CIVIL LAW, COMMON LAW AND SCANDINAVIAN LAW

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It is often said that the legal systems of the western world fall into two main categories: civil law and common law. The expression civil law used in this way does not mean the *jus civile* of the Romans. Civil law is a common designation for all contemporary legal systems based on the Roman law. The term common law, on the other hand, comprises those systems of law that stem from the English common law. It should be mentioned that the observations in this paper are based exclusively on British sources. The development in other Anglo-Saxon countries, notably in the United States, have deviated considerably from the English pattern.

This labelling of legal systems as either civil-law or common-law legal systems is to be found today on the very first page of most treatises on foreign or comparative law. From the viewpoint of an author of a book surveying the law in the Western world, the distinction between civil and common law presents attractive features. The subject matter is divided into two main parts, unrelated to each other. Instead of one integrated story of the law in the West, two separate narratives can be given. And these narratives are easier to relate, because they come much closer to the many existing presentations of the national systems than would the integrated story.

A natural question for a person well versed in the literature of comparative law to ask when visiting a foreign country would be whether the legal system of that country is a civil- or a common-law system. For the Scandinavian countries no intelligible answer can be given to that question. This is so for two reasons. The first is the fact that no clear and unambiguous *fundamentum divisionis* can be found behind the distinction between civil law and common law. The second is that this distinction, even if it could be accepted as a sound classification of the legal systems of today in the various communities of the West, is not exhaustive. I should like to dwell a little on each of these two obstacles that face a Danish lawyer when questioned by his foreign colleagues as to the proper classification of Danish law.

All classification of legal systems must start by finding an answer to the question: What is meant by the statement that one system of law is based on another system? Let us for a moment think of German law. All comparative lawyers agree, I suppose, in classifying German law as a civil-law system. Modern German

law has its roots in Roman law and in the old Germanic law. Many other factors have been influential in shaping German law as we know it today from the Bürgerliches Gesetzbuch and from other sources. Both the role in the law of contract of the will of the parties and the general rules on liability in tort owe much to the thinking of philosophers born long after the decline and fall of the Roman empire. Suffice it here to mention the name of Immanuel Kant. The will theory and the *culpa* dogma both bear his stamp.

In the later part of the nineteenth century, when the Bürgerliches Gesetzbuch was drafted, a conscious effort was made by several lawyers convinced of the superiority of Germanic over Roman legal notions to embody in the new code old national legal ideas, or rather rules and maxims believed to be of Germanic origin. At that time nationalism invaded the world of learning. Let us, in this context, confine ourselves to mentioning as illustration the most famous work of this kind, viz. Gierke, *Der Entwurf eines Bürgerlichen Gesetzbuches und das Deutsche Recht,* 1889. Thus the philosophy of Kant and others, and the renaissance of Germanic law are among the sources of the law of Germany. There remains, however, the *justification* for classifying German law as civil law that Roman law was one of its roots.

The *explanation* why the German and other continental legal systems have been placed in that category is, I submit, that Roman law as handed down by the Glossators and the Post-Glossators was once, in certain fields, the law of the land, and that in the subsequent development of those legal systems no single event involving a complete breach with what went before has taken place. The enactment during the 19th century of the monumental Central European codes implied no such breach. The codes reflect the legal literature of their day. A comparison between Windscheid's famous *Lehrbuch des Pandektenrechts* and the *Bürgerliches Gesetzbuch* and between the works of the great French scholar Pothier and the *Code Civil* will provide evidence of this statement.

Let us look now for the justification and for the explanation why, in treatises on comparative law and elsewhere, English law has been given a different label from the systems of law found in continental Europe. Whether a justification can be found should depend, it seems to me, on the results of a comparison between English law of today and Roman law as it appears in *Corpus Juris,* not on comparisons with the *Pandektenrecht* or

with Pothier. If this view is accepted, it follows, e.g., that the absence of the will theory from English law cannot—as is done by Roscoe Pound in his *Spirit of the Common Law*—be taken as evidence of the independence of English law from the law of the Romans, simply because the will theory did not come into existence until in more recent times philosophers had explored and emphasized the importance of the notion of the will.

It is apparent that many similarities exist between Roman and English law. Suffice it here to mention that recognition of legal claims in both systems is carried out by recognition of a number of certain specified actions, and that both systems are dualistic in the sense that a claim may be enforced either because it is well founded on the traditional law or because it is felt that the claim of the plaintiff, although outside the well-established legal categories, cannot be left without a legal remedy. Thus Roman law knew besides the *actiones civiles* another kind of action, the so-called *actiones in factum.* An *actio in factum* was accorded by the Praetor to plaintiffs who were found worthy of the protection of the law but were nevertheless without any normal legal remedy. The parallel with the English distinction between law and equity and with the activity of the Lord Chancellor is manifest. There are many more similarities between English law and Roman law. A great number of these similarities are enumerated and commented on by Buckland and McNair in their fascinating book, *Roman Law and Common Law,* 2nd ed., revised by Lawson, Cambridge 1952. There is no need for me to repeat what is already said there, but in conclusion of my remarks on the common law I will cite a phrase from the book: "It may be a paradox, but it seems to be the truth that there is more affinity between the Roman jurist and the common lawyer than there is between the Roman jurist and his modern civilian successor."

Not only is English law attached to Roman law by strong ties, but also the scholarly treatment of the law in England is not an art apart from the *science du droit,* from the *Rechtswissenschaft* as cultivated on the continent of Europe. Today the arrangement of the law in textbooks and manuals in all European countries, continental and insular, wears a Roman stamp, and today, as a strange fossil of the knowledge of Latin and of the predominantly classical culture of our predecessors, lawyers in all European countries intersperse their writings and speeches on legal matters with a number of stock phrases in Latin.

The Latin phrases have, I admit, an aesthetic value. Their

origin and precise meaning, however, are more often than not highly obscure. In this connection it must be emphasized that the fact that a rule of law is usually referred to by an expression in Latin is no proof of Roman ancestry. In Danish law, e.g., the rule barring the buyer from claims for breach of warranty or condition because of a defect in the goods manifest to him is often talked of as the rule of *caveat emptor*. Nevertheless that rule has not in fact been transplanted from Roman into Danish law. The rule, as Stig Iuul has demonstrated in a recent article,[1] has its roots in the old Germanic law. The use of the Latin language is not the same as acceptance of Roman law. Latin is the language used in a certain epoch not only of Roman law. Latin is also the language of Canon law. *Pater est quem nuptiae demonstrant* is an example of a rule of law traditionally pronounced in Latin, developed in Canon law but usually thought to be of Roman origin (cf. Ernst Andersen, *Ægteskabsret* I, p. 67). In this connection I may refer to a joke current among law students in Copenhagen in the later years of the last century. In those days Professor Aagesen's book *Forelæsninger over den romerske Privatret* ("Lectures on Roman Private Law"), 1882, was part of the examination requirements. That book contained, the students said, what Aagesen thought was—or ought to be—Danish law, only the references to Christian V's Danish code had been replaced by references to *Corpus Juris*.[2] Of the impact of the Continental, and more especially of the German *Rechtswissenschaft*, on English legal scholars, Fifoot has recently rendered an absorbing account in his book *Judge and Jurist in the Reign of Queen Victoria*, 1959.

The historical development in England is different from that on the Continent. In England a centralized national administration was created after the Norman Conquest, long before the establishment of comparable machinery on the Continent. To the independent courts of England, Roman law never became more than one of several sources from which to draw. Perhaps it is not impertinent to hazard the guess that lack of knowledge is one solid reason why Roman law was not from the beginning used, as in Germany, as a supplementary legal system. Roman influence only gradually crept into English law from the writings of Englishmen who during visits to the Continent had studied Roman law and from the decisions of judges blessed with a classical education. The writings of Bracton (d. 1268) will serve as an example of the

[1] *Festskrift til Henry Ussing*, 1951, pp. 220–234.
[2] Cf. Frantz Dahl, *Juridiske Profiler*, 1920, p. 63.

former kind of influence and the well-known decision of Lord Holt in *Coggs* v. *Bernard,* 1704, as an example of the latter. More on this subject is said by Vinogradoff in his work, *Roman law in Medieval Europe,* 1929.

To sum up: the different historical development in England and on the Continent may well explain why English and Continental lawyers harbour different emotions towards Roman law. The law of the Romans forms part of the cultural background of both. For the Continental lawyer, however, Roman law is much closer to his general cultural pattern than it is for an Englishman. The *reasons* for this difference in attitude lie far outside the province of law. Whatever the nature of the reasons, it is, I think, a fact that on the Continent a special emotional bias towards Roman law exists. Apart from this fact, I see no justification for the view that Continental law of today is more Roman than is English law; the more so because I know of no way of measuring the influence of one legal system upon another.

I am under the impression that one reason why the differences between English and Continental law have often been stressed is that there has beeen a tendency to compare English law as it appears in the decisions of the courts with Continental law as it appears in treatises and manuals. Much of what has been said of the characteristics of either system, therefore, is not relevant to an exposure of the national differences but simply concerns the difference between the presentation of a legal system through Court decisions and through texts. One important reason why texts have attracted more attention on the Continent than in England or in the United States is the difference in teaching methods. To a student who has been taught through texts, an abstract presentation of the law is more natural than it is to a student who has been subjected to the case method. Another reason, I imagine, why textbooks in England are not held in quite the same esteem as on the Continent is that the English universities did not interest themselves in the teaching of law until some time in the 19th century. The scholarly presentation of the law, therefore, has not as yet gained the same veneration for itself as is the case on the Continent.

I have dwelt at some length on civil law and common law. This I have done partly to point to certain phenomena that I want to examine in Scandinavian law, partly to make it clear that the question whether Scandinavian law is a civil- or a common-law system is not meaningful. By Scandinavia I mean Denmark,

Finland, Iceland, Norway and Sweden. The law in these five countries is similar, but is not exactly the same. In what follows I will speak of Danish law only, but—apart from dates and names —most of what I shall say applies to the other four Scandinavian countries as well.

Roman law was never accepted in Denmark as the law of the land or as a supplement of the national law. But, as in English law, Roman notions have from time to time filtered into our law. The impact of Roman law on the law of this country is mainly noticeable in the 18th and 19th centuries. Nor is Danish law today an isolated legal order. One important road for foreign influences has been the works of legal scholars. A characteristic in Danish law is, I believe, the importance of legal scholarship as a bridge between our national law and the laws in the surrounding world.

Danish jurists who wish to prepare themselves for a university career usually study in other countries for a year or two after their graduation from the law faculties of Aarhus or Copenhagen. Until the first world war the majority of these professors-to-be went to Germany. Between the two wars, England, France and Germany took equal shares and now, after the second world war, there is a strong trend towards the United States. In case of success the outcome of the studies abroad is a book written as a dissertation for the *doctor juris* degree. A fruitful way of writing such a dissertation is to present and defend a thesis. It is very natural that the writers should often be tempted to take a maxim of law they have found in a foreign legal system, and formulate their thesis as an assertion that this maxim is or at least ought to be part of Danish law. Some writers of dissertations have in this way succeeded in importing foreign rules of law. Thus Professor Poul Andersen succeeded in convincing our courts that the rules of French administrative law on *détournement de pouvoir* ought to be introduced into Danish law.[3]

Another important road for the influencing of Danish law from other countries is the prevalent tradition, both in textbooks and in the teaching of law, of pointing out when Danish law is in accordance with the laws of the neighbouring countries and when it has followed its own paths. Comparative law is not taught as a separate subject. The reference to foreign laws is a standard part of all courses in Danish law. The students of today are the lawyers of tomorrow. This irrefutable fact gives some assurance that the

[3] Poul Andersen first presented his views on this subject in his doctoral dissertation, *Om ugyldige Forvaltningsakter,* 1924.

effects of the international training of the teachers will spread to lawyers employed in other fields.

There exists in Denmark no modern code. In former times, however, some codifications of the law were made. Most of their provisions are now obsolete. From about 1150 to 1250 several codes for various parts of the country were issued. Not until 1683 was legal unity in the country attained through the adoption of a code applicable in the whole country. This code is called Christian V's Danish Code. It has never been formally repealed. But many of its provisions have been superseded by later statutes and others have lost their effect by desuetude. Even the provisions still cited as laying down the law have in reality but little importance, because their contents have been interpreted and modified, through the numerous cases decided by the courts in the long period that has passed since the days of Christian V. The rule of *respondeat superior,* e.g., is enunciated in the old code (3–19–2). The courts, however, have worked so much on that rule that today the true source for information on *respondeat superior* in Danish law is the leading cases decided by the Supreme Court, and not a short primitive sentence formulated in the 17th century by the men of Christian V and placed in the Danish Code. In modern times the drafting of an all-embracing code has never been attempted.

Today the legislature in Denmark as elsewhere can pride itself on a large-scale production of statutes. Only a small fraction of this stream of rules and regulations concerns what has been called lawyer's law. As to the importance and effect of statutory provisions there is, it seems to me, a contrast or at least a distinction between English and Danish law. In England a statutory provision is given a narrow construction. The statute only accomplishes what is expressly said in it. The rules of the ordinary common law are ordinarily not affected by statutory provisions. They live, so to speak, their own life and are independent of the whims of the legislator. In Denmark we are, I believe, more apt to regard the law as an integrated unity, whether it be fixed in statutes or not. The general reasoning behind a statute—the spirit of a statute—may well have important effects on parts of the law not directly regulated by that statute. Let me give just one example. In English texts on the law of torts, the liability for false statement is said to rely on the leading case of *Derry* v. *Peek*. In that case it was held that the defendant is liable only for fraud. The case was decided in 1889. Since then several statutes, above all the

Companies Act, have introduced liability for negligence in this field, because the rule in *Derry* v. *Peek* would admittedly lead to gross injustice. Nevertheless, *Derry* v. *Peek* is still the law. Salmond, *On Torts,* 11th ed., pp. 690 ff., describes in detail the law as stated in that case and mentions only briefly, in passing, that a number of statutory exceptions exist. The question whether *Derry* v. *Peek* is still, in the light of the statutory development, the law is not even raised, presumably because to an Englishman the answer would obviously be in the affirmative. To a Danish lawyer the answer would be anything but certain. Harmony, it seems to us, should exist between judge-made and legislature-made law. A tendency in modern legislation, therefore, may well affect the law even beyond its immediate scope.

This example leads me to two further inquiries. The first is concerned with the legal literature. Should an author of lawbooks content himself with a description of what has happened in the past, a recording of the relevant cases and statutes, or should he venture to give his opinion on the law to come? That is to say, should a textbook on the law of torts merely record, e.g. *Derry* v. *Peek* and the subsequent statutes, or should it raise and examine the question of what would be the outcome of a similar case in our courts today? In this respect there is, I submit, a great difference between British and Danish authors. The English, it seems to me, as a rule stick to recording, whereas we like guessing—or prophesying, to put it more politely. Our tradition in this respect coincides, it seems to me, with the view expressed by Holmes in his famous essay, *The Path of the Common Law.* Holmes says: "The prophecies of what the Courts will do in fact, and nothing more pretentious, are what I mean by the law." In this country it has been to the advantage of the law that legal scholars have entered into the creative field of law-making instead of contenting themselves with indexing and explaining to students the decisions of the past. The functioning of the law is a creative process. The perpetual genesis of the law is best accomplished as a result of cooperation between judges and scholars. The judge has the advantage of having heard a concrete case before he must give his opinion. The scholar has the advantage when he is studying a particular problem of being undisturbed by the irrelevant special equities of any one particular case. He can take his time, read all the cases, examine the problem in foreign law, discuss the problem with colleagues, etc. Some secrets of the law reveal themselves more readily to the judge, others to the jurist.

The law has by its very nature a tendency to be conservative and immovable. I think that the literary works of jurists in Scandinavia have been a valuable contribution in introducing a little liveliness into the solemn realm of the law.

The other inquiry occasioned by the mentioning of the decision in *Derry* v. *Peek* is an inquiry into the attitude of the courts towards their earlier decisions. It is often said that English law, unlike Continental law, is governed by the maxim *stare decisis.* Such a contrast, however, does not exist. In England the law of a case can be overruled at least by a court on a higher level. In Denmark, as elsewhere on the Continent, precedents have a strong persuasive effect. If a difference exists at all, it is only a difference in degree. As to Danish law, it is usually said that court decisions are one of the sources of law. It is not possible in a few sentences to state what weight is to be attached to this particular source compared to other sources of law, such as legislation, custom and policy considerations. Here I will only testify as to my personal impression formed after some reading of English law and a good deal more reading of Danish law. My impression is that there is no *great* difference between the two systems. Possibly our courts are a little more willing to overrule precedent, especially when the precedent is more than, say, 40 or 50 years old. But apart from the attitude towards older decisions no marked difference is discernible.

Before ending I should like to mention one peculiarity of Danish law. In Danish substantive law there exist only very few formal requirements. Oral contracts, for example, are as a rule binding and enforceable. Even where formal requirements do exist, the courts are reluctant to attach decisive importance to a neglect of mere formalities. Danish procedural law is no less informal. Forms of action do not exist. Nor do the elaborate rules of evidence used in England. What the judge finds relevant can be introduced in evidence. Precise rules on examination and cross examination are not observed. Parties and witnesses are heard as demanded by the circumstances at hand. The proceedings before administrative authorities are even more informal. No fixed rules exist. Furthermore it is, I think, a characteristic feature of Danish law that judicial and administrative authorities are prepared to decide cases without much briefing on the relevant parts of the law and without carrying out any substantial legal research themselves. Decision is rendered upon presentation of the facts of the case. There are several reasons behind this tradi-

tion. Perhaps one is simply that to some extent a direct proportion exists between the size of a country and the complexity of its law. Another, that the Danish population is very homogeneous. Practically everyone is of the same colour and belongs to the same church. The tensions that do exist between workers and employers, between farmers and townsmen are, I think small, when measured by the yardstick of the surrounding world. In a group where ideals and emotions are alike, the sense of what is fair and just also tends to be alike, and for this reason decisions *ex aequo et bono,* made on the spot, are perhaps more acceptable in the Danish community than elsewhere. As a third reason, I would point to the peaceful state of Danish domestic politics. Elaborate rules giving—at least on paper—far-reaching guarantees to all citizens of a just and equal administration of justice have often been the product of the overthrow of dictators and of violent revolutions. To mark the breaking away from the past, the new ideologies have been spelled out in detailed legal rules. In 1660 Denmark got absolutism; in 1849 a democratic constitution. Again, measured by the yardstick of the world historian, it has all come about very peacefully. The traditional catalogue of civil rights was made part of the Constitution from 1849. This was done, I think, more in imitation of other countries than as a measure to meet an urgent demand. The magic sleep of the Danes was disturbed in 1940 by the German occupation and this event led to amendments to the Constitution in 1953. These amendments aim at a stronger protection of civil rights.

F. H. Lawson, in a book called *The Rational Strength of English Law,* 1951, has raised the question whether English law is, as compared to other legal systems, a rational system of law. He answers the question in the affirmative. Is Danish or Scandinavian law a rational legal system? Questions of this sort, I submit, have little meaning. Danish law is an integrating link in the national Danish culture. No other legal system in the world can take its place. Certainly the soundness of details may be questioned and its individual rules improved on. But the spirit and fundamentals of Danish law form part of the national inheritance from which we cannot diverge. An artisan must use his hands. He can see no meaning in an academic debate on whether his hands are functioning rationally or not. In this respect the law is like the hands of the artisan. The Danish community functions within the limits set by land and people; that is all that can be said about the rational strength of Danish law as a whole.