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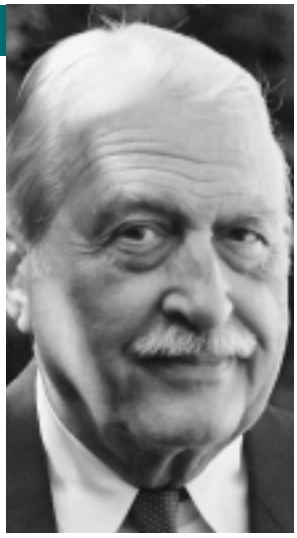

Why Roman Law **Did Not Succeed** *in England*

England is the only European country whose legal system is not based on the Code of Emperor Justinian I, the Corpus Juris Civilis, the splendid codification of old Roman Law (AD 532). And while, during the 13th century, Roman Law successfully penetrated the juristic systems of continental Europe, Germany, and France, England never adopted Roman Law; she developed her own legal system, the Common Law.

Why? It is simplistic to suggest that the Channel excluded England from the great juridicial changes taking place on the Continent during the 11th and 12th centuries.[1]

England had close cultural ties with the Continent and in particular, with France. Cantor states: "England was viewed as an intellectual satellite of France."[1] And Fisher: "The Norman Conquest had made of England a province of French civilization."[2]

Justinian's *Corpus Juris Civilis* was well known in England at that time. Scholars of the Northern Italian universities taught in England. The royal administrators of the reign of Henry I (1100–1135) were educated in France or Italy. Judges during the reign of Henry II (King of England 1154–1189) were usually churchmen familiar with Romano-canonical procedures and principles.

Anglo-Norman rulers had actually no interest in preserving Germanic legal traditions that were opposed to a strong central government but rather based on community power. Legal absolutism and centralism, enshrined in the *Justinian Code*, actually would have better conformed to the policy of the Angevin (Plantagenet) kings of England than did the traditional Germanic law system. Henry II—like his contemporaries Emperor Barbarossa of Germany and the Capetian monarchs of France—favoured central authority. Thus, Henry II might logically have imposed the new civil law on England.

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Unpaid Judges

According to Cantor, the reason why England, however, did not accept Civil Law emerges from the timetable of the 12th century. The Anglo-Norman monarchy was then way ahead of other European governments in the development of strong, centralized institutions. Between 1066 and 1135, the founding period of royal power in England, the Roman laws codified by Justinian, and the new administrative personnel for the royal bureaucracies that the Italian law schools were to provide, did not yet exist. The Crown, therefore, had to make do with laws at hand, although they were less conducive to royal absolutism than the laws that later became available under Roman (Civil) Law.

Consequently, Anglo-Norman rulers allowed the continuance of shire courts, a refinement of the early "Hundred Courts," descendants of old Germanic folkmoots.

English courts were dominated by prominent local men. Regional Lords acted as judges. Pleadings were oral. Until about 1214, trial by ordeal still took place to decide innocence in criminal proceedings.

The English Crown exercised supervision over local courts by dispatching itinerant, unpaid judges to preside during assizes. One function of such judges was to collect fines for the Crown. Under feudal law the king presided, but did not dominate his Royal Courts. Changes in legislation were usually made with the consent of the magnates.

William the Conqueror improved Germanic court procedure by introducing the Frankish-Norman inquest to England. It required local judges to rely on opinions of community leaders who served the court as jurors. Their testimony was critical to civil law decisions. The success of the inquest system encouraged the Crown to use it also for administrative purposes.

Before Northern Italian law schools began turning out a flood of graduates, reliable administrators were hard to find. By mid-12th century, the English monarchy was accustomed to using unpaid jurors to testify on income of local landlords, thus providing evidence for tax levies.

Old Laws Fused to Common Law

When Henry II became King of England in 1154, he inherited a legal system made up of Germanic and feudal elements that had been fused by royal judges into a common law. This system relied on pleadings that made it archaic compared to the civil law spreading throughout Continental Europe. English law, at that time, did not know the concept of equity. There were no means of suspending a law in the interest of justice. Common Law procedure in criminal trials was biased against the defendants, especially if they came from an inferior social class.

As a cosmopolitan Frenchman and one of the best educated kings of the 12th century, Henry II was aware that Common Law compared unfavourably with the Roman system. His judges, trained in canonical procedures, were not blind to its imperfections. But Henry II decided against replacing his inherited Common Law with Civil Law principles and institutions operating at that time on the Continent. Common Law was in place, it was popular, and above all, it was cheap.

English judges were not well-paid civil servants as under the Roman system. Common Law provided a steady revenue from fines and required less administration. It also allowed the Crown to use unpaid juries for local administrative purposes with a minimum of bureaucratic personnel. Common Law, as Cantor said, was truly "self-government at the king's command."

Had English Common Law not already functioned in 1154, Henry II might have adopted the Roman system of centralized law and administration as his French cousins did at the end of the 12th century. But Henry II satisfied himself with improving English legal procedure through the expanded use of juries in civil suits. He introduced the grand jury indictment in criminal pleas.

Although Common Law was less conducive to royal absolutism than the *Justinian Code*, its preservation was convenient and inexpensive to Henry II. The king believed he could achieve practical absolutism by exploiting the existing law institutions.

In the 13th century, the English Common Law assumed its full institutional form with the development of the jury verdict.[3] English Common Law preserved the idea that the law of the land resides both in the legislative power of the king as well as the community. English Law was not an expression of royal will. Thus, while the *Justinian Code* stated "The will of the Emperor has the force of law," in English juristic theory, however, the king, like any other member of the community, was subject to the common law. ▲

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1 Cantor, Norman F. , *Mediaeval History*, London, 1997

2 Fisher, H. A. L., *A History of Europe,* London, 1943

3 Bracton (+1268) wrote the *Note Book*, a compilation of precedents (English case law). The model for its form was the *Treatise of Azo of Bologna*. Bracton introduced enough Roman Law and Bolognese method to save English jurisprudence from a fate that befell old Germanic laws in Germany.