

The Passionate Shepherd

Come live with me ...

When jurists speak of a 'common law of Europe' they are either speaking of a *ius commune* that was once in force in much of continental Europe, or of an aspiration to escape from the nationalized law that replaced it.

The *ius commune* was the name that medieval jurists gave to the Roman law and Canon law that was the staple of continental university education. Around 1100, Irnerius began systematic lectures in Bologna on the so-called *Corpus iuris civilis*, a compilation of Roman legal texts made under the Emperor Justinian in the early sixth century and neglected in the intervening years. His successors, the 'Glossators', wrote notes (*glossae*) to these texts, culminating in the mid-thirteenth century *Glossa ordinaria* of Accursius which contained nearly 100,000 notes. The later medieval jurists, known as 'Commentators', wrote more elaborate expositions of Roman texts and tried to reconcile them where possible with local custom. The greatest of these were Bartolus of Saxoferrato and his pupil Baldus degli Ubaldis.

The systematic study of Canon law began around 1140 when Gratian, about whom we know little, collected excerpts from the Fathers, Church councils, and other sources regarded as authoritative for medieval Christians, in a work known as the *Decretum* or *Concordance of Discordant Canons*. Over time, it was supplemented by letters written by popes to settle particular controversies. A collection of these letters, the *Decretals* of Pope Gregory IX, was compiled by St. Raymond of Penafort. It and the *Decretum* became known as the *Corpus iuris canonici*, which was taught in law schools along with the *Corpus iuris civilis*. Ambitious students sought the 'double doctorate' in 'both laws'.

The law of the *Corpus iuris canonici* was also called *ius commune*, and in two senses. First, it was the common law of the Church applied in ecclesiastical courts everywhere, as distinguished from local custom. Secondly, for the medieval jurists, Canon and Roman law together formed a whole which they sometimes called the *ius commune*. The Canon lawyers applied the Roman law when no particular rule of Canon law was in point. The Roman lawyers accepted rules that had been forged by the Canonists: for example, the rule that no promise was binding if circumstances had changed sufficiently since it was made.

One can exaggerate the extent to which the *ius commune* of the *Corpus iuris civilis* was a common law of Europe if by that one means a law that is uniformly applied or uniformly understood. The medieval jurists claimed that in principle the Holy Roman Emperor ruled the entire world, and hence his law was applicable everywhere. In fact, it was accepted in some territories but not others: at first, in northern Italy and southern France, and only centuries later, in Germany and The Netherlands. In territories that accepted it, the *ius commune* was still a law in *subsidium*, which governed only in the absence of some local custom or statute.

It was based on a common system of instruction. But the Glossators and Commentators themselves often disagreed, as did the judges who applied the law. Moreover, with the passing of the Middle Ages, new schools arose which took different approaches, so that the unity of the university tradition was broken. In the Renaissance, humanists used the methods of philology to discover the original meaning of Roman texts, unlike the medieval jurists who had merely tried to reconcile them in a logical and practical fashion. From the sixteenth to the eighteenth century, the so-called natural law schools explained Roman

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law by philosophical principles, dismissing the rules they could not explain as mere Roman positive law. In the seventeenth and eighteenth centuries, commentaries on the *Corpus iuris civilis*, often called the *Usus modernus pandectarum*, were written by a school of northern European lawyers. Their object was to produce works that were simple, practical, and avoided the subtleties of the Glossators and Commentators.

Nevertheless, the fact remains that for centuries, jurists from much of Europe were trained on the same texts (albeit in different ways) and shared common reference points and common concepts. Moreover, because of the work of university trained jurists, the influence of the *ius commune* extended beyond the territories that had expressly accepted it. Provisions of local customary law as interpreted or described by such jurists often reflected those of the *ius commune*. Branches of Roman law were sometimes impressed into service when customary law was sparse, and were declared to be part of custom. An example was the acceptance of Roman rules of tort and contract in northern France. English law proved exceptionally resistant to infiltration. But in the nineteenth and twentieth centuries, some scholars believe, English law was rationalized by borrowing a large number of ideas from the continental civil law and declaring them to be English.

Beginning in the eighteenth century, the Roman texts were replaced by codes: in Bavaria (1756), in Prussia (1794), in France (1804), in Austria (1811), in Italy (1865), in Spain (1888), in Germany (1900)—despite Friedrich Karl von Savigny's defence of the old Roman texts—and in Switzerland (1907/1912). Codes were understood as an exclusive source of law. The study of one's national code became, and still remains, the prime object of legal education and academic commentary. The old *ius commune* based on transnational study of common texts ceased to exist.

Some say we should still speak of a 'common law of Europe' and, indeed, recognize it as the basis for a European-wide study of law. Every code is an amalgam of rules descended from the old *ius commune*, often differing because the old rules happened to be understood differently when particular codes were enacted. As mentioned, even much of English law was shaped by continental rules. Some think that these resemblances could serve as a common basis for legal studies and perhaps for gradual harmonization of laws. Some want to go further: to enact a common code whose texts would form a new *ius commune*.