

TRANSFORMATION FROM THE ROMAN-CANONICAL “CIVIL LAW” TRADITION TO THE ANGLO-SAXON “COMMON LAW” THROUGH JURISPRUDENCE

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Introduction

The transformation from the Roman-canonical tradition, or civil law, to the Anglo-Saxon tradition, or *common law*, is a complex process that has developed over centuries, shaped by various historical, political and social factors. Roman-canonical law, with roots in the ancient Roman Empire and enriched by the legal tradition of the Catholic Church, is characterized by its emphasis on written and codified law as the primary source of law. By contrast, Anglo-Saxon law, which originated in England, is distinguished by its focus on jurisprudence, that is, on court decisions and judicial precedents as the basis for resolving future cases.

The thesis of this essay is that the transformation of civil law into *common law* in territories under Anglo-Saxon influence was not a spontaneous process; rather, it was driven by a series of interrelated factors such as colonial expansion, the prestige of the *common law* and the need to adapt the law to new social and economic realities.

To support this thesis, three objectives were set:

1. To examine the main characteristics of Roman-canonical law and *common law*, highlighting their differences and similarities.
2. To analyze the historical, political and social factors that drove the transformation of civil law into *common law* in territories under Anglo-Saxon influence.
3. To evaluate the role of jurisprudence as an engine of change and adaptation in the process of transforming civil law into *common law*.

Characteristics of Roman-Canonical Law and *Common Law*

The transformation from the Roman-canonical, or civil-law, tradition to the Anglo-Saxon, or common-law, tradition has developed over centuries and has been shaped by various historical, political and social factors. Roman-canonical law, enriched by the legal tradition of the Catholic Church, is based mainly on written and codified law. In contrast, Anglo-Saxon law, which originated in England, is characterized by its emphasis on jurisprudence, that is, on court decisions and judicial precedents as the basis for resolving future cases.

Roman-canonical law, a cornerstone of the continental European and Latin American legal tradition, has its roots in ancient Rome. Roman law was developed over more than a millennium, from the founding of Rome in the 8th century BC to the compilation of the *Corpus Juris Civilis* by Emperor Justinian in the

6th century AD, and was characterized by its systematization, coherence and adaptability to changing social needs¹. Initially based on customs and oral traditions, Roman law evolved into a more formalized system with the drafting of the Law of the Twelve Tables in the 5th century BC. This law, considered the basis of Roman public and private law, established fundamental principles regarding property, family, succession and judicial procedure.

With the expansion of the Roman Empire, Roman law became an instrument of unification and social control, being applied in various regions and adapting to local particularities. Jurisprudence—the opinions and decisions of Roman jurists—was crucial in interpreting and developing the law, becoming an autonomous and prestigious source of law.

After the fall of the Western Roman Empire in the 5th century AD, Roman law survived and adapted to new political and social realities. The Catholic Church, emerging as a powerful institution in Europe, adopted and adapted Roman law to regulate its internal affairs and establish norms for its faithful². This process of adaptation gave rise to canon law, an autonomous legal system based on the principles of Roman law but enriched with Christian doctrine and morality.

Canon law, through the work of canonists and theologians, developed its own legal concepts and principles, such as the notion of a legal person, marriage as a sacrament and the distinction between divine law and human law. The influence of canon law extended beyond the ecclesiastical sphere, permeating the civil and criminal law of many European countries. The compilation of the *Corpus Juris Canonici* in the 12th century, a systematic collection of ecclesiastical laws and decrees, consolidated canon law as a coherent and comprehensive legal system. This work, together with the rediscovery of Justinian's *Corpus Juris Civilis* in the 11th century, spurred the study and teaching of Roman law in European universities³, laying the groundwork for the development of modern civil law.

Anglo-Saxon law, also known as *common law*, originated in England after the Norman Conquest in 1066. Unlike Roman-canonical law, which was based on written and codified laws, *common law* arose from local customs and traditions as well as judicial decisions in specific cases⁴. In medieval England there was no unified legal system; each region had its own customs and laws applied by local courts. However, after the Norman Conquest, King William I established a system of royal courts that applied a common law throughout the kingdom, based on the most widespread customs and on principles of justice and equity⁵.

¹ Peter Stein, *Roman Law in European History*(Cambridge University Press, 2012), 112-120.

² Harol J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*(Cambridge: Harvard University Press, 1983), 340-357.

³ James A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*(University Of Chicago Press, 2008), 123-125.

⁴ J. H. Baker, *An Introduction to English Legal History*(Oxford University Press, USA, 2004), 89.

⁵ R. C. van Caenegem, *Birth of the English Common Law*(Cambridge University Press, 2012).

Royal judges, when resolving disputes, did not limit themselves to applying written laws; they also considered local customs and the previous decisions of other judges⁶. This accumulation of judicial decisions, known as jurisprudence, gradually created a body of common norms and principles for the whole kingdom, which became the basis of *common law*. Jurisprudence, as the principal source of law in *common law*, was characterized by its flexibility and ability to adapt to new circumstances. In resolving cases, judges could create new norms or modify existing ones, provided their decisions were based on general principles and legal logic.

The principle of *stare decisis*, which means “to stand by things decided,” became a fundamental pillar of *common law*. This principle establishes that judges must follow the precedents set in previous cases, thereby ensuring the coherence and predictability of the law. Over the centuries *common law* evolved and expanded, adapting to changing social and economic needs. Through their decisions, judges created new branches of law—such as contract law, property law and tort law—that became essential elements of the Anglo-Saxon legal system. The influence of *common law* extended beyond England, reaching its colonies and overseas territories. In the United States, Canada, Australia and other countries with Anglo-Saxon legal traditions, *common law* became the basis of their legal systems, albeit with their own adaptations and modifications.

Merryman and Pérez Perdomo⁷ indicate that the expansion of Roman-canonical law and *common law* was a parallel and often intertwined process, driven by factors such as colonization, trade and cultural influence. Roman-canonical law expanded mainly through two avenues: the expansion of the Roman Empire, which carried Roman law to vast regions of Europe, Asia Minor and North Africa, and the expansion of Christianity, which spread canon law, an autonomous legal system based on the principles of Roman law but enriched with Christian doctrine and morality. The rediscovery of the *Corpus Iuris Civilis* in the 11th century revitalized the study and teaching of Roman law in European universities, making it the basis of the *ius commune*, the common European law. Likewise, the Catholic Church, as a supranational institution, contributed to the diffusion and unification of canon law in the territories it evangelized, thus creating a common legal system for believers.

Common law expanded mainly through British colonization. As the British Empire extended across North America, Australia, India and Africa, *common law* was brought along and established as the legal system of the colonies. Even after many of these colonies gained independence, *common law* remained the basis of their legal systems, though with local adaptations and modifications⁸. The expansion of *common law* was, in this sense, a process of imposition and adaptation in which English law became the basis of the legal systems of colonized territories but was also influenced and modified by local realities.

⁶ S. F. C. Milsom, *Historical foundations of the common law* (London: Butterworths, 1981), 328.

⁷ John Henry Merryman y Rogelio Pérez Perdomo, *La tradición jurídico-romana*, 3ªed. (México: Fondo de Cultura Económica, 2015).

⁸ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.14.

The encounter between these two legal traditions occurred mainly in territories colonized or influenced by European powers. In North America, for example, English *common law* encountered French civil law in Louisiana and Quebec, and Spanish civil law in the southwestern United States. In Africa and Asia, British *common law* often overlapped pre-existing customary law systems, and in some cases also encountered the civil law of other colonial powers, such as France and Portugal⁹.

This encounter generated situations of coexistence, conflict and adaptation. In some cases, parallel legal systems were maintained, as in Quebec, where civil law and *common law* coexist. In other cases, a fusion of elements from both traditions occurred, as in South Africa, where Roman-Dutch law has mixed with English *common law*¹⁰. Judges were forced to resolve conflicts between norms from different traditions and to adapt the principles of civil law to the reality of *common law*, or vice versa. In this sense, jurisprudence acted as a bridge between the two traditions, allowing their coexistence and evolution within the same legal system.

Factors That Drove the Transformation from Civil Law to *Common Law*

The evolution of civil law toward Anglo-Saxon law in regions under Anglo-Saxon influence was not a spontaneous process; it resulted from a series of interconnected factors. England's colonial expansion during the 18th and 19th centuries was a determining factor in the spread of *common law*. Merryman and Pérez-Perdomo (2014) note that "*common law* was taken along and established as the legal system of the colonies"¹¹. In this sense, conquest and colonization involved the imposition of English law in conquered territories, displacing or modifying pre-existing legal systems.

Nevertheless, the imposition of *common law* was neither homogeneous nor free of resistance. In many cases English law had to adapt to local realities, incorporating elements of existing legal traditions or modifying its own norms to respond to the needs of the colonies.

One of the main factors were historical, for example the Norman Conquest of England (1066), which introduced a feudal system and a new government structure that gradually replaced the existing Anglo-Saxon legal system. The Normans brought elements of French customary law, which mixed with Anglo-Saxon laws and customs¹².

The Norman kings and their successors established royal courts that applied a common law throughout the kingdom. This led to the development of a system of

⁹ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.

¹⁰ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.

¹¹ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.15.

¹² Baker, *An Introduction to English Legal History*; Caenegem, *Birth of the English Common Law*.

judicial precedents and a body of common law that differed from local customary law¹³.

Another historical factor was the influence of canon law based on the Roman-canonical tradition. Canonists developed legal principles and procedures that were adopted by the royal courts¹⁴.

Among the political factors, first there is the centralization of royal power. English kings sought to strengthen their power and authority by creating a unified and centralized legal system. *Common law* became an instrument to achieve this objective, imposing a uniform law throughout the kingdom and limiting the power of feudal lords and local courts¹⁵.

Second, the relationship between the king and the Church in medieval England was often tense. The king sought to limit the jurisdiction of ecclesiastical courts and assert his authority over spiritual matters. This led to a conflict between *common law* and canon law, and to compromise solutions that allowed both systems to coexist¹⁶.

Among the social factors is the emergence of a legal profession. The development of *common law* led to the creation of a class of lawyers and professional judges who specialized in applying and developing this legal system. These professionals played a decisive role in the consolidation and expansion of *common law*¹⁷.

Additionally, the growth of trade and the expansion of the English economy in the Middle Ages created new legal needs that *common law* was able to satisfy. *Common law* developed principles and rules to regulate commercial transactions and protect property rights, which contributed to its acceptance and spread.

Thus, the transformation from civil law of the Roman-canonical tradition to Anglo-Saxon *common law* was a complex process. Historical factors such as the Norman Conquest and the development of royal justice laid the foundations for this change. Political factors such as the centralization of royal power and the struggle between the king and the Church influenced the direction and scope of this transformation. And social factors such as the emergence of a legal profession and the influence of commerce contributed to the consolidation and expansion of *common law*.

It is important to note that this process was neither linear nor uniform. There were moments of convergence and divergence between *common law* and civil law, and the influence of the Roman-canonical tradition never completely disappeared.

¹³ Baker, *An Introduction to English Legal History*; Milsom, *Historical foundations of the common law*.

¹⁴ Berman, *Law and Revolution: The Formation of the Western Legal Tradition*; Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*.

¹⁵ Baker, *An Introduction to English Legal History*; Caenegem, *Birth of the English Common Law*.

¹⁶ Berman, *Law and Revolution: The Formation of the Western Legal Tradition*.

¹⁷ Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*.

However, the result was the creation of a distinctive and original legal system that has had a lasting impact on the Western legal world.

Jurisprudence was essential in the convergence of civil law and *common law*, as judges had to resolve discrepancies between norms from both traditions and adapt principles from one to the other. In this way jurisprudence served as a link that facilitated the coexistence and joint development of both traditions within the same legal framework.

This dynamic of transformation is evident in various cases and contexts. The case of *Swift v. Tyson* (1842) in the United States established that federal courts were not obliged to follow state jurisprudence in matters of general common law, but could develop their own norms¹⁸. This decision allowed federal courts to depart from state civil law and apply *common law* principles, contributing to the expansion of the latter in the United States.

In Louisiana, despite having a Civil Code based on French law, courts have gradually incorporated *common law* principles in matters of damages, such as strict liability and compensation for pain and suffering¹⁹. This adaptation process has been driven by jurisprudence, which has interpreted the Civil Code in the light of *common law* principles.

The jurisprudence of the Supreme Court of Puerto Rico has also been important in incorporating *common law* principles in the interpretation of the Puerto Rican Civil Code. For example, in family law the Court has recognized the figure of the trust, a typical *common law* instrument, and adapted its regulation to the Puerto Rican reality²⁰.

These examples show how jurisprudence has been an engine of change in the transformation of civil law into *common law*. Through the interpretation and adaptation of norms, judges have managed to reconcile the principles of both legal traditions, creating mixed and dynamic legal systems that respond to the needs of contemporary societies.

The perceived prestige and effectiveness of *common law* were key factors in its adoption at the expense of civil law. *Common law* was presented as a modern, flexible legal system capable of adapting to changing social and economic realities, in contrast to the rigidity and formalism attributed to civil law²¹ (Merryman & Pérez Perdomo, 2014). Moreover, *common law* was associated with the economic and political success of England, which increased its appeal to the elites of colonized territories. The perception that *common law* was a more efficient

¹⁸ "Swift v. Tyson, 41 U.S. 1 (1842)", Justia Law, consultado el 20 de mayo de 2024, <https://supreme.justia.com/cases/federal/us/41/1/>.

¹⁹ Stone, Ferdinand Fairfax. "Tort Doctrine in Louisiana: The Materials for the Decision of a Case." *Tulane Law Review* 17, no. 4 (1943): 589-620.

²⁰ Rivera Ramos, Efrén. "*El fideicomiso en Puerto Rico: un análisis del derecho puertorriqueño a la luz del derecho comparado.*" *Revista Jurídica de la Universidad de Puerto Rico* 52 (1983): 231.

²¹ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.

and fair legal system contributed to its adoption and consolidation in many countries.

The need to adapt the law to new social and economic realities also drove the transformation of civil law into *common law*. The colonies, with their own social and economic dynamics, required a legal system capable of responding to their specific needs²². *Common law*, with its emphasis on jurisprudence and the ability of judges to create law, proved more flexible and adaptable than civil law, which is based on written and codified laws. Judges, in resolving specific cases, could adapt the law to new circumstances, creating new norms or modifying existing ones.

Role of Jurisprudence in the Transformation from Civil Law to *Common Law*

Jurisprudence, understood as the body of judicial decisions, was fundamental in the evolution and transformation of the law. However, its relevance and authority vary between *common law* and civil law. In *common law*, jurisprudence is a primary source of law. Judges, in resolving specific cases, create new norms or interpret existing ones, thereby generating a body of precedents that guides future decisions. The principle of *stare decisis* (to stand by things decided) obliges judges to follow the precedents set in previous cases, thus ensuring the coherence and predictability of the law²³.

In civil law, by contrast, written law, especially codes, occupies a pre-eminent position. Judges, in theory, are limited to interpreting and applying the law without creating new law. However, in practice jurisprudence is also relevant, though its authority is less than in *common law*. As Kelsen notes, “jurisprudence is not formally a source of law...but doctrine has immense authority”²⁴. This is because, although judges do not have the explicit power to create law, their interpretations of the law can influence the practical application and evolution of the law.

In territories where civil law and *common law* came into contact, jurisprudence acted as an engine of change, adapting and transforming civil law to make it compatible with *common law* principles. This process occurred through the judicial interpretation of civil law norms considering *common law* principles and values. In resolving specific cases, judges had to interpret the provisions of civil codes in a way that was coherent with *common law* principles such as equity, reasonableness and the protection of individual rights. This work of interpretation and adaptation was gradual and often involved a real transformation of civil law.

An example of this process can be seen in the evolution of contract law in Louisiana, a US state with a strong influence from French civil law. Throughout the 19th and 20th centuries Louisiana judges interpreted and adapted the provisions of the French Civil Code considering *common law* principles, thereby creating a mixed legal system combining elements from both traditions²⁵. Another example is

²² Hans Kelsen, *Teoría Pura del Derecho*(Eudeba, 1999).

²³ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.

²⁴ Kelsen, *Teoría Pura del Derecho*.

²⁵ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.

found in the jurisprudence of the Supreme Court of Puerto Rico, which has incorporated *common law* principles in interpreting the Puerto Rican Civil Code, especially in areas such as tort law and family law.

This process of transformation of civil law through jurisprudence was not limited to territories colonized by England. In countries such as Japan and South Korea, which adopted civil codes inspired by European models in the late 19th and early 20th centuries, judges have also been active in adapting and interpreting these codes considering their own legal and cultural traditions.

Jurisprudence, as a driver of change, has allowed the evolution and adaptation of civil law to new social, economic and political realities, enriching and complexifying the legal systems in which both traditions converged. This process demonstrates the importance of jurisprudence as an instrument of dialogue and a bridge between different legal traditions, thereby contributing to the creation of law that is more just, equitable and adapted to societal needs. It is important to note that this transformation process was not one-way; there was also an influence of civil law on *common law*. For example, the notion of good faith, present in many civil codes, has been incorporated into the jurisprudence of some *common law* countries such as Canada and the United States.

Thus, it can be affirmed that jurisprudence has been a key factor in the transformation of civil law into *common law* in various territories. Through the interpretation and adaptation of norms, judges have managed to reconcile the principles of both legal traditions, creating mixed and dynamic legal systems that respond to the needs of contemporary societies.

Discussion and Conclusions

Modern constitutionalism, with its emphasis on individual rights and the limitation of state power, owes much to the civil-law tradition. Merryman and Pérez-Perdomo (2014) note that “American constitutionalism had an enormous influence in Latin America and Europe. Judicial review, for example, is now firmly rooted in both traditions”²⁶. This influence is manifested in the adoption of rigid constitutions and the creation of constitutional courts in many civil-law nations.

Likewise, the separation of powers, a fundamental principle of modern constitutional law, has its roots in the European Enlightenment and in authors such as Montesquieu and Locke. Merryman and Pérez-Perdomo (2014) emphasize that

Montesquieu and other authors developed the theory that the only safe way to prevent abuse of this kind was the initial separation of the legislative and executive power from the judicial power, and then the careful regulation of the judiciary to ensure that it was limited to applying the law elaborated by the legislature and did not interfere with public officials in the performance of their administrative functions²⁷.

²⁶ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.13.

²⁷ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.43.

This principle, albeit with nuances and adaptations, has been incorporated into civil-law systems, contributing to a system of checks and balances that limits state power and protects individual rights.

The civil-law tradition, influenced by natural law and the Enlightenment, has been fundamental in the development of human rights. According to Merryman and Pérez-Perdomo (2014)

the new constitutionalism has sought, above all, to guarantee and expand individual rights: rights to due process in civil and criminal matters; to equality; to freedom of association, movement, expression and belief; as well as to education, work, health and economic security²⁸.

Thus, the transformation from civil law to *common law* in territories under Anglo-Saxon influence was a complex process driven by historical, political and social factors. Colonial expansion, the prestige of *common law* and the need to adapt law to new social and economic realities were key elements in this process. Jurisprudence, as an engine of change and adaptation, was fundamental in the transformation of civil law into *common law*. Through the interpretation and adaptation of norms, judges managed to reconcile the principles of both legal traditions, creating mixed and dynamic legal systems that respond to the needs of contemporary societies.

This essay has examined the main characteristics of Roman-canonical law and *common law*, highlighting their differences and similarities. It has analyzed the historical, political and social factors that propelled the transformation of civil law into *common law* in territories under Anglo-Saxon influence, and it has evaluated the role of jurisprudence as a driving force for change and adaptation in this process.

It can be affirmed that the transformation from civil law to *common law* was not a one-way process but a constant dialogue between the two legal traditions. Jurisprudence, as a tool for interpretation and adaptation, allowed the integration of principles and concepts of *common law* into civil law, enriching and strengthening the legal systems in which both traditions converged.

Finally, this study demonstrates the importance of jurisprudence as an instrument of dialogue and a bridge between different legal traditions, thereby contributing to the creation of law that is more just, equitable and adapted to societal needs. The transformation from civil law to *common law* is an example of how law can evolve and adapt to new realities while maintaining its roots and fundamental principles.

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²⁸ Merryman y Pérez Perdomo, *La tradición jurídico-romana*.262.

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