

Book Review

Duncan Fairgrieve, *Comparative Law in Practice – Contract Law in a mid-Channel Jurisdiction*, Oxford University Press, 2016, ISBN 978-1-78225-721-9

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The genesis of the book of Duncan Fairgrieve is to be found in his teaching and research at the Institute of Law in Jersey. Duncan Fairgrieve is an English Comparative law academic, who has lived and worked in France for several years. Having acquired a double competence, both in common law and civil law, he is in the ideal position to analyze the hybrid legal system of Jersey from a comparative perspective.

The Island of Jersey and the other Channel Islands represent the last remnants of the medieval Duchy of Normandy, that held sway in both France and England. Nowadays Jersey does not form part of the United Kingdom but is a self-governing dependency of the British Crown. By constitutional convention established over some 900 years, the Island has complete autonomy in all matters of internal government and the Judicial Committee of the Privy Council remains the Island's ultimate court of appeal.

The Jersey legal system does not have a civil code and written rules are still very much an exception, and yet case law in this sphere is relatively sparse, and where there are cases, the rule of precedent is only lightly observed. Courts instead rely on tradition, which is found in the customary law of Normandy embodied in an informal collection dating from the thirteenth Century and followed, in the sixteenth century, by an official revised version which is impregnated with *ius commune*. Whenever the system lacks a written law and the traditional customary law does not provide a clear answer to the case, the courts look to the ancient French legal doctrine, i.e. the doctrine preceding the French codification, in particular Domat and Pothier. Duncan Fairgrieve explains that the writings of Pothier have thus become one of the primary sources of the Jersey law of contract, representing as it does a sort of a bridge between the ancient customary, law familiar to Jersey, and the law encapsulated into the French Civil Code.

Just recently the Common Law of England has acquired some more consistent influence in the Jersey legal system, since the official language is English; since members of the legal profession, as well as judges, are primarily educated at

English universities and law schools; and since “the majority of banks who lend money on the security of immovable property in the Island are UK-owned”, as pointed out by the Court in *Toothill v. HSBC Bank plc* 2008, JLR 77, 89.

However, despite these ambiguities and despite the fact that, lacking a consistent set of written rules, many areas of the law are a construct of case law, Jersey has a civilian legal system. This is brilliantly explained by Duncan Fairgrieve, pointing out what he refers to as the distinct “mentalité”, the way of reasoning of Jersey judges.

Jersey has rejected the English rule of precedent, thereby creating a dynamic and open-minded approach to the development of the law, described by the Court as “an organic” evolution (*Grove v. Baker* 2005 JLR 348, para 13). Theories, concepts and principles are used regardless of their provenance, in a system of open sources of law which is reflected also in the open economy of the Island. The point made out by the author is that judges reach their decisions by means of deductive reasoning from abstract principles to factual circumstances. This principle-based reasoning, as is well known, is opposite to the pragmatic common law approach based on the assessment of the relevant facts in each case.

Having so described the specific context drawing upon historical, cultural and constitutional perspectives, the author focuses his comparative analysis on Jersey contract law.

The cornerstone of Jersey contract law is the principle of “la convention fait la loi des parties”, which is cited in a myriad of different cases and which embodies the will-theory. As a consequence, the concept of consent plays a central law in Jersey contract law, making predominant the very same subjective approach which characterizes French contract law, rather than the objective approach of the common law.

The author then examines in detail the case law, looking at how the Jersey legal system floats between the French and the common law models in relation to single issues. The general principle of good faith informs all of Jersey contract law and, except in a recent case, shapes a general pre-contractual duty, which is somehow rejected by the Common Law of England, which is reluctant to work from general principles. When interpreting the contract, most of the time Jersey judges look at the common intention of the parties, rather than at the objective meaning captured by third party’s eyes. But the case law is not always consistent with the others. For example, the English law doctrine of misrepresentation has been introduced into vices de consentement, though the former does not necessarily fit naturally into the matrix of the latter. As comparative lawyers well know, also the language used by the courts reveal their underlying thoughts and their implicit references. A contract in Jersey is not void, it is nul. Jersey judges use the notion of cause instead of consideration. In this respect, the author explains that

the notion of cause provides the courts with a more intrusive tool for scrutinizing the contractual bargain and therefore is very useful to their paternalistic approach, which is the typical approach of a small jurisdiction, where citizens need a special protection and where the small community imposes a close control on the morality of the acts, including contracts.

At the end of this succinct, though detailed, analysis the reader will have acquired not only the access key to Jersey contract law, but also a new perspective on differences and affinities between common law and civil law, in a way which will be invaluable for all comparative lawyers. As Rodolfo Sacco explains in his works, the comparison with the other is the way towards the better understanding of ourselves, and is the tool which sheds the light on what remains unconscious, unrevealed in our own way of functioning (the so called criptotypes).