javier Martínez-Torrón. – Berlin :
Duncker und Humblot, 1998

(Comparative studies in continental and Anglo-American
legal history ; Bd. 18)

ISBN 3-428-09414-X

Alle Rechte vorbehalten

© 1998 Duncker & Humblot GmbH, Berlin

Fotoprint: Berliner Buchdruckerei Union GmbH, Berlin

Printed in Germany

ISSN 0935-1167

ISBN 3-428-09414-X

Gedruckt auf alterungsbeständigem (säurefreiem) Papier
entsprechend ISO 9706 ☺

“Upon what I said in relation to our Court of Justice, his Majesty desired to be satisfied in several points: and this I was the better able to do, having been formerly almost ruined by a long suit in Chancery [...]. He asked [...] Whether party, in religion or politics, were observed to be of any weight in the scale of justice. Whether those pleading orators were persons educated in the general knowledge of equity, or only in provincial, national and other local customs. Whether they or their judges had any part in penning those laws, which they assumed the liberty of interpreting and glossing upon at their pleasure.”

(Jonathan Swift, *Gulliver's Travels*, part two, chapter VI)

*To my wife Lorena,
and to my sons Javier and Guillermo*

Preface

This book, written by a young Spaniard of energy and ability, deals with a subject of continued interest to English historians and indeed to students of comparative legal history more generally. He seeks to answer the question of whether the medieval *ius commune*, the amalgam of Roman and canon law that governed European legal education and influenced legal practice for so long, exercised any substantial and sustained influence on the development of Anglo-American law. He finds that it did. The canon law in particular played an important role in the development of several parts of English law. It is an honor to be asked to contribute a Preface to this worthwhile endeavor, for the work has several strengths that are too often missing from discussions of the subject, including my own.

The most remarkable of these strengths is that the author is able to approach the subject with a more thorough grounding in Continental law than is possible for most English legal historians. He finds parallels, connections, and distinctions that are harder for those whose education has been in the history of the common law to see. Although he is familiar with the materials of the English common law, he is not confined by them. His discussion of legal maxims and the *Regulae* of the canonical and civilian traditions is particularly illuminating on this score. Not that he is the first Continental scholar to approach this subject. Our knowledge of the thirteenth century treatise on English law ascribed to Henry Bracton was long ago enriched by contributions by Carl Güterbock, Hermann Kantorowicz, and Fritz Schulz. Martínez-Torrón incorporates their insights and adds his own, showing that Bracton approached legal problems from a juridical perspective that was common to his time, one that was shared by jurists on the other side of the English Channel.

Beyond this Continental perspective, this book approaches the subject in a systematic way that has too often been lacking in treatments of this subject. Professor Charles Donahue once perceptively pointed out that the question of whether there has been influence of Roman and canon laws on English common law was reminiscent of the old story of the blind man and the elephant. Since the old man could touch only a small part of the elephant at one time, his description of the whole depended on which part he happened to be touching at the moment. The story illustrates the danger of making large generalizations from what may be isolated examples. Martínez-Torrón has not fallen into this trap. He has read widely. He treats the institutional history of England's courts system and also takes up many areas of private law, procedural law, and criminal law. His book contains useful and careful excursions into constitutional theory. He has touched as many parts of the elephant as he could.

Finally, the book takes English law as a whole. The author's attentions are not focused upon the royal courts alone. He does deal with the Courts of King's Bench and the Common Pleas and with the assizes that depended upon them. But he also makes room for the Court of Chancery, Admiralty jurisdiction, the ecclesiastical tribunals, and some of the more minor courts of equity. This is only realistic. English law cannot be treated realistically by supposing that the royal courts were the only real homes of law and that all other tribunals were the site of "alternative dispute resolution".

In today's world, when connections between English and Continental law are becoming closer, this historical treatment of England's past may be of broader than purely historical interest. The 'insularity' of English law has never been complete. It is a pleasure to welcome this English translation of a work that describes the connections.

R. H. Helmholz
Chicago, Illinois

Contents

Introduction	1
---------------------------	---

Part I

The Anglo-American Legal Tradition	5
Chapter 1: The Two Great Western Legal Traditions.....	5
1. Anglo-American Law and Continental Law	5
2. Some Considerations on the Evolution of English Law	11
Chapter 2: Isolation and European Inspiration on Anglo-American Law.....	19
1. The Presumed Insularity of English Law.....	19
2. Anglo-American Law and Canon Law	25

Part II

The Routes of Entry of Canon Law into England	33
Chapter 3: Ecclesiastical Courts.....	35
1. The Jurisdiction of the “Court Christian”	36
2. Conflicts and Cooperation between Ecclesiastical and Royal Jurisdiction	41
3. The Law Applied by English Ecclesiastical Courts	44
Chapter 4: The Court of Chancery	51
1. Historical Evolution.....	53
2. The Court of Chancery and Canon Law	62
Chapter 5: Jurisprudence or Legal Doctrine	81

Part III

**The Influence of Canon Law on
the Different Areas of English Law** 93

Chapter 6: Marriage and Family 93

1. English Matrimonial Law 93

2. Ecclesiastical Jurisdiction in Matters Related to Matrimony 101

Chapter 7: The Law of Succession..... 109

1. The Development of Ecclesiastical Jurisdiction on Succession..... 111

2. Extension and Limits of Ecclesiastical Jurisdiction..... 116

Chapter 8: Contract Law 125

1. Assumpsit, Consideration and Canon Law 126

2. Other Elements of Roman-Canonical Origin 136

Chapter 9: Constitutional Law and Theory 143

1. Canonical Influence on the Great Constitutional Principles 145

2. Exercise of Power and Political Representation..... 151

Chapter 10: Other Areas of Law 161

1. Procedural Law 161

2. Criminal Law 167

3. Real Property Law 173

4. Law of Associations and Law of Bankruptcy 180

Conclusion 183

Index..... 187

Introduction

Perhaps I ought to commence by noting that in this book three specialized legal fields converge. First, obviously, canon law; but then also comparative law and legal history, notwithstanding the fact that the author is not a professional historian. Nor is the method followed strictly true to that discipline.

If I had to describe the approach used in this essay, I would say that it seeks to study a historical legal subject from the standpoint of comparative law. In this regard I am indebted to legal historians for their patient research labour. They unveil and arrange the historical data that other jurists can then use from the perspective of their own specialty.

The historical facts mentioned here are outlined only with the detail strictly necessary so that the reader does not to lose sight of the central argument to demonstrate how significantly canon law contributed to forming the Anglo-American legal tradition. However, I have tried to cite the relevant literature in every case.

As is explained later in this work, the greatest influence of the canon law occurred during the later Middle Ages. Therefore, the subject of investigation is essentially limited to an analysis of the impact that classical canon law had on the contemporary development of English law, which in turn constitutes the fundamental core of the broader, modern-day Anglo-American law.

In this context, we ought to bear in mind that the union between canon law and Roman law was then particularly close. Both legists and canonists gave life to the medieval *ius commune* which then dominated the legal world on the European continent. The foundations of conti-

mental law are as much of Roman as they are of canonical origin. And for that same reason, to speak of the influence of canon law on Anglo-American law is equivalent to speaking of the influence of the *utrumque ius*, a product of both ecclesiastical and civil sources. It must be said, however, that the ecclesiastical sources were primarily responsible for the inflow of continental legal notions into the British Isles during the Middle Ages. This explains why canon law is the focus of this study.

I recall that, while working on this project, a legal historian expressed his doubts about its viability. Perhaps, he said, it is premature: there are too many dark areas, much historical research still needs to be done on the subject. I then thought that, in some way, he was correct. But I also thought that, where history is concerned, it may always be too early to expound overall views on subjects as broad as this one. At some point it is useful to stop the clock and pause to elaborate a synthesis of the data unveiled to date by the historians, while at the same time seeking to provide the interpretation which may seem most rigorous — of course, without excluding that later research may correct conclusions once considered almost definitive or yield new elements offering changes in existing long established opinions.

On the other hand, it may seem surprising that someone not belonging to the Anglo-American tradition should address an issue that traditionally has been the realm of English, American, and Canadian authors (though none has approached it on a global basis). One might even be led to believe that despite being conversant in Anglo-American law, a propensity to overvalue the Roman and canonical contribution to common law systems might creep in. To counter this prejudice, should it exist, it is worth noting that the perspective of a civil lawyer can presumably be of use, precisely because it represents a point of contrast with the prevailing Anglo-American doctrine. In legal families or traditions what often happens in human families also occurs: some peculiarities are too evident and too customary to be seen from the inside — above all when they have not been noticed for a long time. They are more easily perceived from the outside and by foreigners.

The first version of this book was written in Spanish and published at the end of 1991. Considering the audience it sought to address, I thought it convenient to offer some explanations regarding certain general aspects of Anglo-American law which now might not be altogether necessary. Nevertheless, I have chosen to leave the original largely unaltered in this present English edition. I have only introduced an essential bibliographic update, which has in turn required some minor modifications to the text.

This work is the result of research conducted at the Universities of Cambridge (England) and Chicago, whose Law Faculties I had the honor of joining in a temporary and honorary capacity. In this regard, I want to express my gratitude to several persons.

Professor Richard H. Helmholz, of the University of Chicago, has been a constant source of aid and motivation, and has been kind enough to supervise meticulously and critically the typescript, making suggestions which contributed to improving it; our friendship has moved him to write a preface to this edition. Professor John H. Baker, of Cambridge University, apart from honoring me with his friendship and hospitality during the months spent in that city, took the time to guide me patiently through the study of English legal history which was indispensable to lay the foundations for the topic explored in this study. Professor Charles Donahue Jr. (Harvard University) put forward some useful observations in the initial phase of my work. A debt of the same kind, but even weightier, ties me to my friend Professor Stephan Kuttner (University of California-Berkeley) who honored me with a preface to the Spanish edition; and also to Professor Knut W. Nörr (University of Tübingen), whose kind help has enabled this English version to see the light of day.

Professor Rafael Navarro-Valls, of Complutense University (Madrid), with whom I have had the good fortune to work for quite a few years, also deserves separate mention. He gave me, some time ago, the initiative to investigate this subject. He was persuaded that it was extremely useful, not only for canon law, but also as a means of bridging the gap between the European and the Anglo-American academic environments, too often separated in the legal sphere. In the diverse stages of my work he has provided help in the way of thematic and