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Tracing Canon Law in Anglo-American Law

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**Javier Martínez-Torrón, *Anglo-American Law And Canon Law* [:]
Canonical Roots of Common Law Tradition,
Preface by R.H. Helmholz,
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Some years ago I read with much benefit the original Spanish version of this great little book¹ and the subscribers of the *Revue générale de droit* had the opportunity to read some time ago an article by the author on some preliminary considerations on aspects of these questions.² It is worth noting that the author quite appropriately chose then the expression "Anglo-American Tradition" rather than of Common Law. He deals not only with the common law, strictly speaking, but also with other juridical sources which contributed to the development of the Anglo-American Legal System.

The credentials of the author as comparative lawyer and legal historian are underlined by Professor Helmholz, one of the co-editors of the prestigious German Comparative Legal History Series. In his preface to the English edition, published in this Series, he writes: "The most remarkable of these strengths is that the author is able to approach the sub-

1. J. MARTÍNEZ-TORRÓN, *Derecho Angloamericano y Derecho Canónico*[:] *Las raíces canónicas de la «common law»*, Madrid, Civitas, 1991.

2. J. MARTÍNEZ-TORRÓN, "Comments on the influence of Canon Law on the Common Law Legal Tradition", (1989) 20 *R.G.D.* 5-30.

ject with a more thorough grounding in Continental law than is possible for most English legal historians" (p. IX). Furthermore, he reminds us of Professor Charles Donahue's observation "that the question of whether there has been influence of Roman and canon law on English common law was reminiscent of the old story of the blind man and the elephant. Since the blind man could touch only a small part of the elephant at one time, his description of the whole depended on which part he happened to be touching at the moment" (p. X). He then goes on to note that "Martínez-Torrón has not fallen into this trap. He has read widely. He treats the institutional history of England's courts system and also takes up many areas of private law, procedural law, and criminal law. His book contains useful and careful excursions into constitutional theory. He has touched as many parts of the elephant as he could. [...] the book takes English law as a whole" (p. X).

The book is in three parts. Part One (pp. 5-32) consists of a concise and dense synthesis of the *Anglo-American Tradition*. Part II (pp. 33-92) points to the *Routes of Entry of Canon Law into England*. Part III (pp. 93-182) analyzes the *Influence of Canon Law on Different Areas of English Law*. The short and enlightening Conclusion (pp. 183-185) is followed by a very useful analytical index (pp. 186-195). The Publisher has also included at the end of the book a list of the other 17 titles previously published in the Comparative Legal History Series.

Following is a brief review of each of the three parts of the book.

The Anglo-American Tradition

As mentioned by the author himself (p. 3), the first part was written mainly considering the audience of the original Spanish edition of the book. His decision to keep it in the English version is welcomed. As a matter of fact, it is not easy to find a good comprehensive historical overview of this tradition. It has often been said that, in terms of a synthetic approach, Continental lawyers are better equipped than Common lawyers. That is well illustrated by Chapter 1 entitled "Two Great Western Legal Traditions" (pp. 5-17). The

Chapter makes for exciting reading, if only because of the rich bibliographical references in the footnotes. These references are in different languages, which is one of the outstanding characteristics of this book.

The author begins with a short presentation of Anglo-American and Continental Laws (pp. 5-11). In the second section, he sets out "Some Considerations on the Evolution of English Law" (pp.11-17), and provides some interesting insights about the historical evolution of the law during the medieval period. In the second Chapter, "Isolation and European Inspiration on Anglo-American Law" (pp. 19-32), the author takes us through "The Presumed Insularity of English Law", before addressing "Anglo-American Law and Canon Law". His analysis of the debate on the presumed insularity of English Law and of the opinions according to which English Law has not been significantly influenced by Continental *ius commune* is both nuanced and enlightening.

He then begins to retrace the elements of canon law that made their way into English Law through different routes and means that are not always clear, that are rarely linear or direct and that very seldom allow one to conclude unambiguously that a particular a canon law principle or norm was the cause of a specific English Law concept or institution.

The Routes of Entry of Canon Law into England

Introducing Part II, the author emphasizes the need to "locate the points of contact between the two legal worlds – the casual nexus, or at least the reasons that can explain the supposed influence. This is why in investigating this subject, the first task is to detect the channels by which canon law managed to penetrate and affect the legal life of England" (p. 33). He justifies the exclusion of the Court of Admiralty on the basis that it was a channel of entry for principles of Italian civil law rather than canon law (pp. 33-34).

The author explores the three paths by which canon law could have penetrated into the English legal system. The first, obviously, is "Ecclesiastical Courts", which are examined in Chapter 3 (pp. 35-49). The second route is "The Court of Chancery", object of Chapter 4 (pp. 51-79). The third

one is "Jurisprudence or Legal Doctrine", to which Chapter 5 (pp. 81-92) is devoted. It is worth taking a closer look at each one of these "routes".

Ecclesiastical Courts.— The widespread ascendancy the Church exerted over many aspects of life in the Middle Ages manifested itself in the legal domain through canon law. Both the revitalization of the Roman pontificate from the time of the Gregorian reformation, in the eleventh century, and the unprecedented improvement experienced by canon law from the time of Gratian's *Decretum*, in the middle of the twelfth century, contributed to the prestige and influence of canon law, not only via the learned *ius commune* (the blending of Roman and canon law), but also in a more direct way by virtue of the broad jurisdiction exercised by ecclesiastical courts. To illustrate this phenomenon in England, the author studies "The jurisdiction of the «Court Christian»" (pp. 36-41); he then analyses the "Conflicts and Cooperation between Ecclesiastical and Royal Jurisdiction" (pp. 41-44); finally he focuses on the "Law Applied by English Ecclesiastical Courts" (pp. 44-49).

The pages dedicated to the jurisdiction of the ecclesiastical courts are well nuanced, as this jurisdiction was exercised more or less in common by clergy and lay people until William the Conqueror separated the jurisdiction of ecclesiastical and civil courts. The author quotes Stubbs who considers this step as "the most important ecclesiastical measure of the reign". By the middle of the thirteenth century, the Church had already established a complete network of courts. However, the author stresses that this separation was never rigid from the outset and that the jurisdictional boundaries needed to be clarified. The exclusive jurisdiction claimed by the Church in some areas was not always recognized by the royal jurisdiction. For instance, the privilege of exclusive competence in judging the clergy claimed by the Church was not totally recognized in England. However, as the author notes, quoting Maitland: "Every layman, unless he were a Jew, was subject to ecclesiastical law. It regulated many affairs of his life, marriages, divorces, testaments, intestate successions; it would try to punish him for various offences, for adultery, fornication, defamation; it would constrain him

to pay tithes and other similar dues; in the last resort it could excommunicate him and the state would come to its aid" (p. 39).

Needless to say, from the tensions between ecclesiastical and royal courts arose conflicts as well as cooperation. Besides, the enforcement of Roman canon law was somehow overshadowed by local variants in the law.

Court of Chancery. In this very well documented chapter, the author examines the equity jurisdiction, stressing at the outset that identical or similar doctrines could be found in Greek as well as in Roman Laws, in diverse forms, and in all legal orders (p. 51). Nevertheless, as is well known, the Court of Chancery has played an essential role in the development of this doctrine in English Law. The author starts with an "Historical Evolution" of this Court (pp. 53-62). He emphasizes various important historical events and steps which ended up shaping the jurisdiction of the Court as well as the equitable remedies. The second section of this chapter is dedicated to relations between this Court and Canon Law (pp. 62-79). The absence of documentary evidence about the use of Canon Law by the Court requires searching for other indications. Having established that the procedural practice of the Court was based on Roman-canonical procedure, rather than on the common law procedure, the author finds difficult to believe that English Chancellors could operate in a sort of "legal schizophrenia" (p. 63). As a matter of fact, the personality, functions and training of the Chancellors and of their staff suggests that canon law could have impacted on their reasoning. After describing the intellectual background of a good number of fourteenth and fifteenth century Chancellors, the author concludes: "The entire ambience of Chancery, if we look at its relevant personnel, emanated a legal aroma of evident Roman-canonical origin. [...] Therefore, it is not difficult to suppose that canon law was one of the sources [...] that inspired the actions taken in Chancery, perhaps not always providing specific norms but definitely contributing general principles. [...] This supposition is reinforced when we consider that the Chancery characterized itself as a court of conscience" (p. 66). Also, referring to Maitland's *Equity*, the author notes that during their university studies, Chancel-

lors acquired a good grounding in the *regulæ iuris* included in the *Liber Sextus* of Boniface VIII (p. 68). He then goes on to make an interesting parallel between the English equity maxims and the Latin ones in the *regulæ*. He also refers to the concept of *æquitas canonica* as well as to some publications, specifically St. German's *Doctor and Student*.

This being said, the author concludes, with Coing, that "although canon law provided the guiding principles, English equity as a differentiated legal branch was an expression of the English genius" (p. 79).

Jurisprudence and Legal Doctrine. This is the title of the last chapter dealing with routes of entry of canon law into England. The various fundamental references identified in previous chapters are here presented in a more thorough and comprehensive manner so as to highlight relationships between the canon law works and those of English scholars. The basic conclusion is that: "from the beginnings of the common law, the *regulæ iuris* of the *Liber Sextus*, together with other Roman texts — mainly the *Digest* — provided one of the resources of choice among English writers and judges. Through them, important aspects of Roman-canonical jurisprudence were assimilated by Anglo-American legal tradition" (pp. 91-91).

The Influence of Canon Law on Different Areas of English Law

Part III is essentially a search of canon law vestiges in specific areas of English Law: "Marriage and the Family" (Chapter 6, pp. 93-108), "The Law of Successions" (Chapter 7, pp. 109-123), "Contract Law" (Chapter 8, pp. 125-141), "Constitutional Law and Theory" (Chapter 9, pp. 143-159), and "Other Areas of Law" (Chapter 10, pp. 161-182). The latter includes "Procedural Law", "Criminal Law", "Real Property" and "Law of Associations and Law of Bankruptcy".

Because the influence and the presence of canon law are generally not documented in writing, the author goes about his search through suggestions, traces or hints. To give a sense of how the author develops his argument, some examples of "fingerprints" that cannon law has left behind are

worth mentioning. Thus, at the end of the Chapter on Marriage and Family, Martínez-Torrón underlines some positions of Church courts that were adopted later by common law. These include: "the legitimation of offspring through subsequent marriage, the married woman's freedom to leave a will, and the obligation to provide child support for natural offspring" (p. 108).

In the Law of successions, Ecclesiastical Courts jurisdiction was contested, but nevertheless remained important in Probate, wills, intestate inheritance, and in cases of personal property. Although the channels to exert influence were limited, the Ecclesiastical Courts did exercise some influence, particularly in the development of the institutions of the executor of the will and the administrator of the intestate estate. Tensions between the Common Law and the Ecclesiastical Courts are well presented. Although the influence of canon law in this field is more diffuse, it nevertheless remains significant.

After a detailed study of many aspects of Contract Law, where an interesting parallel is drawn between the canonical enforcement of the *pacta nuda* and the common law action of *assumpsit*, the author concludes that in this area common lawyers took whatever ideas they needed at particular points in time from the civil law tradition, and gave those ideas a renewed vitality. However, it would be incorrect to infer from the original characters of the common law of contracts a radical insularity (p. 141) of English Legal thinking.

In the realm of Constitutional Law and Theory, the author stresses the influence of Canon Law on the great constitutional principles as well as on the exercise of power and political representation. Although traces can be here more tenuous, many scholars have established the existence of relationships between medieval canon law and contemporary constitutional principles. Hence, Maitland's affirmation that "it is impossible to frame any acceptable definition of the State which would not include the medieval Church" (p. 146). "Something similar, adds Martínez-Torrón, can be said with regard to the individual rights", and, reproducing Reid's remarks, he indicates that "the ideas of legal rights is not an entirely modern invention. Rather, it was essential to the functioning of medieval canon law and it included — above all

in matrimonial matters — an operative concept of due process” (p. 147). Indeed, despite “the singularity of English constitutional evolution, it is difficult to think that England remained entirely impervious to canonical influence” (p. 148).

As regards the exercise of power and political representation, the author analyzes the relationship between canon law principles and legal trends in common law. Of special interest is the study of the canonical maxim *quod omnes tangit*. This principle brought canonists to “produce a comprehensive theory on the corporate representation — embracing both private and public law — which was subsequently echoed by the constitutional thinking and practice throughout medieval Europe, England included” (p. 156).

Also of interest are the pointer towards canon law that the author mentions and documents in the last Chapter in relation to Procedural Law, Criminal Law, Real Property, Law of Associations and Law of Bankruptcy. Any reader going through these pages (161-182) will find a good number of rich insights.

The finale of Professor Helmholtz Preface is most appropriate in closing: “In today’s world, when connections between English and Continental law are becoming closer, this historical treatment of England’s past may be of broader than purely historical interest”.

In a context of global relationships between our two main Western Legal Systems,³ the book of Martínez-Torrón should find its place in all Law Libraries. I would not hesitate to make his *Anglo-American Law and Canon Law* compulsory reading for first year law students.

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3. For a geographic and statistical presentation, see N. MARIANI & G. FUENTES, *World Legal Systems / Les systèmes juridiques dans le monde*, Collection Bleue, Montréal, Wilson & Lafleur Ltée, 2000.