

Rechtsgeschichte

www.rg.mpg.de

<http://www.rg-rechtsgeschichte.de/rg10>
Zitiervorschlag: Rechtsgeschichte Rg 10 (2007)
<http://dx.doi.org/10.12946/rg10/169-192>

Rg **10** 2007 169 – 192

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The Fantasy Men

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Abstract

The remarkable success of the Anglo-American legal system in establishing stable, democratic societies throughout the globe contrasts with the catastrophic failure, over the centuries, of the legal systems of continental Europe. Nevertheless, nationalistic sentiment in South Africa and Scotland reacted to increasing Common Law influence with a paradoxical idealisation of the Civil Law system. The various discourses of *europäische Rechtsgeschichte* behind the ideology are set in their historical and cultural contexts. The nationalistic discourse of Savigny, which reduced the whole of European legal history to a *translatio studii* of Roman law from Italy to France to Holland to German apotheosis, gave way in the wake of two world wars and the Holocaust to the new discourse of the *ius commune*, a legal paradigm for a future European Union based not on the historical reality of three centuries of religious, political and juridical conflict, but on a fantasy world of European legal unity from the beginning of the modern period until the 19th century national codifications. This was the post-war narrative of Helmut Coing, which, failing to anticipate the eclipse of the British Empire, steadfastly contrasted the shared legal tradition of continental Europe with the opposing system of the Anglo-American Common Law. With England now in the European Union the discourse has had to be modified. By exaggerating the importance of some minor and long-recognised continental influences on the Common Law, the contemporary discourse of the *ius commune europaeum* propagated by Reinhard Zimmermann succeeds in trumping the historical fantasy of a uniform continental legal past with the even more remote fantasy of a uniform continental and English legal culture. The old nationalist programme of a return to the 17th–18th century Roman-Dutch law, imbibed by Zimmermann as a law professor in Apartheid South Africa, can thus be presented as an appeal to the pan-European legal inheritance. This discourse currently enjoys great success both as an authentic picture of the European legal past and as an attractive blueprint for the European legal future.



The Fantasy Men

One of the most prestigious English lecture series in the field of legal studies is that known as the Hamlyn lectures. This is administered by the Hamlyn Trust, created by the last will and testament of Miss Emma Warburton Hamlyn, a maiden lady of Torquay, who died in September 1941 at the age of eighty. The trust was an act of piety in memory of her father, who had practised as a solicitor in Torquay for many years. Miss Hamlyn was, we are told, »a woman of dominant character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law, and studied the subject. She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology.«¹

The trust is now administered by the University of Exeter, not far from Miss Hamlyn's native Torquay, and on the University's website we can ascertain that the objective of the trust is the furtherance of the knowledge of:²

the comparative jurisprudence of the chief European countries, to the intent that the people of the United Kingdom may realise the privileges which in law and custom they enjoy ... and recognise the responsibilities and obligations attaching to them.

That, at any rate, is what we read on the Hamlyn Trust website, but the textual purist cannot help but notice that the passage is affected by three intriguing points of ellipsis. And if we are so curious as to consult the original, it emerges that the mysterious dot dot dot is less *abbreviatio superflui* and more calculated *suppressio veri*. For what Miss Hamlyn actually wished to encourage was the furtherance of the knowledge of:³

the comparative jurisprudence of the chief European countries, to the intent that the people of our country may realise the privileges which in law and custom they enjoy *in comparison with other European peoples and realising and appreciating such privileges may* recognise the responsibilities and obligations attaching to them.

Of course, the interpretation of wills, and particularly of trusts, is notoriously fraught with difficulty. But I rather suspect that when Miss Hamlyn, the lover of her country and frequent traveller on the continent of Europe, wrote that she hoped the people of our country might appreciate the privileges which in law and custom

1 JOHN MURRAY, chairman of the trustees of the Hamlyn Trust, October 1961, »The Hamlyn Trust«, pp. xi–xii, at p. xi, in: T. B. SMITH, *British Justice: the Scottish Contribution* (Hamlyn Lectures, thirteenth series), London: Stevens & Sons, 1961.

2 <http://www.law.ex.ac.uk/hamlyn/>

3 The full text of the relevant portion of the will was as follows: »... the furtherance by lectures or

otherwise among the Common People of this Country of the knowledge of the Comparative Jurisprudence and the Ethnology of the Chief European countries including our own and the circumstances of the growth of such Jurisprudence to the intent that the Common People of our Country may realise the privileges which in law and custom they enjoy in comparison with other European

Peoples and realising and appreciating such privileges may recognize the responsibilities and obligations attaching to them.«

they enjoy in comparison with other European peoples, what she meant – what she really, really meant – was that she hoped the people of our country might appreciate the privileges which in law and custom they enjoy in comparison with other European peoples.

Bear in mind that there is no evidence that Miss Hamlyn had stopped off during her extensive European travels to follow a course in europäische Rechtsgeschichte at a German university. She had only her personal impressions of comparative jurisprudence and ethnology to fall back on. And it was doubtless in her golden years, in the 1920s and 1930s, that she received the inspiration for the purpose of her trust, as she surveyed the political complexion of Europe – in the East, Russia deformed into the communist Soviet Union, and in the West the nations of Germany, Italy, Spain, Portugal and Greece all in the grip of vicious fascist dictatorships. In the last two years of her life she looked out from Torquay across the English Channel at France, Belgium, the Netherlands, Denmark and Norway, all occupied by a triumphant and seemingly indomitable Third Reich. So in her last winter of 1940 to 1941, as the bombs now rained down on London, Coventry, Birmingham, Sheffield, Manchester, Liverpool and Glasgow, it is not clear to me – with all due respect to the Exeter University website – that Miss Hamlyn would have set up a trust to consider the signal benefits to mankind of 150 years of *deutsche Rechtswissenschaft*, or even, indeed, of 2,000 years of the Roman legal genius.

In fact, Miss Hamlyn seems rather to have been of the opinion that continental Europe, with its fascisms and communisms and nationalisms; its endless revolutions and constitutions and codifications; its bewildering succession of second republics and third empires and monarchies deposed, restored and again deposed; its pogroms and wars and genocides; that this Europe presented a historical chamber of horrors, a permanent warning rather than an enduring model. As a student of ethnology and jurisprudence, perhaps she wished to pose the very question whether continental Europe's central problem did not lie in the catastrophic failure, over the centuries, of its legal structures and political institutions, beginning with its servitude to Roman law and the poisonous doctrines of *princeps legibus solutus* and *quod principi placuit legis habet vigorem*, placed prominently at the head of Justinian's Digest.⁴ In stark contrast to this European morass, she could look

⁴ D. 1.3.31 and D. 1.4.1.pr.

with serenity on the common law of England, royal justice administered according to a pattern which had persisted without material change from the mid-13th century until the Judicature Act passed in her youth in 1873. Constitutional monarchy, parliamentary democracy, freedom under the law, protection of property rights, due process of law, Habeas Corpus, presumption of innocence, trial by jury: these were the unique institutions which England had evolved and exported with enduring success to the four corners of the globe. And it might have been Miss Hamlyn's last wish, in those dark days of 1940–1941, that if by some miracle England could stave off invasion and even liberate continental Europe from the impending Thousand Year Reich, then if the whole rotten edifice of European legal and political institutions could not be consigned once and for all to a merciful oblivion, at least the beneficiaries of her trust could remind the people of Britain of just how valuable their own legal and constitutional institutions were by comparison.

Miss Hamlyn's will was in fact contested on the grounds of uncertainty, and the matter had to be determined in Chancery. One of the questions to be decided was the meaning of »our country«. What country? The court decided this must mean the »United Kingdom of Great Britain and Northern Ireland«. It is indeed probable that Miss Hamlyn thought of herself as British, but it is even more certain that when she commended the legal institutions of »our country« to its people, she had in mind the common law of England.

This at any rate is how the trust was interpreted by the legal scholars who gave the first lectures in the series. Beginning in 1949, the people of »our country« were enlightened by such topics as:⁵

- Freedom under the Law* by the Rt. Hon. Lord Denning
- The Inheritance of the Common Law* by Richard O'Sullivan
- The Rational Strength of English Law* by Prof. F. H. Lawson
- English Law and the Moral Law* by Prof. A. L. Goodhart
- The Queen's Peace* by Sir Carleton Kemp Allen
- Trial by Jury* by the Rt. Hon. Lord Devlin
- Protection from Power under English Law* by the Rt. Hon. Lord MacDermott
- The Sanctity of Contracts in English Law* by Prof. Sir David Hughes Parry
- Judge and Jurist in the Reign of Victoria* by C. H. S. Fifoot
- The Common Law in India* by M. C. Setalvad.

⁵ Listed on the Hamlyn website, cit. not. 2.

Miss Hamlyn would surely have been proud. But then, in 1961, out of a clear blue sky, something terrible happened: the lecturer chosen was Professor Thomas Brown Smith.⁶ Sir Thomas, as he was later to become, was born in 1915 and attended the English boarding school of Sedbergh before going up as an exhibitor to Christ Church, Oxford. During the war he served with distinction in the Royal Artillery, rising to the rank of Lieutenant Colonel. Thereafter he was called to the Bar at Gray's Inn, becoming a Queen's Counsel in 1956. He was a Fellow of the British Academy, and his gentleman's club in London was the Naval and Military. So the curriculum vitae would suggest a rock solid, British Establishment figure. But there was one fatal flaw: Sir Thomas was Scottish.

Not only was he Scottish, but T. B. Smith, as he was known, was a Scottish fundamentalist. When he went abroad he made a point of wearing the kilt,⁷ and in later life he even changed his middle name from the English *Brown* to the Scottish *Broun*. His 1961 series of Hamlyn Lectures on »British Justice: the Scottish Contribution« is dedicated *parentibus Scotis, coniugi carissimae ex Anglia ortae, utriusque sanguinis liberis*⁸ – to his Scottish parents, his English wife, and finally to the unfortunate products of this miscegenatic union, the *utriusque sanguinis liberi*, mestizos lacking the *sangre puro*, with no national identity, half English children and half pair wee Scoatt'sh bairns.

The general thrust of his Hamlyn lectures can be summed up as follows:

1. There are two great legal families in the world, the common law and the civil law.
2. Scotland in its formative period had been a civilian system, which had subsequently been infiltrated and overlaid with English doctrines.
3. As a result, Scotland was a mixed jurisdiction, sitting between the two families and showing aspects of both.
4. At every point, continental law is revealed, on objective examination, to be better than English law.
5. Last but not least, to retain its status as an independent legal system, it was vital for Scotland to cultivate its legal roots, and this could only be achieved by returning to its historic connection to the civilian tradition.

6 For a full bibliography and important individual studies of his work, see ELSPETH REID and DAVID L. CAREY MILLER (edd.), *A Mixed Legal System in Transition. T. B. Smith and the Progress of Scots Law* (Edinburgh Studies in Law 1), Edinburgh: University Press, 2005. A list of biographical notices is provided at p. 311.

7 KENNETH G. C. REID, »While One Hundred Remain: T. B. Smith and

the Progress of Scots Law«, in: *A Mixed Legal System in Transition*, cit. not. 6, pp. 1–29, at pp. 3–4, esp. note 8. VERNON VALENTINE PALMER, »Travelling the High Road with T. B. Smith: Nationalism and Internationalism in the Defence of the Civilian Tradition«, *ibid.*, pp. 255–271, at p. 255.

8 T. B. SMITH, *British Justice: the Scottish Contribution*, cit. not. 1, at p. v.

In fact there was nothing very new in all this, as Smith would have been the first to admit. Smith acknowledged himself to be the disciple of a man for whom he delivered the memorial lecture at the University of Aberdeen in 1955.⁹ This was Thomas Cooper, an eminent Scottish legal historian who had published important studies of Scots law in the Middle Ages, including the standard edition of the two main medieval legal texts.¹⁰ But this was all achieved in his spare time, for Cooper was also Lord President of the Court of Session, the highest judicial appointment in Scotland. Born in Edinburgh in 1892, he took a law degree at Edinburgh University, was called to the Bar in 1915, promoted King's Counsel in 1927, and elected Conservative Member of Parliament in 1935. Serving in politics was the prerequisite to his appointment as Solicitor General and then Lord Advocate (the Scottish Attorney General) in 1935, which led eventually to his promotion in 1947 to Lord President, a position he filled until shortly before his death in 1955.¹¹

The official title of the political party to which Cooper was attached was the Conservative and Unionist Party, so it may come as a surprise to read the opening declamation of an address he delivered to the Institute of Bankers in Scotland in October 1929. This is what he said:¹²

... there never was a time when there was greater need to stimulate and to foster all that is best in Scottish ideals, Scottish sentiment, and Scottish traditions, if the spirit of Scotland is to survive and to rise superior to the material influences which are at present combining to stifle our independent national life. In matters commercial, industrial, financial and political, we are rapidly succumbing to a process which can only end, if unchecked, in degrading Scotland to the level of a minor and decaying English province. We have lost our railways. We have lost many of our shipping interests. We are even losing our banks and our insurance offices. The *Daily Mail* is sold in our streets. The voice of the cockney is heard in the land. Heirs though we are of a great national culture, of a romantic historical tradition, and of our own distinctive art, literature, and jurisprudence, we shall soon be associated in the mind of the supercilious southerner with nothing more inspiring than the grouse, the haggis, and that perennial fount of post-prandial merriment, Aberdonian thrift.

This peroration he concludes with the affirmation, »Now this is not the election address of a Nationalist candidate.« Well, one might think, if this is not the election address of a Nationalist candidate, it certainly comes remarkably close to the genre. The date of this lecture was 1929, the very year in which the first candidate of the National Party of Scotland, founded the preceding

9 »The Contribution of Lord Cooper of Culross to Scottish Law«, reprinted in: THOMAS COOPER, *Selected Papers, 1922–1954*, Edinburgh and London: Oliver & Boyd, 1957, at pp. xxix–xlix, and in T. B. SMITH, *Studies Critical and Comparative*, Edinburgh: W. Green & Son, 1962, at pp. 137–153. In the opening paragraph Smith describes himself as »a junior disciple«, repeated (in

retrospect) in an address delivered towards the end of his career, »While one hundred remain: Scots law, its historical and comparative dimensions«, *Aberdeen University Review*, vol. L, no. 171 (1984) 229–242, at p. 230. In 1970 he called himself simply »a disciple«; see T. B. SMITH, »Scottish Nationalism, Law, and Self-Government«, in: NEIL MACCORMICK (ed.), *The Scottish Debate. Essays*

on *Scottish Nationalism*, London, Glasgow, New York: Oxford University Press, 1970, pp. 34–51, at p. 43.

10 *Regiam Majestatem and Quoniam Attachiamta*, based on the text of Sir John Skene, edited and translated with introduction and notes by the Rt. Hon. Lord Cooper, LL.D., (Stair Society 11), Edinburgh, printed for the Stair Society by J. Skinner & Co., 1947.

11 His main historical writings are gathered in his *Selected Papers, 1922–1954*, cit. not. 9. This contains a biography at pp. xi–xxviii.

12 »Some Classics of Scottish Legal Literature. An address delivered to the Institute of Bankers in Scotland at Edinburgh on 29th October 1929«, *Scottish Bankers Magazine* 21 (1929–1930) pp. 259–271. Reprinted in *Selected Papers*, cit. not. 9, pp. 39–52; quotation at p. 39.

- 13 *The Scottish Legal Tradition*, (Saltire Pamphlets No. 7), Edinburgh and London: Oliver & Boyd, 1949. Here cited after the reprint in: *Selected Papers*, cit. not. 9, pp. 172–200; quotation at p. 173. The paper was again reprinted, with accompanying essays, in: M. C. MESTON, W. D. H. SELLAR and LORD COOPER, *The Scottish Legal Tradition. New enlarged edition*, Edinburgh: The Saltire Society and the Stair Society, 1991.
- 14 *The Scottish Legal Tradition*, cit. not. 13, at pp. 180–181: »The second leading characteristic of the period since 1820 has been the revival of English influence ... unsought and indirect. It has made itself felt increasingly through two different channels ... The first is the legislative practice adopted at Westminster through pressure of work whereby statutes are normally drafted by English lawyers for England, and then applied with the minimum of “adaptation” to Scotland ... The second channel of English influence is the House of Lords, the final court of appeal for Scotland in civil (but not in criminal) cases ...«
- 15 »The World Society of Mixed Jurisdiction Jurists« was founded in November 2002. For a history of the conception, see KENNETH G. C. REID, »The Idea of Mixed Legal Systems«, in: *Tulane Law Review* 78 (2003) 5–40.
- 16 *The Scottish Legal Tradition*, cit. not. 13, at p. 173. Cf. »... that eclectic system, midway between the two great schools of Romanist and English Law, which represents Scotland’s unique contribution to the jurisprudence of the world«, in: *The Dark Age of Scottish Legal History, 1350–1650, being the nineteenth lecture on the David Murray Foundation in the University of Glasgow, delivered on 12th November 1951* (Glasgow University Publications 92), Glasgow: Jackson, 1952. Reprinted in *Selected Papers*, cit. not. 9, pp. 219–236; quotation at p. 234.
- 17 »The Importance of Comparative Law in Scotland«, in *Selected Papers*, cit. not. 9, pp. 142–152, at p. 145: »Our affinities are with Roman Law and with its modern offshoots and developments ... the

year, stood for Parliament. Yet Scottish nationalism at its inception had as much a cultural as a political aspect, so we need not be surprised to find in Cooper’s writings a strong nationalistic sentiment divorced from any desire for Scottish political independence.

Cooper’s fundamental juridical Weltanschauung, following the standard studies of comparative law, held that:¹³

... two schools of legal thought have latterly been competing for the allegiance of the modern world – the Anglo-American and the Continental or Franco-German – the first founded upon English common law and equity ... and the second founded on the law of Rome and its modern offshoots in many recent codifications ... Each of these schools can number its adherents in populations of hundreds of millions. Each has extended its sphere of influence far beyond the countries of its origin, initially as a result of conquest or colonisation, and latterly through voluntary adoption or imitation.

The independence of Scots law from the English common law had in fact been explicitly guaranteed by the Treaty of Union of 1707. Yet since the 19th century it was increasingly being influenced and penetrated by English law. This, according to Cooper, was imposed on Scotland through two mechanisms: first, legislation on an English pattern by a nominally United Kingdom but in fact predominantly English Parliament, and secondly, through civil appeals to the House of Lords heard by judges of the common law with scant knowledge of the law of Scotland.¹⁴

From this analysis there emerges in Cooper’s work an idea currently very much en vogue, namely the concept of a mixed, or in Cooper’s terminology, a hybrid legal system.¹⁵ Scots law, he said, occupied »a position somewhere midway between the two great opposing schools«. ¹⁶ In the end Cooper seems to be making a plea for the widening of contemporary Scottish horizons. Scots law was a mixed system, in its formative period strongly influenced in its law of moveable property and obligations by the law of continental Europe, and in its mercantile law by the common law of England. It should therefore not acquiesce in the imposition of English law, nor accept uncritically the authority of English precedent, in those areas where it had no application; the solutions of the contemporary continental or »Franco-German« systems should also be consulted.¹⁷

When Cooper died in 1955 his mantle was inherited by T. B. Smith, such that in Scotland it is usual to speak of the »Cooper-Smith ideology«. ¹⁸ Smith, unlike Cooper, has left a considerable

Continental or Franco-German system, as exemplified in the long series of codes beginning with the Code Napoleon and continuing through such later codes as those of Germany, France [sic], Austria, various South American States, Turkey and Japan. If Scots Law is not merely to survive but to thrive, we must renew and deepen our contacts with these kindred legal systems, and draw from them the

inspiration for the task of perfecting Scots Law as an instrument for the service of our people in the days ahead.«

- 18 First explicitly so formulated by IAN D. WILLOCK, »The Scottish Legal Heritage Revisited«, in: JOHN P. GRANT (ed.), *Independence and Devolution. The Legal Implications for Scotland*, Edinburgh: W. Green & Son, 1976, pp. 1–14, at p. 8.

œuvre in academic format, but what is striking is just how much of the ideology is found explicitly formulated already in Cooper. Yet one crucial new departure is made by Smith. Both demand that Scotland return to its civilian roots, and Cooper hints that these would be found in comparative law, through contacts with contemporary »Franco-German« civilian systems. But Smith came to understand the return to the civilian tradition literally. The origins of the change can be traced with chronological precision to the sabbatical term he spent in the Union of South Africa in the academic year 1957–1958.

In South Africa Smith found what he had been looking for: a people who, incredible though it may seem, had succeeded in hating the English even more than do the Scots. South Africa had been a Dutch colony since 1652, but was taken over by the British during the Napoleonic Wars. The Great Trek of the descendants of the original Dutch settlers to found the Transvaal and the Orange Free State in the end did nothing to solve the ever increasing hostility between the Afrikaner and the British, which culminated in the Boer War of 1899 to 1902.

The subsequent growth of Afrikaner nationalism in the 20th century had an important expression in the legal field. Once again, a continental legal system was perceived to be in conflict with the growing influence of the English common law. And the response in South Africa was: *ad fontes*. Back in the home country, Dutch law had been codified in 1809, but by then South Africa was already in British hands. At the Cape, therefore, the »old authorities«, the 17th and 18th century Roman-Dutch jurists, were still cited in the courts, and the growing legal nationalism expressed itself in a strident affirmation of the Roman-Dutch tradition. This found its voice in the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, the Journal of Contemporary Roman-Dutch Law, founded in 1937, and a *bellum juridicum* was ferociously fought out between the purists, who wanted a return to the pristine Roman-Dutch law, and the pragmatists who saw the necessity of some compromise with the English common law. But pick up any South African law book from either belligerent, and we find the footnotes divided between the citation of modern case law and the citation of passages of the Latin and Dutch writings of Grotius, Vinnius, Voet, Van Groenewegen, Van Leeuwen and all the other exponents of the *Rooms-Hollands-Regt*.



In Cape Town and Stellenbosch and the Witwatersrand, Smith was spellbound. The South African model was immediately bought, packed up and carried back to Scotland. Later that same year, in 1958, Smith delivered his inaugural lecture as Professor of Civil Law at the University of Edinburgh with the title: »Strange Gods: the Crisis of Scots Law as a Civilian System«. ¹⁹ The title is an Old Testament quotation: ²⁰ Scots lawyers had abandoned their civilian roots and gone »a-whoring after some very strange gods« ²¹ – namely the decisions of the common law courts of England. »A teacher of the Civil law in a Scottish University,« he declaimed, »has a special duty to denounce the strange gods, and to preach a return to purer doctrine.« ²² »Is it not time,« he demanded, »to go back to the Civilian fundamentals in Scotland?« ²³ And for his examples he noted, »It is significant that the same trends are apparent in other “mixed” jurisdictions such as South Africa;« ²⁴ »The general relevance of *animus injuriandi* has been reopened in South Africa;« ²⁵ »It is stimulating to read in the contemporary South African reports;« ²⁶ »A perusal of the decision ... by the Appellate Division in South Africa may stimulate second thoughts.« ²⁷

The following year, 1959, Smith was back in Cape Town, giving an address at the centenary celebrations of its Law Faculty, entitled: »Scots Law and Roman-Dutch Law: A shared tradition.« ²⁸ The lecture begins with a quotation from Sir Walter Scott’s novel, *The Heart of Midlothian*: »We import our lawyers from Holland«. This is an allusion to the fact that Scots students of the 17th and 18th centuries studied law not in Scotland, where it was hardly taught, nor in Oxford or Cambridge, where they would have been required to swear an oath of loyalty to the Church of England, but in the Netherlands, like Scotland a Calvinist country. In these centuries hundreds of Scottish students enrolled at Leiden and Utrecht, ²⁹ while the founder of Scots law, Sir James Dalrymple of Stair, also spent many years of exile in the Netherlands. To this day the works of the Dutch jurists are particularly well represented in Scotland’s historic law libraries, and it was to these which Smith directed the attention of his contemporaries: ³⁰

I have already published in South Africa ... an account of how English legal influence tends to infiltrate a Civilian system ... The haphazard use of English precedents and textbooks ... may be most damaging to the whole fabric of a Romanistic system. Such anyway has been the experience of Scots law. Over the

Dutch Legal Relations in the Seventeenth and Eighteenth Centuries«, in: T. C. SMOUT, *Scotland and Europe, 1200–1850*, Edinburgh: John Donald, 1986, pp. 128–142; »revised and edited« in: H. DE RIDDER-SYMOENS and J. M. FLETCHER (edd.), *Academic Relations between the Low Countries and the British Isles, 1450–1700. Proceedings of the first conference of Belgian, British*

and Dutch historians of universities held in Ghent, September 30 – October 2, 1987 (Studia Historica Gandensia 273), Gent 1989, pp. 25–45; »réimprimé avec addenda« in: ROBERT FEENSTRA, *Legal Scholarship and Doctrines of Private Law, 13th–18th Centuries*, Aldershot: Variorum Reprints, 1996, No. XVI.
30 cit. not. 28, at pp. 56–57.

19 Juridical Review 119 (1959) 119–141, revised and reprinted in: *Studies Critical and Comparative*, cit. not. 9, pp. 72–88.

20 Deuteronomy 31.16: »And the Lord said unto Moses, Behold, thou shalt sleep with thy fathers; and this people will rise up, and go a-whoring after the gods of the strangers of the land, whither they go to be among them, and will forsake me, and break my covenant which I have made with them.«

21 »Strange Gods«, in *Studies Critical and Comparative*, cit. not. 9, pp. 72–88, at p. 72; cf. at p. 83: »Here again, however ... we preferred to go a-whoring after some very strange gods«, and at p. 86: »We have not always remained, either, faithful to our understanding of that tradition of the Civil law which we inherited, and we have often gone a-whoring after “common law” solutions to the detriment of our law.«

22 *ibid.*, at p. 81.

23 *ibid.*, at p. 85.

24 *ibid.*, at p. 74.

25 *ibid.*, at p. 79.

26 *ibid.*, at p. 81.

27 *ibid.*, at p. 83.

28 An address delivered at the Centenary Celebrations of the Law Faculty of Cape Town University, 4 September 1959; published in: *Acta Juridica* 36 (1959) 36–46, revised and reprinted in *Studies Critical and Comparative*, cit. not. 9, pp. 46–61.

29 *ibid.*, at p. 51. For more details, see ROBERT FEENSTRA, »Scottish-

past century and a half the law of Scotland has been isolated and exposed to influences which have threatened the viability of the system. I am convinced that the only sure remedy for this is a reappraisal of the Civilian principles upon which the Scottish legal system is based – and these are substantially the same as your own [i.e. those of South Africa], at all events in fields such as obligations and moveable property.

What Smith envisaged, then, was the regeneration of an independent Scots legal system through the use of the Latin writings of the Roman-Dutch law of the 17th and 18th centuries. This is the gospel he propagated in numerous articles published in the late 1950s and 1960s, and which informs his Hamlyn Lectures of 1961 and his magnum opus, the *Short Commentary on the Law of Scotland* of 1962.³¹

After all this patriotic sound and fury, it might be wondered, what happened? And the answer is: absolutely nothing. First of all, Scottish practitioners simply ignored the ideology as patently absurd, utterly remote from the pressing social and legal issues of the day.³² But even within academic circles it aroused as much hostility as approval. On 21st March 1960, at Sharpeville in the Transvaal, South African police opened fire on an assembly of unarmed men, women and children, killing 69 and injuring at least 180, most of the dead being shot in the back while fleeing.³³ The world reacted to the massacre with outrage. Recommending the legal system of Apartheid South Africa, and the benefits of contacts with its universities, courts and jurists, was at best a provocation, at worst a disgrace. At any rate, the message fell on deaf ears, and one cannot help but detect a note of disillusionment in Smith's early retirement from the Edinburgh Chair of Scots Law in 1972. Two years later, in the October 1974 U.K. General Election, the Scottish National Party, buoyed up by the discovery of large oil reserves in the North Sea, received a third of the popular vote in Scotland, and for a while held the balance of power at Westminster. But a return to Scotland's Roman law roots was not a prominent feature of its political programme.

There is one last gathering cry of the clans, or perhaps we should say one last lament on the pipes, in a lecture Smith delivered on St. Andrew's Day 1981 entitled, »While one hundred remain: Scots law, its historical and comparative dimensions«. ³⁴ *While one hundred remain*: this is an allusion to the Declaration of Arbroath of 1320, when the Scots barons pledged to Pope John XXII, »For

31 Edinburgh: W. Green & Son, 1962; its forerunner was published as *The United Kingdom. The Development of its Laws and Constitutions. Scotland. The Channel Islands*, first in the series *The British Commonwealth. The Development of its Laws and Constitutions* (General editor George W. Keeton), London: Stevens & Sons, 1955.

32 Cf. SMITH, »Strange Gods«, cit. not. 19, at p. 81: »A re-examination of the Scottish law of delict against the background of the evolved *lex Aquilia* is indispensable for students, and the busiest practitioner, I suggest, would find much of value in such research.«

33 For the reprint of the Cape Town Law Faculty address »Scots Law and Roman-Dutch Law: A shared tradition« in *Studies Critical and*

Comparative, published in 1962, cit. not. 28, Smith added a *Post-scriptum* in which we read (p. 60): »Let me, in conclusion, face frankly a doubt which some of you may have entertained regarding the value of strengthening contacts with South African law. There are aspects of current political policy in South Africa which are distasteful [sic] to many present here ...«

34 Aberdeen University Review, vol. L, no. 171 (1984) 229–242.

so long as one hundred of us remain alive, we shall never under any circumstances submit to the domination of the English«. ³⁵ This is Smith's last defiant *apologia pro vita sua*, addressed to the Britain of the 1980s, of Margaret Thatcher, the Falklands' War, the Miners' Strike and a resurgence of the liberal economic model. Like the Jacobite Rebellion of 1745, like the Scottish World Cup campaign of 1978, a romantic delusion had raised high hopes before collapsing in inevitable fiasco. In the end the whole Smithian episode receives its tragic but inescapable valedictory in the words of another Scot, Alan Rodger, himself a leading modern Roman law scholar, formerly Lord President of the Court of Session and now a Lord of Appeal in the House of Lords, who in 2003 characterised Smith's grandiose vision as, »never anything more than fantasy«. ³⁶

* * *

Is this whole narrative, then, no more than the fantasy of a patriotic Scottish judge and of a kilt-swinging Scottish professor, playing to the gallery of his predictably anglophobic hosts on his visiting lectures in France, Quebec and South Africa? Certainly, from that day to this, no Scots lawyer has taken to reading the Latin civilian writers of the 17th and 18th centuries, let alone published a legal textbook blending modern case law with Grotius, Vinnius and Voet, tracing the law back to its Roman law and civilian principles. And yet just such a book was published in the English language in 1990, only two years after Smith's death. It is called *The Law of Obligations. Roman Foundations of the Civilian Tradition*, extends to over 1,200 pages, and its author is Reinhard Zimmermann, director of the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg. ³⁷

»The present book«, he writes in the preface, »is based on seven years' experience of teaching Roman law at the University of ...« – wait for it – »... Cape Town.« ³⁸ And indeed, at the heart of the enterprise, as its bibliography and footnotes attest, lies our old friend, the Roman-Dutch law of South Africa. This work has been followed by three further blockbusters compiled in collaboration with Scots and South African law professors: *Southern Cross. Civil Law and Common Law in South Africa*, edited by Zimmermann and Daniel Visser of Cape Town; ³⁹ two volumes of *A History of Private Law in Scotland*, edited with Kenneth Reid of the University of Edinburgh; ⁴⁰ and finally, with both Visser and

35 Quia quamdiu centum ex nobis vivi remanserint, nunquam Anglorum dominio aliquatenus volumus subiugari.

36 »'Say not the struggle naught availeth': the costs and benefits of mixed legal systems«, in: Tulane Law Review 78 (2003) 419–439, at p. 422; cf. my article, »The Myth of European Legal History«, in: Rechtshistorisches Journal 16 (1997) 393–410, at p. 410:

»... the fantasies of the contemporary manufacturers of the Euro-myth of legal history«.

37 Cape Town, Wetton, Johannesburg: Juta & Co., 1990.

38 op. cit., at p. xi.

39 Oxford: Clarendon Press, 1996; pp. c, 892.

40 Oxford: University Press, 2000; pp. lxi, 552; lxxviii, 748.

Reid, *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*.⁴¹

So had T. B. Smith, after all, truly glimpsed the Promised Land from afar? Not quite. Coup de théâtre: what in the hands of Smith had been a nationalistic doctrine to rescue Scots law from English cultural imperialism, has been turned completely on its head; it has now become the recipe for a supra-national, pan-European, modern *ius commune europaeum*, including, horror of horrors, the English common law.

This transformation rests on two pillars. The first of these is the proposition that the Roman-Dutch law is not to be understood as the peculiar tradition of the Calvinist Northern Netherlands, of its colony in South Africa, and of a Scottish satellite circling in the orbit of a close religious and personal alliance. Rather it is part of a *ius commune*, a unitary legal system operating throughout continental Europe from the 12th century until the promulgation of the national codifications in the 19th century. Secondly, it emerges that the whole rationale of the original enterprise had been completely misconceived: for England, it turns out, is really not so different after all. Just how has this breath-taking volte-face been achieved?

In the introduction to *The Law of Obligations* Zimmermann writes:⁴²

From the late Middle Ages until the time of the French Revolution, the countries of Western and Central Europe had a common law and a common legal science ... In the Middle Ages, the whole of educated Europe formed a single and undifferentiated cultural unit; and the Roman-canon "common" law was part and parcel of this European culture. Law professors moved freely from a chair in one country to one in another; the same textbooks were used at Pavia or Bologna as much as at Halle, Alcalá or Oxford; and it was on a European level, too, that all the major transformations of that common law took place.

History would seem not to be the strongest suit of a scholar who shifts so effortlessly from the Middle Ages to the universities of Alcalá, the humanist Complutense inaugurated in 1508, and of Halle, the Pietist foundation of 1695. But let us concentrate on the crucial sentence: »In the Middle Ages, the whole of educated Europe formed a single and undifferentiated cultural unit.« This is in fact a silent quotation from David Knowles, in his work *The Evolution of Medieval Thought* of 1962 – except that Knowles' »Western Europe« has been nonchalantly expanded into the whole

41 Oxford: University Press, 2004; pp. lxxxi, 871.

42 cit. not. 37, at pp. ix–x.

of Europe en passant.⁴³ But acknowledgement of the quotation, which clearly had so impressed him, is duly made by Zimmermann two years later in his programmatic inaugural lecture at the University of Regensburg which bears the title, »The European ius commune as the Foundation of European Legal Unity«, when he (mis)quotes the original passage:⁴⁴

(»In the Middle Ages«), in den Worten von *David Knowles*, »the whole of educated Europe formed a single undifferentiated cultural unit. ... It (was) the age of *Lanfranc* of Pavia, *Bec* and *Canterbury*, of *Anselm* of Aosta, *Bec* and *Canterbury*, of *Vacarius* of Lombardy, *Canterbury*, *Oxford* and *York*, ... of *John* of *Salisbury*, *Paris*, *Benevento*, *Canterbury* and *Chartres*, ... of *Thomas* of *Aquino*, *Cologne*, *Paris* and *Naples*, of *Duns Scotus* of *Dumfries*, *Oxford*, *Paris* and *Cologne*, of *William* of *Ockham*, *Oxford*, *Avignon* and *Munich*.«

But what was applied by Knowles to Western Europe in the Middle Ages, Zimmermann extends also in time to the modern period in a rhetorically impressive counterpoise of equally itinerant, equally transnational legal scholars:⁴⁵

The same can be said for the development and study of the Roman-canonical ius commune, and that not only for the Middle Ages but also for the entire period until the end of the *usus modernus*. *Henricus Zoesius* taught at the universities of *Salamanca* and *Louvain*, *Franciscus Hotomannus* at, among others, *Strasbourg*, *Bourges* and *Basel*. *Matthias Wesenbeck* was born in *Antwerp*, studied in *Louvain* and *Jena*, and became professor in *Jena* and *Wittenberg*. *Johann Friedrich Böckelmann* was Professor in *Heidelberg* and *Leiden*, *Johann Gottlieb Heineccius* in *Franeker*, *Frankfurt an der Oder* and *Halle*, *Andreas Fachinaeus* in *Ingolstadt* und *Pisa*. *Alberico Gentili* studied in *Pisa* and became professor in *Oxford*. The Germans *Johann Jacob Wissenbach*, *Antonius Matthaeus II* and *Samuel Pufendorf* were professors in *Franeker*, *Utrecht* and *Lund*, the Spaniard *Antonius Perezius* taught in *Louvain*, and the Frenchman *Donellus* in *Heidelberg*, *Leiden* and *Altdorf*.

The general image is thus of a *ius commune*, a law common to all of Europe, written in the *lingua franca* accessible to all scholars, Latin. This was a pan-European scholarly community, we are told, unaffected by the barriers of the modern nation state or the babel of diverse languages which was later to descend upon the continent.

Of course, it is true that in these centuries scholars wrote, spoke, taught and no doubt thought and dreamt in Latin, and a work in Latin could be read from *Groningen* to *Granada*, from *Glasgow* to *Göttingen*. And yet what is generally overlooked, but what is nevertheless absolutely crucial to keep before our eyes, is that there is no necessary corollary between a work being written in

43 London: Longman, 1962, at p. 80; (second edition, *ibid.* 1988, at p. 73).

44 »Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit«, in: *Juristenzeitung* 47 (1992) 8–20, at p. 11, col. 1. »(In the Middle Ages)« is Zimmermann's paraphrase of Knowles' specific delimitation: »For three hundred years, from 1050 to 1350, and above all in the century between 1070 and 1170 ...«

45 *ibid.*: »Gleiches läßt sich für die Entwicklung und Pflege des römisch-kanonischen ius commune sagen, und zwar nicht nur für das Mittelalter, sondern für die gesamte Zeit bis hin zum Ende des *usus modernus*. *Henricus Zoesius*

lehrte an den Hochschulen von *Salamanca* und *Löwen*, *Franciscus Hotomannus* unter anderem in *Straßburg*, *Bourges* und *Basel*. *Matthias Wesenbeck* wurde in *Antwerpen* geboren, studierte in *Löwen* und *Jena* und wurde Professor in *Jena* und *Wittenberg*. *Johann Friedrich Böckelmann* war Professor in *Heidelberg* und *Leiden*, *Johann Gottlieb Heineccius* in *Franeker*, *Frankfurt an der Oder*

und *Halle*, *Andreas Fachinaeus* in *Ingolstadt* und *Pisa*, *Alberico Gentili* studierte in *Pisa* und wurde Professor in *Oxford*. Die Deutschen *Johann Jacob Wissenbach*, *Antonius Matthaeus II* und *Samuel Pufendorf* waren Professoren in *Franeker*, *Utrecht* und *Lund*, der Spanier *Antonius Perezius* lehrte in *Löwen* und der Franzose *Donellus* in *Heidelberg*, *Leiden* und *Altdorf*.«

Latin and its having a pan-European circulation. For there intervened the fundamental mechanism of book production and distribution.

Two quotations, specifically from works of legal scholarship, capture the reality. In 1708 the Leipzig professor Johann Burckard Mencken (1674–1732) saw to the publication in Germany of the *Origines iuris civilis* of Gian Vincenzo Gravina, first published at Naples in 1701.⁴⁶ In his preface Mencken records that he procured the edition for the benefit of his fellow Germans, »to whom books published on the other side of the Alps are available but rarely and at an enormous price.«⁴⁷ The same point is made again half a century later by another German scholar, Karl Ferdinand Hommel (1722–1781). In his *Literatura iuris*, a guide to earlier legal writings, published in 1761, he states: »Books published in Sicily, England or Sweden, of whatever description, can be purchased here in Germany only with great difficulty. But above all, any writings emanating from Spain are extremely rare, on account of the poverty of commerce between the two countries.«⁴⁸

The dissemination of books in a southerly direction was even more problematical, for here not just the vicissitudes of commerce intervened, but the ever watchful eyes of the Holy Office of the Inquisition. In fact, the import of law books from Protestant Germany into Counter-Reformation Italy was effectively blocked. So where, for example, they were incorporated in great collections of various legal tracts, which simply were too important to be dispensed with, there was nothing for it: the offending German work would simply be cut out of the volume. Some books were allowed after censorship, and so we find Italian and Spanish libraries full of copies in which the offending passages have been carefully inked out by hand. A tiny handful of works deemed essential reading – such as the commentaries on Justinian’s Institutes by Mynsinger, Schneidewein and Vinnius – were republished in Italy in specially expurgated editions – Schneidewein significantly being named on the title page by his Greek name form of Oinotomos.⁴⁹ Acceptable law books produced in the unacceptable location of Geneva simply left their provenance out of the imprint; in other cases we find an offending name like Hotman or Erasmus, or an offending place like Nuremberg or Basel, obliterated in ink. So European legal history would present us with the image of a united Europe? This was a Europe riven into

46 De ortu et progressu juris civilis liber, qui est Originum primus ... Neap., ex officina Bulifoniana, 1701. 8°.

47 Origines juris civilis, quibus ortus et progressus juris civilis, jus naturale, gentium et XII Tab. legesque ac SCta. explicantur ... Lipsiae, apud Jo. Fridericum Gleditsch, 1708. 4°, at leaf **F1r: »... Germani nostri, ad quos libri trans

Alpes excusi rarius et immenso pretio perferuntur ...«

48 Litteratura iuris. Lipsiae, apud Ioannem Wendlerum, 1761. 8°, at p. 186: »Quae in Sicilia, Anglia, Sueciaque exeunt scripta, quaecunque demum illa sint, apud nos comparantur difficiliter; inprimis Hispanorum scripta ob infrequentiam commercii rarissima sunt ...«

49 The problematic is made explicit, for example, on the title-page of

the following edition: Arnoldi Vinnii, auctoris damnati cum expurgatione vero permissi, in quatuor libros Institutionum imperialis commentarius academicus et forensis, correctus secundum Indicem expurgatorium Sanctissimae Inquisitionis Hispaniae anno 1707 publicatum ... Coloniae Allobrogum et Lugduni, prostant apud fratres de Tournes, 1729. 4°.

two ideologically warring camps, separated by the Iron Curtain of the confessional divide, through which very little was allowed to penetrate, not excepting works of law.

It is a revealing experiment to seek out 17th century Dutch law books in an Italian or Spanish library. Of course, some relatively few there are, but even here it is their original provenance which tells the story. Over the preceding century, our legal historical research libraries have been subjected to a process of systematic if covert contamination which has invariably restructured their contents to conform to the Savignyesque discourse of europäische Rechtsgeschichte. According to the traditional *translatio studii* narrative, the Roman-Dutch Elegant Jurisprudence was the »leading« continental law school of the 17th and 18th centuries. Observing with consternation, therefore, the serried ranks of Italian and Spanish juristic writings weighing down the shelves of their libraries, and the complete absence of 17th century Dutch law books, Italian and Spanish professors of legal history, having imbibed the ideology of europäische Rechtsgeschichte, would urgently commend their librarians to make contact with the antiquarian bookdealers of Leiden, Utrecht, Amsterdam and The Hague, in order to fill this embarrassing legal-historical lacuna. So little by little, purchase by purchase, book by book, the Dutch authors percolated into the 20th century Istituti di Storia del Diritto and Institutos de Historia del Derecho, thus helping to reinforce the illusion of a European *ius commune*. Europäische Rechtsgeschichte had thus become a self-fulfilling prophecy. That in the 17th century these books never crossed the Alps or Pyrenees has in the meantime come to be entirely forgotten.

Examine the books themselves, however, and the truth soon emerges. In the Biblioteca de Catalunya there is an edition of Vinnius published at Amsterdam in 1665; closer inspection reveals the ex-libris of Alexander Pringle of Whitebank.⁵⁰ Again, an edition of Boeckelmann published at Utrecht in 1694 is now in the library of the Circolo Giuridico of Siena; look at the book itself, however, and you find a book-label with the name of W.H. McLellan, and a note on the end fly-leaf recording: »John Anderson – this book got in a compliment from Mr. Forrest«.⁵¹ Again, an edition of Heineccius of Amsterdam 1738 is in the library of the Istituto di Storia del Diritto Italiano in Rome; but it bears the ex-libris of Charles Gordon, and the inscription *Ex libris Societatis*

50 Shelf-mark: E.I.III.7; see my article, »Scoto-Dutch Law Books of the Seventeenth and Eighteenth Centuries«, in: JOHN M. FLETCHER and HILDE DE RIDDER-SYMOENS (edd.), *Lines of Contact. Proceedings of the second conference of Belgian, British, Irish and Dutch historians of universities held at St. Anne's College, Oxford, 15–17 September 1989*

(*Studia Historica Gandensia* 279), Gent 1994, pp. 57–74, at p. 67.

51 Shelf-mark: F.A. X-B BÖCK 1.

Advocatorum in Aberdonia.⁵² In other words, these books prove on closer inspection to be of historic Scottish provenance, subsequently adopted by 20th century Spanish and Italian legal historians; they thus provide no evidence of a *ius commune* which transcended the Alps or Pyrenees in the 17th and 18th centuries.

Pari passu, at the other end of Europe, in Groningen in the northern tip of the Netherlands, which has not been subject to the same process of contamination, we find a complete absence of law books printed in Spain – with the exception of a copy of the *Opusculorum libri quatuor* of José Fernandez de Retes, published at Salamanca in 1650.⁵³ When we order up this copy we find that the title-page betrays the provenance of the Dutch humanist Gerard Meerman, and thereby hangs a tale. Meerman's greatest scholarly endeavour was to collect the works of Spanish and French humanists for his *Novus Thesaurus juris civilis et canonici*, published at The Hague between 1751 and 1753. Why was this necessary? Simply because the editions of the many humanist works it includes – all seven massive folio volumes of them – had never reached the Netherlands, supposed centre of the *jurisprudentia elegantior*, and even in the mid-18th century copies had to be dispatched to Meerman from Spain to be reprinted. So this single Salamanca imprint in Groningen will be one of the copies sent to Meerman by his Spanish collaborators, once again evidence not of a pan-European legal culture but of its radical fragmentation.

The process of modern contamination can be observed on the grand scale in the Van Zyl Law Library in Cape Town. The Van Zyl, father and son, were lawyers and bibliophiles whose library passed to the University of Cape Town, together with a considerable sum for the acquisition of further relevant literature. This bequest has opened the door to an avalanche of Italian and Spanish imprints, which have thus, for the first time, found their way to the Cape. So now we have a true »*ius commune* library« – if by that we mean a completely unhistorical hotchpotch of editions reflecting no more than the ideology of the second half of the 20th century. But examine the books themselves, eliminate those with modern sale labels of bookdealers in Barcelona and Madrid, and seek out those with the ex-libris of Van Zyl or De Villiers or Rose Innes. Or compare the holdings of the High Court of the Cape; or of the National Library of South Africa; or of the University of Stellenbosch; or of the Appellate Division in Bloemfontein; in short, of

52 Shelf-mark: 35.89.

53 Groningen Universiteitsbibliothek, shelf-mark: GF- 5, bearing the inscription *Ex dono nobilissimi atque eruditissimi viri Gerhardi Meerman <I.U.D.> possidet Herm.^s Cannegieter.*

any genuine historic library in South Africa, and the picture comes back into focus. These libraries are all full of the standard Dutch law books, not least those in the Dutch language, together with the legal productions of Germany and a selection of the juristic writings, again Latin and Dutch, of the Southern Netherlands.

Behind all these bibliographical examples lies, of course, the text itself. Put simply, if the medium didn't deliver the text, the message couldn't be read. Consider this example. In 1691, Gerard Noodt, doyen of the Dutch Elegant School, published a monograph on the *lex Aquilia*, the Roman statute on damage to property.⁵⁴ Yet completely unbeknownst to Noodt, a monograph of Juan Suárez de Mendoza on the *lex Aquilia* had been published at Salamanca in 1640, half a century earlier.⁵⁵ Was this work of relevance for Noodt? Here is the opinion of Meerman, comparing the two works in the preface to his reprint in the Thesaurus:⁵⁶

The renowned and learned Gerard Noodt published a monograph on the same subject towards the end of the 17th century, about fifty years after Suarez de Mendoza ... and yet he cannot snatch the palm of victory from Suarez, *whom he had never seen*. Even if Noodt was endowed with great knowledge of the law, and writes with consummate elegance, it must be apparent to anyone who reads both works with due care that Suarez is superior to Noodt in application, erudition and depth of learning.

So a *ius commune* in a united Europe? In reality, we are here confronted by a Europe so riven by political and religious divisions that scholars working even in the uncontroversial antiquarian tradition of Roman law could do so in complete ignorance of fundamental work published on the same subject in a different country half a century previously.

The significant change in 16th century legal history is not, I would suggest, the emergence of the humanist school, so congenial to the ideology of the 19th century founders of europäische Rechtsgeschichte.⁵⁷ Much more fundamentally, it is the disintegration of the legal unity of the Medieval world, itself largely based on the canon law of the Universal Church. What emerges in its place in western continental Europe is the formation of three clearly differentiated legal families or *Rechtskreise*. One of these is Protestant Germany and the Netherlands, with a European satellite in Scotland and an overseas colony in Dutch South Africa, at its heart the *Professorenrecht* distilled from the research and teaching of Germano-Dutch university professors of law. Another is France, the

54 Probabilium juris civilis libri quatuor, quibus accedunt De jurisdictione et imperio libri duo, et Ad legem Aquiliam liber singularis. *Lugduni Batavorum, ex officina Felicis Lopez, 1691*. 4°.

55 Commentarii ad legem Aquiliam ... *Salmanticae, apud Tabernier, 1640*. 4°.

56 Tom. II, pp. ii–iii: »Qui vero sub exitum superioris aevi, et quinquaginta circiter post Suarezium annis idem argumentum libro singulari illustratum dedit jurisconsultus celeberrimus atque humanissimus Gerardus Noodt, etsi Balduino fuerit superior, palmam tamen Suarezio, *quem non vidit*, praeripere haud potuit; ut ut enim multa juris cognitione instructus, nec minori scribendi elegantia usus

fuerit Noodtius, quin tamen hunc industria, amoenitate, variaque doctrinae copia vincat Suarezius, neminem utriusque commentarium debita cum cura examinantem latere poterit« (my emphasis).

57 See my article, »The Myth of European Legal History«, in: *Rechtshistorisches Journal* 16 (1997) 393–410.

nation tout court, with a legal literature written largely by practitioners, almost exclusively in the French language, and based on the *coûtumes* of the regions, the *arrêts* and *décisions* of the parlements, and the great *ordonnances* of Louis XIV and XV. And thirdly, the Baroque, South European, Catholic, Counter-Reformation legal systems of Spain and Spanish Italy of the period 1550 to 1750, their independence from any Northern or Gallican influence carefully scrutinised by a watchful Inquisition.⁵⁸ In Spain we see a legal system which blended the Roman law with the *Fuero Real*, *Siete Partidas*, *Ordenanzas Reales*, *Leyes de Toro* and *Nueva Recopilación*, but which shared with Italy its allegiance to the Roman Catholic Church, the canon law, and the decisions of the *Rota Romana*. And if, in a paroxysm of originality, we are so daring as to interpret Europe to mean Europe, the land-mass between the Atlantic and the Urals, and thus bring into consideration England, Scandinavia, the Balkans, Russia and the whole of Eastern Europe, the salient characteristic of European legal history which emerges is one of diversity, not of community or homogeneity: *ius diversum*, not *ius commune*.

Having identified the basic political, religious and thus also juridical fault lines of early modern Europe, it is time to return to Zimmerman's rhetorically impressive passage on the internationalism of the early modern European jurist. Here once again are his ten examples of intellectual freedom of movement in what, it will be recalled, is described as »a single undifferentiated cultural unit«.⁵⁹

1. *Henricus Zoesius* taught at the universities of Salamanca and Louvain.

– Well, not really so remarkable if we remember that Louvain was the university of the Catholic Southern Netherlands, otherwise known as the Spanish Netherlands, being under Spanish suzerainty until 1713. In fact Zoesius studied at Salamanca for a short period during his youth, and thereafter spent his entire career at Louvain.

2. *Franciscus Hotomannus* taught at the universities of Strasbourg, Bourges and Basel.

– Hotman did indeed teach at Bourges, and then in the Germanic cities of Strassburg and Basel. Not, however, very good evidence of an entente cordiale. In fact, as a Protestant, Hotman had to flee for his life in 1572 during the massacre of St. Bartholomew, when for

58 For a first contribution towards a bibliography of this legal system, see my forthcoming publication, *The Jurisprudence of the Baroque: A Census of 17th Century Italian Legal Imprints*, Frankfurt a. M.: Vittorio Klostermann, 2007.

59 See p. 180, supra.

almost a month the streets of the major French cities flowed with the blood of the indiscriminate slaughter of thousands of Huguenots.

3. *Matthias Wesenbeck* was born in Antwerp, studied in Louvain and Jena, and became professor in Jena and Wittenberg.

– As a Protestant Wesenbeck emigrated while still a student to Jena and Wittenberg to escape the deepening religious struggle of the 16th century Low Countries, which, after the Eighty Years' War, resulted ultimately in the disintegration of the country and the establishment of the Northern Provinces as a separate Protestant state.

4. *Johann Friedrich Böckelmann* was professor in Heidelberg and Leiden.

– And why not? Both universities are located in the Protestant Germano-Dutch sphere.

5. *Johann Gottlieb Heineccius* was professor in Franeker, Frankfurt an der Oder and Halle.

– Exactly the same: Franeker in Friesland was not a significantly greater cultural leap from Germany than was Halle from Frankfurt an der Oder.

6. *Andreas Fachinaeus* was professor in Ingolstadt and Pisa.

– A Germano-Italian exchange programme? Hardly; Ingolstadt was the great German fortress of Counter-Reformation Catholicism, the intellectual rival of Protestant Wittenberg.

7. *Alberico Gentili* studied in Pisa and became professor in Oxford.

– Perugia in fact, but this time Gentili went not to Ingolstadt but to Oxford, and, unlike Fachinaeus, did not thereafter return to Italy. Why? Because Gentili was a Protestant who spent his life in exile in England.

8. The Germans *Johann Jacob Wissenbach*, *Antonius Matthaeus II* and *Samuel Pufendorf* were professors in Franeker, Utrecht and Lund.

– Certainly, Pufendorf's sojourn in Sweden is famous, but that episode is merely a personal extension of what is once again the Protestant Germano-Dutch context.

9. The Spaniard *Antonius Perezius* taught in Louvain.

– Not so terribly remarkable if we recall once again that Louvain was the university of the Spanish Netherlands. Of course, Pérez is a good Spanish name, but the impact is somewhat diminished when

we discover that »der Spanier Perezius« was in fact the chico Antonio, brought by his parents from Spain to Louvain at the age of twelve, where he remained for the rest of his life.

10. The Frenchman *Donellus* taught in Heidelberg, Leiden and Altdorf.

– Indeed, but as with Hotman, the arrangements for Donellus to be called to a Chair in Heidelberg had to be made in something of a hurry, given that he was once again a Huguenot fleeing for his life from the massacre of St. Bartholomew.

Thus it emerges that all of Zimmermann’s examples of European unity, without exception, involve either movement strictly within the Protestant or Catholic spheres, or political refugees fleeing persecution or death in their own countries. So here we have asylum seekers being cited as an indication of individual freedom of movement. Far from being examples of a shared European culture in the early modern period, these cases forcefully remind us that Europe in these centuries was split apart, rent by implacable religious and political struggles, and for most of the time stricken by internecine warfare.

But if we have difficulty with the concept of a united European continent, we will be even more perplexed by the sudden disappearance of the fundamental juristic division between the civil and common law families. Thus in the same introduction to *The Law of Obligations*, Zimmerman writes:⁶⁰

the “European” – *but which now appears in quotation marks* – the “European” ius commune and the “English” – *again in quotation marks* – common law were (and are) not really so radically distinct as is often suggested.

And so the most basic observation on European legal culture, held unanimously by all comparative and historical commentators over the centuries, is suddenly perceived – by a remarkable coincidence, at precisely the moment of English entry into the European Union – to be not so fundamental after all.

And this is achieved by historical sleight of hand, whereby a whole series of disparate incidents of English legal history, from widely different contexts and eras, are thrown together into the melting pot of an undifferentiated historical period 1200 to 1800. The buzz themes to watch out for are:

1. canon law in the Medieval English ecclesiastical courts
2. the teaching of Roman law at Oxford and Cambridge

⁶⁰ *The Law of Obligations*, cit. not. 37, at p. xi.

3. Doctors' Commons
4. the High Court of Admiralty
5. the law merchant and the use of continental treatises
6. English translations of Grotius, Pufendorf and Heineccius.

All of these themes have, of course, long since been fully recognised and assessed by legal historians, being duly categorised as interesting but isolated features of English legal history which never deflected the line of development of the Common Law. Now, however, they are being thrown together pell mell, manipulated to register cumulatively on our subconscious, subliminally as it were, the close connection of English law with continental Europe. »England,« Zimmermann concludes, »in reality was *never completely cut off* from continental legal culture.«⁶¹ Again: »Since the days of the Norman conquest, England was *never entirely cut off* from continental legal culture.«⁶² Again: »Today ... it is becoming increasingly clear that England was *never entirely isolated* from the rest of Europe.«⁶³ Again: »The English common law has traditionally been perceived as flourishing *in splendid isolation* from (continental) Europe.«⁶⁴ Again: »... England in Wahrheit von der kontinentalen Rechtskultur niemals völlig abgeschnitten war«,⁶⁵ which means: »England in reality was *never completely cut off* from continental legal culture«. True; but the repetition is all the more superfluous when we consider that no one in their sane senses has ever suggested the contrary.

The expression *ius commune* naturally conjures up the figure of the most important post-War German legal historian, Helmut Coing. This was the Leitmotiv of the Institute he founded in Frankfurt in 1964, the Max-Planck-Institut für europäische Rechtsgeschichte, whose collaborators would publish their results in the Institute's periodical, »Ius Commune«. And Coing indeed reveals a similar orientation when he writes:⁶⁶

... the system of *Ius Commune* on the Continent lasted up to the eighteenth century and was finally changed only by the modern national codifications, especially by the influence of the legal ideas of the French Revolution whose outcome on the Continent was the modern national state. Since then, the law on the Continent has been split up into a series of national systems. Still, one cannot deny the common background all these systems have.

Coing, too, records that »it would certainly be wrong to say that England was *never touched* by these developments in legal

61 *ibid.*, at p. xi (my emphasis).

62 »Savigny's Legacy. Legal History, Comparative Law, and the Emergence of a European Legal Science«, *Law Quarterly Review* 112 (1996) 576–605, at p. 588 (my emphasis).

63 *Southern Cross*, cit. not. 39, at p. 2 (my emphasis).

64 *ibid.* (my emphasis).

65 »Der europäische Charakter des englischen Rechts. Historische

Verbindungen zwischen civil law und common law«, in: *Zeitschrift für Europäisches Privatrecht* 1 (1993) 4–51, at p. 8.

66 »The Roman Law as *Ius Commune* on the Continent«, in: *Law Quarterly Review* 89 (1973) 505–517, at p. 515.

ideas and practice«,⁶⁷ and a page later, »the English Common Law has *never been completely separated* from legal development on the Continent.«⁶⁸ And he mentions explicitly the canon law in the Medieval English ecclesiastical courts, the Medieval law schools of Oxford and Cambridge, and the High Court of Admiralty.⁶⁹

Sounds familiar? True, Coing represents a break with the traditional narrative of the *fax jurisprudentiae*, passing from Italy to France to Holland to German apotheosis, the teleology of the unashamed German nationalists of the 19th century Historische Schule, for whom all legal roads led to Berlin. In the meantime the Red Army had also found its way to the Hauptstadt, and in its wake the gates of Auschwitz had been opened to a world left speechless with horror. The supra-national, continental *ius commune* of Coing reflects the new, reconstructed, pacific, post-War Germany, content to live within its borders, contritely seeking re-admission to membership of the European family. But the United States of Europe which Winston Churchill commended in the aula of the University of Zürich on 19th September 1946 was never intended to include »the British Empire and its Commonwealth«. In the post-War era, therefore, Coing was not constrained, as are the contemporary Euro-fundamentalists, to perform the legal-historical contortion of forcing England into continental Europe. So when Coing writes that »one cannot deny the common background all these systems have,« he is speaking of *continental* systems, and he continues, »and modern writers on Comparative Law rightly speak of the Continental legal systems as a family of laws which *can be opposed* as a unit to the great systems of the English-speaking nations, the English Common Law.«⁷⁰ And at the end of his catalogue of continental influences on English law, he arrives at the incontrovertible conclusion:⁷¹

Despite all this, the fact remains that the English Common Law developed independently and is a legal system of its own, not based on Roman Canon Law.

These quotations from Coing are drawn from an article in the Law Quarterly Review published in 1973, the very year in which Britain entered the European Union or Common Market as it was then known. This laid a rather large common law cuckoo's egg in the continental legal nest, an unforeseen complication which Coing's final paragraph hesitantly confronts:⁷²

67 *ibid.*, at p. 515 (my emphasis).

68 *ibid.*, at p. 516 (my emphasis).

69 *ibid.*, at p. 515: »It has been clear since Maitland's writings that ecclesiastical courts in medieval England followed the Roman Canon Law. It is also clear that the medieval law-schools in Oxford and Cambridge taught Canon and Roman Law ... We also know that up to the end of the eighteenth century there were courts in Eng-

land which not only followed Roman Canon procedure but also based their judgment, as far as substantive law is concerned, on *Ius Commune*. This is true for the High Court of Admiralty and the Curia Militaris, the Court of the Constable and Marshal.«

70 *ibid.*, at p. 515 (my emphasis).

71 *ibid.*, at pp. 515–516.

72 *ibid.*, at pp. 516–517.

From the past to the future: the main subject of Comparative Law in these last decades has always been the comparison between the English Law and Continental Law. Now, with Great Britain entering the Common Market, this theoretical research may bear practical fruit. There may be within an economically and, in the future, politically United Europe a greater community in law.

But regarding the *ius commune europaeum* it is surely more accurate to say: from the future to the past; the dominant contemporary discourse of legal history has appropriated Coing's trade mark *ius commune*, but set itself the task of demonstrating not that continental legal systems have a shared tradition distinct from that of the Anglo-American common law, but that »the "European" *ius commune* and the "English" common law were (and are) not really so radically distinct.«⁷³ And it has to do this for no better reason than that England is part of the contemporary political entity known as the European Union. For legal historians, however, this modern *ius commune europaeum*, which pretends to detect in the past a seamless European continent, a seamless period of European history from the Middle Ages to the 19th century, and a seamless juncture of English and continental law, lacks any credentials to be taken seriously as an outline of the European legal experience. Rather it appears as a tendentious, 21st century discourse, a theatrically impressive pseudo-historical mise-en-scène constructed by contemporary comparative lawyers to accord historical legitimacy to their task of harmonising the individual legal systems of the member states of the European Union.⁷⁴

Can we, then, simply translate Alan Rodger's judgment on the same ideology in its previous nationalist incarnation, and thus dismiss the *ius commune europaeum* as *nichts anders als Phantasie*? Such direct equivalence seems to me slightly unfair. Let us suppose that a Scottish jurist of nationalistic sentiment wishes to appeal to a period of the Scottish legal past before the baleful influence of English law had exerted itself. This, it is true, will involve ignoring two centuries of British legal convergence from the industrial revolution onwards – the development of such marginal subjects as commercial law, company law, insurance law, tax law, administrative law, labour law, health and welfare law, mass transit law, consumer protection law, etc. etc. – and concentrating instead on the fixed stars of the legal firmament, the law of obligations and moveable property.⁷⁵ Under such circumstances there is indeed a certain historical logic in a Scottish appeal

73 The Law of Obligations, cit. not. 37, at p. xi; see p. 187, supra.

74 Or rather, for the Euro-fundamentalists, of annihilating these individual legal systems, since they make no secret of their ultimate goal of replacing all national systems with a single European code (hence the construction of a single, unitary European legal past as paradigm). Thus we gather from Zimmermann, »Savigny's Legacy«, cit. not. 62, that just as Savigny prepared the way for a single German code to replace the various legal systems of the German Reich, so too must a latter-

day legal genius prepare the way for a single European code to replace the diversity of national systems; no prizes for guessing who has been summoned by Destiny to fill the role of Savigny redivivus. On this whole misconceived Euro-project, see ALAN RODGER, »Say not the struggle naught availeth'«, cit. not. 36, at pp. 430–434.

75 Cf. T. B. SMITH, *British Justice: the Scottish Contribution*, cit. not. 1,

at p. 141: »A good deal of modern legislation, however, to adopt Lord Cooper's phrase, has no better title to be recognised as 'part of our system of jurisprudence than the current issue of the railway timetable' would be to recognition as part of English literature«, citing Lord Cooper in *The Scottish Legal Tradition*, cit. not. 13, at p. 174.

to the Roman-Dutch law. It was to the Netherlands that Scots law students went to study in the 17th and 18th centuries; it was in the Netherlands that Scotland's greatest jurist spent six years in exile. »We import our lawyers from Holland,« Butler observed to Saddletree in *The Heart of Midlothian*;⁷⁶ it is Ioannes Voet's commentary on the Pandects which Alan Fairford uses as a convenient reading-desk when penning a letter to Darsie Latimer in *Redgauntlet*.⁷⁷ The Roman-Dutch jurists constitute the core repertoire of the typical early modern Scottish law library, and it is preeminently their treatises which the Scots institutional writers from Stair to Erskine had before their eyes.

By contrast, when one considers the vicious cockpit of the European nations in the period 1500 to 1800, separated by an irreconcilable ideological divide and convulsed by endless bitter wars both on the continent and in overseas colonies, the pseudo-historical underpinning of the *ius commune europaeum*, in which »the whole of educated Europe formed a single undifferentiated cultural unit«, stands revealed as a pastoral idyll and a romantic fantasy. The ideology of the *ius commune europaeum*, based on the fallacy that in these three centuries there existed a single European legal community, with one language, one literature, and personal and intellectual freedom of movement, has no shimmer of a claim to historicity. In reality, the single corner of Europe constituting the Germano-Dutch legal family is being passed off by Zimmermann as the pan-European historical inheritance: an unashamed *Etiketenschwindel*. And to crown the whole there is the grotesque reinvention of the English common law as an offshore province of continental Europe, in and of itself the *reductio ad absurdum* of the whole *ius commune europaeum* discourse. At this point, given current demographics and the future status of Turkey as the most populous nation in the European Union, we might as well embark forthwith on discovering the historic common core in the Western legal tradition and Sharia.

As regards the respective shelf-lives of these two constructs of *historia fantástica*, there is, however, another important distinction to observe. T. B. Smith was a member of the law faculty of a British university. As such, apart from being subjected to the good-natured irony of his colleagues for his nutty ideas, he would, like everyone else, have had one vote in any faculty appointment. The director of a Max Planck Institute, by contrast, presides over a range of

⁷⁶ See note 28, *supra*.

⁷⁷ Quoted in my article, »Scoto-Dutch Law Books of the Seventeenth and Eighteenth Centuries«, cit. not. 50, at p. 57.

patronage, and untrammled power in its exercise, that would have caused an 18th century monarch to salivate with envy. A multi-million Euro annual budget pays for a lot of Mitarbeiter, a lot of conferences, a lot of guest lectures and a lot of finger buffets; in the present state of our discipline, this all amounts to a formidable range of legal-historical fire-power. The chimaera of the *ius commune europaeum* could be with us for quite some time to come.⁷⁸

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⁷⁸ This is a revised version of a lecture given to the REUNA conference at Reykjavik on 29th April 2006.