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Résumé de l'article

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Comments on the Influence of Canon Law on the Common Law Legal Tradition *

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ABSTRACT

In this paper, the author questions the conventional view that the civil law and common law traditions are radically different in their reception of Roman Law. He argues that Roman Law concepts, mediated by canon law, exerted a considerable influence over the common law. He identifies a number of channels through which this influence has shaped common law concepts. Thus, canonical equitas *probably served as a model for the equitable rules bases on good faith. Although common law evolved in a distinctive way, because of procedural considerations, its evolutionary path had already*

RÉSUMÉ

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* This paper is based on a lecture given at the Law Faculty of the Complutense University of Madrid in 1987. The original Spanish version was published in *Dimensiones jurídicas del factor religioso. Estudios en homenaje al Profesor López Alarcón*, Murcia 1987, pp. 295-320. It was written for a public unfamiliar with common law and for this reason certain explanations that would be superfluous for those acquainted with the Anglo-American legal system have been removed from the English translation, although others have been retained to keep the thread of the argument.

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INTRODUCTION

The Continental legal tradition, or civil law, and the Anglo-American legal tradition, or common law, are universally acknowledged to be two of the major legal traditions within the corpus of law systems. The basic characteristics of the two traditions, including their historical formation and their key traits, are generally considered to be mutually contrasting.

The first of these traditions is rooted in Roman law, was gradually shaped by canon law, and was later influenced by the stamp of despotism, rationalism and legal positivism. Briefly, its salient features are the unequivocal supremacy of written law as the source of Law, preferably codified in systematic bodies, the essentially interpretative function of jurisprudence, and a market tendency toward legal-dogmatic interpretation.

The Anglo-American tradition, on the other hand, is formed historically from indigenous elements, different from the Roman concepts that lie at the heart of Continental law. It grows non-systematically as a result of judicial activity and the political struggles amongst the monarchy, nobility and middle class that mark the entire history of the United

Kingdom. Accordingly, this second legal tradition, as opposed to the first, is characterized as being deeply rooted in custom, as law created primarily by judges, and by the predominance of pragmatic solutions over logical-juridical constructs. [1]

Continental legal culture has been described as both ignorant of and attracted to the common law system, since many of the latter's general features exercise the fascination of the unknown over Europeans. [2] Perhaps this is why too much stress has frequently been placed in Europe on the radical differences between the two great legal traditions, while too little has been placed on what they have in common. The profound influence of canon law on Continental systems is unconditionally acknowledged, while its influence on Anglo-American law is minimized. From this perspective Anglo-Americain law would thus be a peculiar phenomenon, difficult for the systematic European mentality to understand; it would have grown in almost total isolation from Continental legal doctrine, and consequently would have remained virtually isolated from both Roman and canonical constructs.

This is not the place to attempt a comparative analysis of the two legal traditions, nor is it the occasion to join in the argument over whether the methodolocial differences between the Continental and Anglo-American contexts are *prius* or *posterius* to their respective legal systems.

The substantial differences between these two ways of making and understanding the law cannot be questioned. These differences are clearly apparent in modern law, and also in legal literature and the ways in which universities teach law. The separation can be explained historically by the fact that English jurists, unlike the Europeans, did not study at Mediaeval universities that taught Roman and canon law. On the contrary, they generally trained at the royal courts that applied the common law of the land and were reluctant to apply Roman law as reworked by the commentators since they wished to stress the fact that the English kingdom was independent from the Roman-Germanic empire.

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1. For a thorough view of the Spanish bibliography on the history of Anglo-Saxon law, see J.A. ESCUDERO LÓPEZ, "La historiografía general del derecho inglés", (1965) *Anuario de Historia del Derecho Español* 217-356. A French translation, by E. CAPARROS, "L'historiographie générale du droit anglais", (1967-68) 9 *C. de D.* 117-240. In my view it is also very interesting to examine the opinions of Anglo-American jurists on European legal tradition and vice-versa. Consult, for example, J.H. MERRYMAN, *The Civil Law Tradition*, Stanford, 1969, G. RADBRUCH, "La théorie Anglo-Américaine du Droit vue par un juriste du Continent", (1936) *Archives de Philosophie du Droit et Sociologie Juridique* 29-45.

2. *Cf.* J.L. DE LOS MOZOS, "El sistema del 'Common Law' desde la perspectiva jurídica española", in *Estudio de Derecho civil en homenaje al Profesor J. Beltrán de Heredia y Castaño*, Salamanca, 1984, p. 541.

However the differences between the Continental and Anglo-American traditions do not mean that we should lose sight of the historical reality of one element that is common to both. In different ways and through different channels, canon law has played a major role in the evolution of both traditions. One canon law specialist, Stephan Kuttner, noted this in passing years ago at the end of the well-known speech he gave in Rome on the occasion of the official celebration of the 50th anniversary of the *Codex Iuris Canonici* of 1917. [3]

All things considered, the contrary would have been surprizing, when we recall that for almost five centuries, from William the First's conquest to the Henry the Eighth's Act of Supremacy, England was a kingdom that clearly belonged to the Christian world and therefore came under the Papacy to a greater or lesser extent, at different times in its history. The Church had been firmly established in the British Isles for several centuries before the Battle of Hastings and significantly influenced all aspects of culture as well as law.

This fact alone would be sufficient to allow us to assume that canon law influenced English legal institutions. As Plucknett has written "the Church brought with it moral ideas which were to revolutionise English law". [4] This statement, however, must be enlarged upon and that is what I shall attempt to do briefly here, pointing out the channels through which this influence occurred and indicating some of the concrete ways in which it manifested itself.

I should caution the reader, however, that this is a first approach to the subject and further study will of course be necessary to provide additional nuances and perhaps corrections to the ideas put forward here. This paper, as the title implies, is a set of suggestions about the main points of contact between canon law and Anglo-American law. The true extent of the historical influence of these contacts has still not been defined in full detail. The task requires prolonged study and obviously cannot be dealt with in a few pages. [5]

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3. *Cf.* S. KUTTNER, "Il Codice di Diritto Canonico nella Storia", in *Attività della Santa Sede*, Città del Vaticano 1967, pp. 1633 and ff. An English version can be found in (1968) *The Jurist* 129-148. More recently, R. NAVARRO-VALLS has stressed the need to delve further into this question in "La enseñanza universitaria del Derecho canónico en la jurisprudencia española", (1985) I *Anuario de Derecho Eclesiástico del Estado*, particularly pp. 80-83.

4. T.F.T. PLUCKNETT, *A Concise History of the Common Law*, 5th edition, London, Butterworth, 1956, p. 8.

5. It should be noted that the author has been able to consult very little recent bibliography on the subject since it is not available in Spain. Therefore he intends to pay a relatively long visit to the Universities of Cambridge and Chicago to study the subject in greater detail. He will work within the broader research project directed by Professor Knut Wolfgang Norr of the University of Tubingen. On this project see H. COING & K.W. NORR, *Englische und kontinentale Rechtsgeschichte : ein Froschungsprojekt*, Berlin 1985.

With this caution in mind, and prior to continuing, I draw the reader's attention to a peculiarity that is sometimes found in British and American writings on the components that have contributed to the historical shaping of Anglo-American law. I am referring to a tendency to identify canon law with the Roman law rediscovered in the early Middle Ages, which is not only inexact but also leads to an underestimation of the true influence of canon law, at times relegating it to a shadow world.

One of the factors that may explain this is that classical canon law and the Mediaeval reworking of Roman law coincide historically. The two legal phenomena arose in the same university environment and were frequently studied by the same people. This is the result of the strong spiritual unity of Roman-Christian Europe in the Middle Ages, in which ethical and political differences dissolve. As Calasso has noted, the great forces that give life to this unity are Latin culture, which permeates every corner of Europe, and the Christian faith that transforms it; and therefore it is useless to try to separate what is truly Roman from what is Christian, since the Latin culture is unimaginable without the Christian faith and vice versa.[6]

With regard to the compass of legal institutions, this meshing of Roman and Christian elements means that canon law will not only carry specifically Christian contents into English law, but also that it will be the main, and almost the sole channel through which Roman law will enter the British Isles. This fact is accepted by both Continental and Anglo-American scholars. Winfield has stated unreservedly that we would look to canon law, rather than to pure civil law, to find the most decisive influence of Roman law on the Anglo-American tradition.[7]

I. CHANNELS THROUGH WHICH THE INFLUENCE OF CANON LAW WAS RECEIVED

To turn to the specific subject of this paper, the first point worth noting is the variety of channels through which the influence of canon law worked, and the fact that it is not always easy to identify them, at least not in the current state of historical studies in this field. As opposed to certain cases that I will discuss later in which the influence occurred through very concrete channels, in other cases it is impossible for the moment to do more than indicate traces left by Christian-Canon law in English law. How these traces came to be left is not clear (at least to me).

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6. *Cf.* F. CALASSO, *Medio Evo del Diritto. I. Le fonti*, Milano, 1954, p. 326.
7. *Cf.* P.H. WINFIELD, *The Chief Sources of English Legal History*, Cambridge New York, Burt Franklin 1925, pp. 55 ff.

Nonetheless, as general influences, mention must be made of the strong presence of the Catholic Church in England until the Reform of Henry VIII; the influence of the Papacy on the government; and the many ecclesiastical chancellors who helped the king to administer justice during the first centuries after the Norman Conquest. The Chancellor is the channel through which the king granted writs, a key procedural element in common law. It should also be remembered that William the Conqueror's main assistant in legislative matters was the monk Lanfranc of Pavia, who was well acquainted with Roman and canon law, and that two of the first systematic treatises on common law (in the 12th and 13th centuries, respectively) were written by men with some Romanistic training, with the canonical implications than went with it at the time. I am referring to Ranulf Glanvill and Henry Bracton, the second of whom apparently lectured for some time on canon law in Oxford following the lines of Gratian's *Decretum*. [8]

In any event, the survival of Christian-canon concepts can be found in one of the chief principles that has traditionally characterized Anglo-American law : the principle of the supremacy of the law. As Roscoe Pound has stressed, one constant can be found in the attitude of the English courts, which is their refusal to be subject to the king, the legislator or the electorate. They accept only the constraints of God and Natural Law. This doctrine of the supremacy of law, continues Pound, has its origin in Mediaeval ideas on the distinction between spiritual and earthly power : there is one fundamental law that rises above all States and all human authority. [9] This is simply one consequence of an idea that, as Calasso has indicated, dominates all law in the Mediaeval Christian world : the subordination of human to divine law, which determines that on the Continent and in the Anglo-Saxon world, the assimilation of Roman law is strongly conditioned by the new world view of the Christian spirit that permeated canon law. [10]

This view of the supremacy of the law has marked English constitutional law from its beginnings. Maitland notes that the internal logic of the Magna Carta rests on the restrictions that Natural Law places on the power of the sovereign, which, in turn, justifies the right of subjects to resist unjust laws. [11] This is not surprising if we recall that Pope Innocent III and Stephen Langton, Archbishop of Canterbury, apparently had an influence of the drafting of this document.

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8. *Cf.* L. LACHANCE, *Le droit et les droits de l'homme*, Paris, P.U.F., 1959, pp. 26-29.

9. *Cf.* R. POUND, *The Spirit of the Common Law* (reprinted), Francestown, New Hampshire, 1947, pp. 62 ff.

10. *Cf.* F. CALASSO, *op. cit.*, note 6, pp. 324 ff.

11. *Cf.* F.W. MAITLAND, *The Constitutional History of England*, Cambridge, Cambridge University Press, 1963, pp. 69 ff.

Schwarz has also stressed this point, noting that canon law served in England to strengthen currents that ran counter to a law based on State control and voluntarism. And on another matter, he affirms that "the procedural rules of canon law have deeply marked the evolution of the English constitution", referring in particular to the Justinian principle repeated in Boniface VIII's 29th *regular iurus* : *quod omnes tangit debet ab omnibus approbari.* However, the French comparative law specialist notes that this does not mean that canon law has determined the content of English law, but rather that within canonical forms which were transmitted, typically English institutions have evolved. [12]

Plucknett has noted another matter also related to the concept of authority, which shows how deeply canon law penetrated in England, even against firmly rooted customs. I am referring to the canonical principle that in the last instance the authority that ordained a law is the authority responsible for interpreting it. This idea was accepted in Great Britain for a relatively long time. Although the common law courts ordinarily interpreted the law, in the early Middle Ages there were a number of famous cases in England in which the king imposed his authority, both on his own inititiative and even at the request of his justices. Symptomatically, the courts laid claim to being the exclusive interpreters of the common law of the land in the 16th century, after the Anglican Church broke away from Rome. [13]

The jury, an institution so strictly Anglo-American and so foreign to the ecclesiastical tradition, was also influenced by canon law. Henry II created the jury in the mid-12th century as a procedural means for settling civil disputes, specifically those having to do with possession and ownership. It was meant to replace the barbaric method of trial by ordeal that had been practiced by Anglo-Saxon tribes for centuries before the Norman Conquest. The jury became widespread in the 13th

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12. *Cf.* H.A. SCHWARZ-LIEBERMANN VON WAHLENDORF, *Introduction à l'esprit et à l'histoire du Droit anglais*, Paris, L.G.D.J., 1977, pp. 32-33.

13. *Cf.* T.F.T. PLUCKNETT, *op. cit.*, note 4, pp. 328 ff. The first of these cases occurred in 1226. In the wake of disagreements between certain sheriffs and the residents of their shires on the interpretation of the Magna Carta, Henry III called the disputant before him to clear the matter up. Something similar happened eight years later because of a discussion between bishops, earls and barons on the meaning of clause 35 of the Charter. In 1259, Henry III sent a warning to the Bishop of Durham, informing him that the interpretation of the law and customs "belong to us and our nobles, and none other". Edward I also took a similar attitude. In 1278, he and his justices published an extra-judicial "exposition" of the Statute of Gloucester, and in 1281 the King in Council "corrected" the same Statute. Recourse to the legislator as the supreme authority on interpretation did not only originate with the king; on other occasions the judges themselves *motu proprio* went to the King's council to request an interpretation of difficult points. The appeals made to the Council by two Chief Justices, Hengham and Thorpe in 1303 and 1336 respectively are particularly well-known.

century due to the influence of a number of factors, not the least of which was the role played by Church authorities. Under pressure from the Church, Henry III prohibited the primitive system of trial by ordeal, which was gradually replaced by the jury. [14] Apart from this indirect influence, English historians acknowledge that canon law had a direct influence on some of the ways in which juries operate, particularly with regard to questioning and disqualifying potential jury members, which Glanvill and Bracton attributed to similar rules governing the selection of witnesses in canonical trials. [15]

Common law, on the other hand, originally developed out of actions related to land ownership and possession. Two related institutions that are typically English arose as a result of ecclesiastical influence.

The first is the action known as *novel disseisin*, created in the time of Henry II, which is virtually the same as the interdict *recuperandae possessionis*. The purpose of this action was to restore possession of a piece of land to a person who had been ejected from it, and only once he had been restored dit it become possible to argue the rights of the parties to ownership of the land in dispute before a court. Plucknett believes that this solution, Roman in origin, passed into English law through canon law, and concretely through Gratian's *Decretum*. [16]

The second institution arose around the same time and is known as the "term of years". Maitland has seen the influence of Roman law here, which would reduce the term of years to a usufruct. However, Longrais considers that the term of years was a home-grown device for immoral and speculative purposes, largely to elude the Church's ban on usury. According to this view, its main purpose was to permit loans at high interest rates that would be guaranteed by land. The moneylender would make a loan to a landowner in a difficult economic situation and in return would be given possession of the land for a "term of years sufficiently long to enable him to recover his capital and profits out of the revenues of the land". [17]

Contrary to the situation with royal rights, common law on contracts would grow with its own specific characteristic, outside Roman or canon influence. However, contracts were affected by ecclesiastical law through another channel, equity, to which I will refer later.

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14. *Cf.* O. RABASA, *El Derecho angloamericano*, 2nd edition, Mexico, 1982, pp. 113 ff.

15. *Cf.* T.F.T. PLUCKNETT, *op. cit.*, note 4, pp. 298 ff.

16. *Cf. ibid.*, pp. 358 ff.

17. The opinions of Maitland and Longrais are taken from PLUCKNETT, *op. cit.*, note 4, pp. 570 ff.

II. THE STAR CHAMBER AND ENGLISH CRIMINAL LAW

I said earlier that it is not always easy to pinpoint the channels through which canon law penetrated English law after the 11th century. Occasionally, however, these paths appear clearer to those who enquire into the sources of Anglo-American law.

In the field of criminal law, one path lay through the Star Chamber, one of the highest royal courts, born in the early Middle Ages to ensure that the criteria for administering justice would be homogeneous and centralized. Roscoe Pound has pointed out that the Star Chamber followed the doctrines of the penitential system of the Catholic Church. It would lead to a gradual individualization of criminal responsibility in contrast to the deeply rooted Germanic notion of objective responsibility. [18] Accordingly, and due to the unique spirit that permeated penitential law in the Church, ethics would be infused into English criminal law : the focus would no longer be on the crime but on the criminal, and whether or not his crime was intentional would be weighed when imposing the punishment, in accordance with the 23rd *regular iurus*, *Liber Sextus* : *sine culpa, nisi subsit causa, non est aliquis puniendus.*

In short, the classical canonical idea that crime must be judged from the viewpoint of sin was assimilated. Because of this, some historians of English law attribute to the Catholic Church the introduction of emprisonment in criminal law. It was meant to mitigate the cruel corporal punishment of the Middle Ages and to give a criminal the chance to repent during the time he spent meditating in solitary confinement. [19]

Commenting on this, Le Bras has written that classical canon law was the crucible in which the different legacies of the ancient European civilizations were fused. The Church assimilated and transformed according to the Christian spirit "the care of the poor and the oppressed which was characteristic of Judaism, the Roman love of order and authority, the Greek conceptions of political economy and formal logic, and the enthusism and scrupulousness of the Celts, which were shown more particularly in their penitential system". [20] This whole new legacy would pass into English law as it grew with the dynasty of the Norman kings.

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18. *Cf.* R. POUND, *op. cit.*, note 9, pp. 50 ff. On the offenses created by the Star Chamber see S.F.C. MILSOM, *Historical Foundations of the Common Law*, 2nd ed., Toronto, Butterworth 1981, pp. 417, ff. This influence of the Church's penitential system was already felt prior to the Norman Conquest, above all through the "Penitential books" that were so widely known in English and Ireland.

19. *Cf.* T.F.T. PLUCKNETT, *op. cit.*, note 4, p. 305.

20. *Cf.* G. LE BRAS, "Canon Law", in *Legacy of the Middle Ages* (edited by C.G. CRUMP and E.F. JACOB, Oxford, Clarendon Press, 1969 (print of the 1926 first edition), p. 361.

III. THE ECCLESIASTICAL COURTS

The ecclesiastical courts were another well-defined channel through which canon law would leave its imprint on English law. After 1066, William the Conqueror tried to strengthen the Church internally, while restricting its political power in an attempt to guarantee the independence of the new monarchy. To achieve this, he prohibited the bishops from interfering in the administration of justice of secular matters, but strengthened the powers of ecclesiastical courts. Apart from strictly canonical matters, they had jurisdiction over certain areas that had an unequivocal impact on civil matters, especially laws governing succession and marriage. [21]

With regard to the latter, the influence of canon law on the legal structure of marriage in England and in the rest of the West is well-known. Nor is it necessary to go into detail about testamentary law where canon law produced effects similar to those that can be seen in the Continental legal tradition. Suffice it to say that most Anglo-American scholars believe that wills are an institution unknown to the Germanic tribes that lived in the British Isles, which was introduced through Church law.

As for the origins of ecclesiastical jurisdiction over these two matters, there can be no doubt with regard to marriage since from the time the Anglo-Saxons were converted to Christianity, marriage was viewed as a sacrament and therefore as belonging to the Church's jurisdiction, which, as Holdsworth notes, maintained it exclusively and unchallenged from at least the 12th century. [22]

The origins of ecclesiastical jurisdiction over succession are more hazy. Plucknett considers that the Church gradually took over pre-Christian forms of passing on possessions *mortis causa*. According to pagan customs, the property of the deceased was divided into three parts : one for his widow, one for his children and one for his soul. This "soul's part" was either burnt or buried with him, to be used in the afterworld. With the coming of Christianity, the soul's part took on new significance : the baptized ceded it to maintain the clergy or to be used in pious or charitable works. This led the Church to gradually introduce written wills and take over the task of administering and interpreting them. [23]

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21. About the influence of Ecclesiastical Courts in other fields of Common Law, like law of defamation or bankruptcy, see R.H. HELMHOLZ, *Canon Law and English Common Law*, (Selden Society Lecture), London, 1983.

22. *Cf.* W.S. HOLDSWORTH, "The Ecclesiastical Courts and their Jurisdiction", in THE ASSOCIATION OF AMERICAN LAW SCHOOLS, *Select Essays on Anglo-American Legal Tradition*, vol. 2, Frankfurt, 1968, p. 298.

23. *Cf.* T.F.T. PLUCKNETT, *op. cit.*, note 4, pp. 734 ff.

In any case, the Magna Carta already granted the Church authority over intestate successions as it states in clause 27 : *si aliquis liber homo intestatu decessit, catalla sua per manus propinquorum et amicorum suorum per visum Ecclesiae distribuantur, salvis cuicunque debitis quae defunctus ei debebat.* [24]

Also, while the ecclesiastical courts in England applied canon law up to the 16th century, the situation did not change radically after the schism caused by Henry VIII. As William Holdsworth has written, the king replaced the Pope as the source of the Church courts' authority, but canon law continued to be applied in substantially the same manner, although later, and above all with regard to marriage, the influence of the Protestant reform would leave its mark. [25] If this was the situation with substantive law, the same was the case with procedural law, which continued to be canonical. The reason, for this as Langdell explains, is that magistrates and advocates in ecclesiastical courts were educated in their own system and were hardly touched by common law, since the same persons could not engage simultaneously in practicing law in both legal spheres. [26]

The ecclesiastical courts' authority over marriage and succession ended in the 19th century. In 1857 they were replaced by two specific civil tribunals which, in turn, were integrated in 1873 into the corresponding sections of the High Court of Justice. This did not eliminate the canonical heritage that had accumulated over centuries. True to the respect for tradition that characterizes Anglo-American law, the purpose of these judicial reforms was not to break with the substantive and procedural legal praxis that had been consolidated in earlier jurisprudence, but rather to unify different jurisdictions.

IV. EQUITY AND COMMON LAW IN THE DEVELOPMENT OF BRITISH LAW

Although the influence of the Star Chamber and the ecclesiastical courts on English law is appreciable, the main channel through which canon law exerted its influence is undoubtedly through the concept of equity developed by the Courts of Chancery. In contrast to other systems, in Anglo-American law equity did not remain simply one of those abstract notions that pervade the whole of the legal order to

24. *Cf.* T.E. SCRUTTON, "Roman Law Influence in Chancery, Church Courts, Admiralty and Law Merchant", in *Select Essays...*, *loc. cit.*, note 22, vol. 1, p. 228.

25. *Cf.* W.S. HOLSDWORTH, *loc. cit.*, note 22, pp. 267 ff.

26. *Cf.* W.S. LANGDELL, "The Development of Equity Pleading form Canon Law", in *Select Essays...*, *loc. cit.*, note 22, vol. 2, pp. 777-778.

varying degrees. Instead, and without diminishing its nature as an underlying principle (or rather by extracting all its potential) it gave rise to a whole branch of law with its own jurisdiction and specific traits. To understand its true dimensions, a brief account of certain aspects of the historical evolution of English law is necessary. [27]

What is generally called common law began when the Normans established themselves in England after the Battle of Hastings in 1066. It appears that the term was coined by Edward the First, who became known as the "English Justinian" for his work on legislation.

Roscoe Pound has mentioned three points that are essential in defining the common law system : the doctrine of the supremacy of the law mentioned above, the value attached to legal precedent and trial by jury. [28] This bare summary allows us to understand two of the main characteristics that make the historical development of this law so singular.

In the first place, it grew non-systematically, spontaneously, through judicial decisions; a growth that resists all attempts at rational systemization using the parameters that are customary in Continental doctrine. It was described eloquently by the American judge, Justice Holmes, who roundly affirmed that "the life of the law has not been logic, it has been experience". Or in the words of Schwarz, Anglo-American law has been the result of perpetuating the "accidents of history". [29]

The second relevant characteristic is the role of procedural matters in the evolution of this legal system. This is expressed in the well-known phrase "where there is no remedy there is no right". As Maitland says, following Maine, "substantive law has grown up independently of the law administered in other forms". [30]

In the light of these facts, it can easily be seen that common law, since it lacked mechanisms for renewal, was destined to crystallize into a set of very rigid procedural rules. And this is indeed what happened. In the beginning, the royal common law courts themselves operated with an eye to this two-tiered ideal of justice that equity represents. With time, however, and through the action of the doctrine of

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27. Among the extensive bibliography on the historical development of equity and its links to common law, the following can be consulted for a summarized but exact view : C.K. ALLEN, *Law in the Making*, 5th ed., Oxford, Clarendon Press, 1951; F.W. MAITLAND, *Equity. A Course of Lectures*, Cambridge, 1969 (reprint of the 2nd ed., 1936); R.A. NEWMAN and R. CASSIN, *Equity in the World's Legal System*, Brussels, Bruylant, 1973.

28. *Cf.* R. POUND, *op. cit.*, note 9, p. 65.

29. *Cf.* H.A. SCHWARZ-LIEBERMANN VON WAHLENDORF, *op. cit.*, note 12, pp. 16-17. Holme's words have been taken from here also.

30. F.W. MAITLAND, *The forms of Action at Common Law* (reprint), Cambridge, Cambridge University Press, 1954, p. 4.

precedent, the gaps in a system unable to accomodate social changes became apparent. Common law operated on things — especially land — rather than on people; it had no procedural means to prevent illegal acts, but only to punish them, and it lacked instruments to specifically compel people to render services due. It was limited to ordering reparation for damages. The growing rigidity of the system meant that it was impossible to administer justice when a plaintiff could find no recourse to action in judicial praxis.

In these circumstances it was necessary to find corrective measures. However they could not be found within common law, but only outside it, through the judicial action of the Chancellor. A person unable to obtain justice in the ordinary courts could petition the king to use his prerogative of mercy, since he was the kingdom's fountain of justice. The monarch, for his part, exercised this prerogative through the Chancellor who was a member of the King's Council and the person who issued writs.

The Chancellor, known as the "king's conscience" decided cases solely on the basis of equity, unconstrained in any way by the rules of common law. The marked increase in the number of cases taken to the Chancellor led him to surround himself with a group of officials who eventually became the Court of Chancery.

In the 14th century, the Court of Chancery became consolidated as an independent court that resolved conflicts in the sovereign's name, and later in its own name, but always based on equity and not on the common law that was applied by the regular courts. During the 15th and 16th centuries the new system spread, and municipal equity courts appeared, coming under the Chancery. By the start of the modern era, equity had taken full root as a new branch of English law, that was parallel and supplementary to the strict common law system. As was to be expected, there was no lack of friction between the two lines of jurisdiction, which was generally resolved in favour of equity. Despite this, the situation remained stable up to the judicial reorganization carried out under the Judicature Acts of 1873 and 1875 which fused the two branches of British law.

Since then, any English tribunal can apply both common law and equity. The Court of Chancery lost its independence and became the Chancery Division of the High Court of Justice. This union, however, was more administrative than of substance. Broggini has rightly affirmed that the two legal bodies, common law and equity, remain separate in the legal consciousness of Anglo-Saxon countries. [31] The Chancery Division continued ruling on matters traditionally heard by the Court of Chancery and the procedure remained essentially unchanged.

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31. *Cf.* G. BROGGINI, "Riflessioni sull'equità", (1975) *JUS* p. 31.

In any event, the supremacy of equity was confirmed by the Judicature Acts of the 19th century which established that in the case of conflict between legal and equitable rights, the latter would prevail. This rule had already been applied by James I when resolving the conflict that took place in 1615 between the Chancellor, Lord Ellesmere, and the Chief Justice of the main royal common law court, Edward Coke.

It is not easy to arrive at a general theory of equity, since it developed in an unsystematic way, like common law, and the only common denominator of its rules was an effort to tailor law to the social necessities that arose in England, based on a criterion of justice. Rabasa has described it correctly when he states that equity "is not a structure designed by theorists of legislation or jurisconsults, but like common law, it has grown gradually, the product of the needs of a race of practical men who strive to administer justice rather that to conform to logic. Thus, this *sui generis* legal system of the Anglo-Saxons, as they themselves recognize, is not a law ordered on a logical or scientific plan, like Roman and European legislation in general, but rather a group of doctrines, matters and procedures taken from different and disjointed juridical orders that grew spontaneously and whose only rule was to fill the gaps that common law left in its wake". [32]

This unique and fragmentary development meant that equity would not have a well-defined sphere of action. There were, of course, three basic matters that fell within the jurisdiction of the Court of Chancery : fraud, accident and breach of confidence. As the old adage attributed to Thomas More goes "these three give place in Court of Conscience, Fraud, Accident and Breach of Confidence". [33]

In practice, however, its authority was broader and clearly tended to increase whenever the need to do justice in a specific case submitted to the Chancellor made this necessary. The only two clear limits on it were that it was restricted to civil matters (it was never applied to criminal matters) and operated *in personam* and not *in rem*, although exceptions to this second limit have been legislated in recent times.

Despite the intrinsic flexibility of equity, with time it would be forged into a system of legal rules in a manner similar to common law, and would also adopt the doctrine of *stare decisis*, with the Chancellor bound by previous decisions of the Court of Chancery, unlike his almost total freedom in early times when he could rule with only his conscience for a guide. In the opinion of René David, equity became more rigid on account of precedent as it lost its original nature. [34] This process of

32. O. RABASA, *op. cit.*, note 14, pp. 151-152.

33. Cited by T. RAVA, "Un esperienza di interpretazione comparativa : origini e struttura delle fonti nella 'common law' inglese", (1974) *Rivista di Diritto Civile* p. 215.

34. *Cf.* R. DAVID and J.E.C. BRIERLEY, *Major Legal Systems in the World Today*, 3rd ed., London, Stevens & Sons, 1985, n° 286, pp. 326-328.

intensified technicality took place particularly in the 17th century with the work of three Chancellors, Nottingham, Hardwick and Eldon.

Scholars have assessed this process in different ways. Radbruch [35] has suggested that it solved the problem of uncertainty regarding the Court's decisions, which is reflected in a popular saying : "equity varies with the length of the Cancellor's foot". But there are also those, like Frosini [36], who speak of a *rigor aequitatis* similar to *rigor iuris*, which is paradoxical if we recall that equity arose to mitigate the formalistic rigidity of strict common law.

The consolidation of equity as a stable set of rules should not lead us to think of a self-sufficient systems created to rival common law. On the contrary, it presupposed the existence of common law at all times. Without it, as Maitland has written, equity would only be "a castle in the air, an impossibility" [37], or in Plucknett's simile, equity is like a gloss on common law made by the Chancellors. [38]

The subsidiary role of equity is reflected in one of the maxims that have become classics in Anglo-American literature as descriptions of the core of the system : "Equity follows the law". [39] It means that an equity court must apply the common law to those aspects of a matter under consideration for which equity has not laid down rules. Describing the supplementary nature of equity more closely, Tito Ravà has said that its function is not to modify, correct or complete common law, but rather to correct and complete its effects. [40]

This led Spence and Maine in the last century to draw an analogy between English equity and the Roman *ius honorarium*. In both cases, the rigidity of the earlier law was softened through recourse to the ideal of justice represented by equity. [41] Unlike the process in Roman law

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35. *Cf.* G. RADBRUCH, *Der Geist des englischen Rechts*, 2nd edition, Heidelbert, 1947, p. 44.

36. *Cf.* V. FROSINI, "La struttura del giudizio di equità", in *Teoremi e problemi di scienza giuridica*, Milano, 1971, pp. 202 ff.

37. *Cf.* F.W. MAITLAND, *Equity*, *supra*, note 27, p. 19.

38. *Cf.* T.F.T. PLUCKNETT, *op. cit.*, note 4, p. 673.

39. Historians do not agree on the exact number of maxims about equity. The first book on maxims appears to have been published by Richard Francis in 1728 with the title *Maxims of Equity collected from and proved by Cases out of the Book of the best Authority in the High Court of Chancery*. It contains fourteen maxims. In other authors the number varies, going as high as twenty. They do agree on the twelve basic maxims. In this paper I have followed MARSTON GARSIA in his work *Equity in a Nutshell*, 3rd ed., London, 1941. For a brief commentary on maxims in the context of a broader study on equity see J. CASTÁN TOBEÑAS, "La equidad y sus tipos hitóricos", (1950) *Revista General de Legislación y Jurisprudencia* 745 ff.

40. *Cf.* T. RAVA, *loc. cit.*, note 33, p. 212.

41. *Cf.* G. SPENCE, "The History of the Court of Chancery", in *Select Essays...*, *loc. cit.*, note 22, vol. 2, pp. 219 ff; H.S. MAINE, *Ancient Law*, 3rd American — from the 5th London Edition, New York, H. Holt & Co., 1888, pp. 42-69.

however, equity did not transform the old law from within, but became a parallel and independent branch which, as I have said, had its own jurisdiction until the judicial reforms in the 19th century.

Although it is true that these two branches of English law, common law and equity, have evolved independently, it is no less true that they have frequently had contact with each other. At times these contacts degenerated into conflicts over jurisdiction, but often they translated into cross influences. Langdell has pointed out that the typical procedure of equity has gradually grown closer in some aspects to the procedural rules of common law, because the same people acted as practitioners in both jurisdictions.[42] And in another direction, Roscoe Pound has pointed out that major doctrines created and developed by equity have been received into the common law system.[43] This has occurred especially in the field of bankruptcy law where the principle that "Equity is equality" was introduced, and also in contract law where the ideas contained in other maxims on equity sucn as "Equity looks to the intent rather than to the form" and "Equity looks on as done that which ought to have been done" have had considerable impact.

V. THE CANONICAL ROOTS OF ENGLISH EQUITY

The reason I have taken the liberty of reviewing the foregoing ideas on equity is to stress that it is a key element in understanding Anglo-American law as a whole. It would be just as unthinkable to imagine the Anglo-American legal tradition without equity as to attempt to understand to Continental tradition without making reference to Roman Law.

It being thus, it is now time to consider the doctrinal substratum that serves as the groundwork for this unique juridical construct. To do so, we must look at those early centuries in which equity gradually took shape as a body of jurisprudence endowed with internal coherence.

Once again Plucknett provides the key to the problem. With regard to the fragmentary and unsystematic evolution of equity, he writes that the powers of the Chancellor do not originate in the idea of equity, but on the contrary, equity is the result of the activities of the Chancery.[44] The Chancellor is known as the "king's conscience" and rules on cases through an exclusive appeal to the abstract idea of equity as a reflection of the justice that must be applied to resolve each specific conflict.

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42. *Cf.* C.C. LANGDELL, *loc. cit.*, note 26, pp. 777-778.
43. *Cf.* R. POUND, *op. cit.*, note 9, p. 73.
44. *Cf.* T.F.T. PLUCKNETT, *op. cit.*, note 4, pp. 675 ff.

Where did the Chancellors find the source of inspiration for their decisions? Evidence seems to point clearly to canon law. Starting in 1530 with Thomas More, a series of lay Chancellors were appointed who came from a common law background. But up to the time of the preceding Chancellor, Wolsey, only a few laymen had been named Chancellor, while about 160 Churchmen had held that office. As Scrutton notes, from 1380 to 1488 all the Chancellors of England were clerics. [45] The total predominance of ecclesiastics in that position is even more significant when we note that their sway coincides with the epoch between the birth of equity and its consolidation as an independent jurisdiction in the Court of Chancery. These were precisely the years in which the groundwork for the new system was laid, which would be left undisturbed by future events.

In view of this, it is not difficult to assume that canon law provided the ground on which equity would grow in England. Regardless of how much canonical training the Chancellors had, it can be presumed that they would know Church law much better than common law. Moreover, it would make no sense for them to resort to common law, since the idea was precisely to correct the defects in the administration of justice that were caused by the application of strict common law. The influence of canon law on the formation of equity cannot be doubted if we remember that the Chancellor's sole guide was natural justice, whose interpretation at that time was the undisputable province of the Catholic Church.

Anglo-American law historians as diverse as Vinogradoff, Holmes, Maitland, Pound, Scrutton, Holdsworth, Adams and Plucknett agree that canon law formed the basis for equity in this initial and decisive stage in its evolution. [46]

The great author of treatises on English law, William Blackstone, whose work was so important for the early development of American common law, expressed the same idea as early as the 18th century. In his *Commentaries on the Laws of England*, Blackstone wrote that : "The systems of jurisprudence in our courts both of law and equity are now equally artificial systems, founded in the same principles of justice and positive law; but varied by different usages in the forms and mode of

45. *Cf.* T.E. SCRUTTON, *loc. cit.*, note 24, pp. 214-215.

46. *Cf.* P. VINOGRADOFF, "Reason and Conscience in Sixteenth Century Jurisprudence", in *Collected Papers*, Oxford, 1978, vol. 2, pp. 196 ff; O.W. HOLMES, "Early English Equity", in *Select Essays...*, *loc. cit.*, note 22, vol. 2, pp. 705 ff; F.W. MAITLAND, *Equity*, *supra*, note 27, pp. 5 ff; R. POUND, *op. cit.*, note 9, pp. 25 ff; T.E. SCRUTTON, *loc. cit.*, note 24, pp. 213 ff; W.S. HOLDSWORTH, "The Relation of the Equity administered by the Common Law Judges to the Equity administered by the Chancellor", (1916-17) 26 *Yale Law Journal* 1 ff; ADAMS, "Continuity of English Equity", (1916-17) 26 *Yale Law Journal* 550 ff; T.F.T. PLUCKNETT, *op. cit.*, note 4, pp. 675 ff.

their proceedings : the one being originally derived (though much reformed and improved) from the feudal customs, as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies, introduced by their clerical chancellors". [47]

Contrary to this majority opinion, Spence feels that equity is primarily Roman in origin. [48] Although I believe that he is mistaken, it is not at all surprising to find Roman elements in equity, if we believe, like Schwarz [49], that the canonical influence on the doctrine applied by the Chancellors lies in its principles rather than in its specific contents. Put another way, the most direct source of inspiration for the substance of equity is *aequitas canonica*, an idea which, as Calasso says, synthesizes the Mediaeval world of ideology and is rooted in the whole judicial order, encompassing both legal rules doctrinal expositions. [50]

It should be remembered that the canonical concept of *aequitas* does not arise *ex nihilo*. On the contrary, it is based on the Greco-Roman heritage and transformed by an injection of the Christian spirit. As Pio Fedele has aptly said, the structure of canonical *aequitas* is Roman but its soul is exclusively canonical. [51] Thus, the Chancellors do not look to the details of ecclesiastical law for the basis of equity, but to the parallel idea of *aequitas*, which most certainly permeated all Church law.

Hazeltine and Maitland have affirmed that English equity was able to build on canonical foundations, creating its own, original characteristics tailored to the social reality of Great Britain. [52]

Maitland himself, in an attempt to trace the ecclesiastical roots of equity, has attributed it chiefly to the *regulae iuris* inserted at the end of the *Liber Sextus* of Boniface VIII. [53] This fact becomes clearer if, for example, these precepts are compared with some of the maxims on equity. [54] Thus the rule *qui prior est tempore potior est iure* is almost

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47. Vol. III, pp. 429 ff. The reference is taken from MAITLAND, *Equity*, *supra*, note 27, p. 13.

48. *Cf.* C. SPENCE, *loc. cit.*, note 41, pp. 246 ff.

49. *Cf.* H.A. SCHWARZ-LIEBERMANN VON WAHLENDORF, *op. cit.*, note 29, pp. 32-33.

50. *Cf.* F. CALASSO, *op. cit.*, note 6, pp. 324 ff. A. PORTOLES has interesting suggestions to make on the relations between English and canonical equity in *Aequitas canonica y equity*, unpublished doctoral thesis presented at the University of Navarre, 1977.

51. *Cf.* P. FEDELE, "L'equità canonica", in *Discorsi sul Diritto canonico*, Roma, 1973, pp. 69 ff.

52. F.W. MAITLAND, *Equity*, *supra*, note 27, pp. 5 ff.

53. *Cf.* F.W. MAITLAND, *ibid.*

54. For the *regulae iuris* I have used FRIEDBERG's edition of the *Corpus Iuris Canonici*, vol. 2, Graz, 1959, pp. 1122-1124.

literally repeated in the maxim "where equities are equal, the first in time shall prevail". So also does the maxim "Equity will not suffer a wrong to be without a remedy" reflect the same moral preoccupations as the rules *possessor malae fidei ullo tempore non praescribit* and *pro possessore habetur qui dolo desiit possidere*. This is the case as well for the maxim "delay defeats equity" and rule 86, Book Six : *Damnum, quod quis sua culpa sentit, sibi debet, non aliis, imputare.*

This influence of the *regulae iuris* can also be seen in the tenet that error is a factor that invalidates legal acts. In strict common law, error, regardless of its nature, can never be forgiven by the law. In equity on the other hand, although it also accepted the irrelevance of *error iuris*, the rule was precisely the opposite with regard to *error facti, i.e.* an act performed in error or ignorance of an important fact, which cannot be attributed to its author's negligence or fault, is void. This agrees significantly with the 13th *regula iurus* : *Ignorantia facti, non iuris, excusat.*

We have one very revealing document on the influence of canonical *aequitas* on English equity : the book by Christopher Saint Germain, which was widely read and was the springboard for a series of later treatises on equity and common law. It was written precisely at the time when the Court of Chancery had become established as an independent tribunal. [55]

Saint Germain, an English lawyer, was considered by his contemporaries to be a true authority on legal matters and he became famous for a polemic he maintained with Thomas More on doctrinal matters. In 1523 he published his Latin *Dialogus de fundamentis legum Angliae et de conscientia.* Seven years later he wrote a second dialogue on the subject, and in 1613 he published the first English edition of the two dialogues in London, commonly known as *Doctor and Student* and whose complete title is *The Dialogue in English between a Doctor of Divinitie and a Student in the Laws of England.*

In his dialogues, Saint Germain discusses how equity operates, based on the ideas I have already mentioned : it acts as a corrective for the defects in the rigid common law system. His notion of equity is taken literally from the traditional definition of canonical *aequitas* contained in the *Summa Hostienses* [56] which has been attributed to different authors ranging from Abbot Panormitano to Gulielmus Durantis and Juan Andrés : "*Aequitas est iustitia pensatis omnibus circumstantiis particularibus dulcore misericordiae temperata*".

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55. On the work of Saint Germain, see *inter alia*, W.S. HOLDSWORTH, *A History of English Law*, vol. 5, London, 1924, pp. 266 ff. On its relation with canon law in particular, see L. DE LUCA, "Aequitas canonica ed equity inglese alla luce del pensiero de C. Saint Germain", (1947) *Ephemerides Iuris Canonici* 46-66.

56. *Cf. Summa Hostiensis*, Lugduni, 1537, book 5, title. "De dispensationibus", n. 1, fol. 289 r.

Both the concept and the vision of equity transmitted by Saint Germain are permeated with the spirit of canon law and inspired in canonical sources. As Allen suggests, although the Decretals are not quoted, the equitable solutions mentioned there "strongly savoured of the principles and distinctions of Canon Law". [57]

More specifically, Vinogradoff has pointed out that Saint Germain took many of his ideas and virtually all of his method from Jean de Gerson, known as "Doctor Christianissimus" and "Doctor Consolatorius", who was Chancellor of the University of Paris in the 15th century. [58] De Luca, referring to contractual matters, has shown that Saint Germain's constructs are deeply influenced by the *Summa angelica de casibus conscientiae* of Angelo Carleto de Clavasio. [59]

Saint Germain's work was extremely well-known in his time, because, among other things, he discussed canon law concepts of equity in terms that were familiar to those who practised law in England. This was very relevant, since the work appeared at the time that the lay Chancellors were begining to dominate over ecclesiastics. It meant that the canon law principles that formed the doctrinal base for equity would continue to exert their influence in this branch of English law. Vinogradoff has therefore been able to speak of a true process of indirect reception of canon law by Anglo-American legal institutions. [60]

Doctor and Student demonstrated the hold that *aequitas canonica* had at that time and permitted it to continue influencing English law in the future. But the same can be said of other more concrete aspects of canon law, especially procedural law.

To anyone familiar with Anglo-American law, the vast differences in procedure followed by the common law courts and the equity courts, which had broader jurisdictional powers, are self-evident. These differences range from the absence of writs and jury, to peculiarities caused by the fact that its decisions were executed *in personam* and not *in rem*.

Wohlhaupter has defended the opinion that the procedures of the Court of Chancery come from Germanic models [61] as opposed to Fry, Langdell and Holmes who have maintained that they are firmly inspired by canon law. [62] It is symptomatic that Spence, despite the fact that he

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57. C.K. ALLEN, *op. cit.*, note 27, p. 384.
58. *Cf.* P. VINOGRADOFF, "Reason and conscience..." *loc. cit.*, note 46, pp. 196 ff.
59. *Cf.* L. DE LUCA, *loc. cit.*, note 55, pp. 59 ff.
60. *Cf.* P. VINOGRADOFF, *loc. cit.*, note 46, pp. 196 ff.
61. *Cf.* E. WOHLHAUPTER, "Der Einfluss naturrechtlicher und kanonisticher Gedanken auf die Entwicklung der englischen Equity", in *Acta Congressus Iuridicu Internationalis*, vol. 2, Romae, 1935, p. 443.
62. *Cf.* E. FRY, "Specific Performance and laesio fidei", (1889) *L.Q.R.* 241 ff; C.C. LANGDELL, *loc. cit.*, note 26, pp. 776 ff; O.W. HOLMES, *loc. cit.*, note 46, pp. 705 ff.

considers equity to be a repeat of what happened in Roman law, mentions that one of the most frequent attacks against the Chancery was that its procedures did not follow the guide of common law but rather the practise of the Catholic Church. [63] Holdsworth, for his part, states that the procedural rules of equity may have been influenced in their origin by the summary process that the Mediaeval canonists were developing and applying to commercial transactions. [64]

With greater precision De Luca, when comparing the dialogues of Saint Germain with the *Summa Hostiensis*, has reached the conclusion that the procedure of the Chancery is taken from a typical canonical procedure : the *imploratio officii iudicis per modum denunciationis* or, in short, the *denunciatio iudicialis privata*. He points to two traits in the latter that fully coincide with the procedure followed by the Chancellors, as opposed to the practise of the ordinary courts. The procedure begins with an *imploratio* to the *officium iudicis*, which was limited to describing the illicit act (in the common law courts, a hearing could not begin unless the plaintiff had previously obtained a specific writ for the case). Moreover, a sanction is requested that will force the defendant to desist from his illicit activity (ordinary civils courts, on the contrary, acted *in rem* and not *in personam*). The purpose of the *denunciatio privata* was not only to satisfy private interests, but also to halt illicit acts and in this it coincides with the Court of Chancery which played a preventive and protective role, beyond simply deciding in disputes between parties, which was what the common law courts did. [65]

VI. SOME TYPICIAL ANGLO-AMERICAN LEGAL INSTITUTIONS CREATED BY EQUITY

Based on what has been said thus far, it is clear that English equity, even though it developed with its own characteristics, has historically followed paths previously taken by canon law, to a degree that has still not been precisely determined. In turn, equity has left its mark on the British legal system as a whole, and it can be detected, for example, in the law of succession, especially in legacies; in the protection of possessions, particularly in the action of ejectment; in the legal efficacy of the *pacta nuda*, similar to the situation in Continental law; and in the system of cross-examination, which, as Buckland and McNair [66] acknowledge, was

63. *Cf.* G. SPENCE, *loc. cit.*, note 41, pp. 243-244.

64. *Cf.* W.S. HOLDSWORTH, *A History of English Law*, *supra*, note 55, vol. 5, pp. 81 ff.

65. *Cf.* L. DE LUCA, *loc. cit.*, note 55, pp. 63 ff.

66. *Cf.* W.W. BUCKLAND — A.D. MCNAIR, *Roman Law and Common Law*, 2nd edition, revised by F.H. Lawson, Cambridge, Cambridge University Press, 1952, p. 405.

copied by the regular courts from the Chancery, since hitherforeto it was unknown in common law.

To furnish other examples of the historical and modern importance of equity, I will refer briefly to three institutions that are particularly typical of Anglo-American law and which owe their origins to equity courts : I refer to trusts, injunctions and specific performance. [67]

Trusts are one of the institutions that have been most closely regulated technically by equity. It is not germane here to discuss the legal nature of this institution, which most historians consider to be a real right, although Maitland believes that it is a personal right juridically assimilated to a *ius in rem*, *i.e.* "A right primarily good against *certa persona viz.* the trustee, but so treated as to be almost equivalent to a right against all". [68]

It is worthwhile, on the other hand, to note that despite the similarities between trust and the Roman *fideicommissum*, historians of Anglo-American law unanimously agree that it comes from a similar and ancient Church institution known as "use", originally created by the ecclesiastical Chancellors. In the common law systems, the only owner in the eyes of the law was the person to whom legal ownership had been transmitted. The obligation of this trustee to a person who had the "use" of the thing (*cestui qui trust*) was exclusively moral, based on confidence. The Chancery which, it will be remembered, acted as a "court of conscience" transformed this moral obligation into a legal one, although it could only be demanded before the courts of equity and not before the common law courts. Thus, two ownerships coexisted : one legal and the other equitable, which is the one that prevailed.

The ecclesiastical origin of "use" can be grasped more clearly when we recall that it was born out of the Statutes of Mortmain promulgated in England beginning in 1217, which prohibited religious institutions from acquiring land. The intention (or at least the stated intention) was to foster land productivity. To get around this legislation, it became customary to transfer land to an intermediary who was trusted by the clergy. The ecclesiastical Chancellors' decisions determined that the right of use that belonged to religious bodies would become a new property right, based on equity, different from legal ownership, which was the only right recognized by the common law courts.

Later, it would be applied to many more cases to solve the problems caused by the rigidity of the common law with regard to the

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67. On these institutions see F.W. MAITLAND, *Equity*, *supra*, note 27, on Trusts pp. 23-105 and *passim*, on Injunctions pp. 318-329, on Specific Performance pp. 301-317. From the perspective of a jurist trained in continental law, see O. RABASA, *op. cit.*, note 13, *passim*.

68. *Cf.* F.W. MAITLAND, *Equity*, *supra*, note 27, p. 23.

transmission of property. Also, from the time of Edward VI, heirs inherited the obligation of the legal owner to respect use, a point that bears some similarity to the 77th *regula iuris*, *Liber Sextus* : *ratione congruit, ut succedat in onere, qui substituitur in honore.*

The word "use" was replaced by "trust" in the 16th century during the reign of Henry VIII. The way in which this came about shows how deeply rooted the institution had become and how much power the Court of Chancery wielded. In 1536, Henry VIII promulgated the Statute of Uses which was intended to abolish the distinction between the two types of ownership, legal and equitable. However, the doctrine applied by the Court of Chancery was able to evade the intention of the law and perpetuate "use", although it would henceforth be called "trust".

"Specific performance" was an equitable remedy intended to make up for the ineffectivness of the remedies established in common law by providing adequate protection and indemnization for the rights of individuals. The remedies known in strict common law were very limited and supposed a preferably objective judicial coercion which, in most cases, led to reparation in money or objects but which lacked the means to compel a defendant to personally comply with an obligation.

To overcome these inconveniences, the Chancery developed a basic procedural remedy known as "injunction" which could take two forms : mandatory or prohibitory. In both cases, however, the effects are identical : an individual is constrained by judicial mandate and disobedience is technically termed "contempt of court", punishable by fine or imprisonment.

This flexible equitable remedy of injunction was gradually applied to many fields, giving rise to different special remedies with regard to trusts, contracts, real rights, succession, etc. Perhaps one of its most typical uses in Anglo-American law is to require "specific performance" or specific compliance with contracts.

I have already said that in the case of failure to perform an obligation, in common law it was only possible to force a debtor to pay compensation for damages. This led to unjust situations in cases of strictly personal obligations that could scarcely be compensated for by paying a sum of money or surrendering a thing. In these cases, through an injunction and the sanctions for disobeying it, the equity courts had an efficient means of applying personal pressure to force a defendant to materially comply with his obligations, whether of commission or omission.

Scrutton affirms that the doctrine of specific performance was developed by the Chancellors from strictly canonical bases, as opposed to Roman law, which only granted reparation for damages for breach of contract, as stated in the maxim *nemo potest praecise cogi ad factum.* [69]

69. *Cf.* T.E. SCRUTTON, *loc. cit.*, note 24, pp. 222 ff.

Fry [70] has noted its possible inspiration in the Decretals of Gregory IX which establish that *studiose agendum est ut ea, quae promittuntur, opere compleantur.* [71]

VII. AMERICAN LAW

Thus far I have discussed how canon law influenced the historical development of English law through different channels, especially through the equity created and developed by the Court of Chancery. The question now arises of what role it played in that broad area of Anglo-American tradition represented by United States law.

It is no easy task to summarize the brief but complex history of the American legal system in a paper such as this. [72] Nor is it easy to answer the question of what part canon law played, especially when we note that in American universities relatively little attention was paid to the historical aspect of legal studies until the end of the 1950's. [73] This is a field that still offers fertile ground for research.

In any event, it seem clear that at least since the end of the Colonial period we can speak only of an indirect influence of canon law, owing to the Protestant roots of the United States and the system of Church-State relations established in the Constitution. This indirect but not necessarily unimportant influence takes place through English law. In this regard, from his impartial Continental stance, Oscar Rabasa has written that the content and form of United States law is a modern reproduction of English law, tailored to American political, social and economic conditions. The one exception is public law. In public law, American institutions have followed their own path, different from that of English law. Rabasa too affirms that canon law, as incorporated through the ecclesiastical courts into the British system governing marriage and succession, becomes part of American law as applied by civil courts in the different states. [74]

The English inspiration behind American law is a fact that does not require demonstration despite the anti-British climate that

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70. *Cf.* E. FRY, *Specific Performance*, 2nd edition, London, 1881, pp. 3-8 (cited by SCRUTTON, *loc. cit.*, note 24, pp. 222-223).

71. Book I, tit. 35, chapter 3 (see E. FRIEDBERG's edition, *op. cit.*, note 54, vol. 2, p. 204).

72. On the history of American law see L.M. FRIEDMAN, *A History of American Law*, New York, Simon and Schuster, 1973. With regard to European bibliography, suggestive ideas can be found in A.P. SERENI, *Studi di Diritto Comparato. I. Diritto degli Stati Uniti*, Milan, 1965.

73. This is the opinion of G. GILMORE, *The Ages of American Law*, New Haven and London, Yales University Press, 1977, pp. 102 ff.

74. *Cf.* O. RABASA, *op. cit.*, note 14, pp. 123 ff.

prevailed in the United States following Independence. It could hardly be otherwise, since that country's cultural roots are genuinely English, except for the state of Louisiana and more recently, Puerto Rico and Hawaii. Historians also agree that the chief and concrete way in which English law penetrated after the *Declaration of Independence* was through the work of William Blackstone, which quickly became widely known in American legal circles. [75]

One example of this influence is the survival of the two ramifications of the legal system, common law and equity, which are expressly recognized in the Constitution. [76] Despite the process of unification that began in 1848 when New York State decreed that the two jurisdictions would be joined, Sereni notes that this did not eliminate the distinction between "legal rights" and "equitable rights", with the latter prevailing in the event of conflict, just as in the United Kingdom. [77]

FINAL COMMENTS

I would like to conclude this paper with a few brief remarks on the usefulness of historical research into the canonical roots of Anglo-American law.

On the one hand, the study of the history of law *per se* is clearly interesting in that it allows us to learn more about the identity of the legal system. Regardless of whether we fully agree with the postulates of the historical school, we can only weigh and fully understand the current state of a given set of laws and forecast how it will evolve in the future in the light of its historical background. Thus, the efforts of researchers on the Continent since Savigny have not been in vain.

But there are two other reasons why this task is important.

The first has to do with the need to facilitate a dialogue between Continental and Anglo-American law which, for several decades now, has been advocated by comparative haw historians in the more or less explicit desire to foster reforms in their respective legal systems. Despite its relative intensity, this dialogue still runs along rather uncertain channels, perhaps because too few common elements of sufficient substance have been found to allow for mutual understanding of such different legal languages.

Often these common elements have been sought exclusively in the Roman heritage. Historians of canon law can only feel that this is an

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75. *Cf.* G. GILMORE, *op. cit.*, note 73, pp. 3 ff; O. RABASA, *op. cit.*, note 14, pp. 123 ff.

76. Article 3, Section 2 of the Constitution begins "The judicial Power shall extend to all Cases in Law and Equity...".

77. *Cf.* A.P. SERENI, *op. cit.*, note 72, pp. 143-146.

incomplete approach, since it understates the fact that the reception of Roman law in the Middle Ages on the Continent and in the British Isles was strongly mediated by canon law norms and doctrinal constructs. Classical canon law, inspired of course by Roman law, can be viewed as an underlying historical nexus that could make the current rapprochement between the two legal traditions more viable.

The second of these elements has to do particularly with the laws of the Catholic Church. No one is unacquainted with the changes that canon law experienced under the influence of the absolutist tendencies of the 16th century, and later through codification. As Wieacker says, the purpose of this cultural phenomenon, which is the result of the meeting between relationalism and the Enlightenment, was to convert the natural law of reason into the positive law of the people. [78] Among Canadian and American canonists, Kuttner in particular has repeatedly stressed this. [79]

This dual impact has also been felt in European civil law, but the Anglo-American systems have remained more impassive to it. Thus, a study of the canonical contents that lie at the historical roots of Anglo-American law also implies that key aspects of the best spirit of classical canon law must be rediscovered.

As Navarro Valls has said paraphrasing García Gallo [80], for canon law to look at Anglo-American law does not pose any threat to its traditions, but instead means returning to the origins of the tradition itself. [81] This task is particularly interesting for canon law at this juncture since it is still somewhat blinded by the apparent juridical certainty caused by the myth of codification — an idea that is looked upon with growing scepticism in juridico-civil circles on the Continent and an idea which must, at any rate, be contrasted with the original constructs that were developed by Mediaeval canon law from a very different perspective.

(*Text translated by Lorraine Hernández, Ottawa*)

78. *Cf.* F. WIEACKER, *Privatrechtsgeschichte der Neuseit*, 2nd edition, Göttingen, 1967, pp. 312 ff.

79. *Cf.* S. KUTTNER, *loc. cit.*, note 3.

80. *Cf.* A. GARCIA-GALLO, "Pasado y presente del ordinamiento canónico", (1969) *Ius Canonicum*, pp. 402-403.

81. *Cf.* R. NAVARRO-VALLS, *Equidad y revisión del Derecho canónico* (manuscript I have consulted by courtesy of the author).