‘The Debt Is Forgotten’: A Compendious View of Arthur Browne, c1756-1805

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1. Introduction

Today, I’ll be discussing the Irish jurist Arthur Browne against the backdrop of eighteenth-century legal education and ‘science’ in the Anglophonic world. Browne was one the most gifted legal scholars of eighteenth-century Ireland; he was also an educator, an advocate, and a parliamentarian. This paper overlaps with both my earlier work on Edmund Burke and a forthcoming collection on Irish legal history.¹ It’s also part of my wider research on comparative legal history. I believe that comparative lawyers must be more mindful of legal history, especially its complexity and hybridity. Perhaps even more importantly, legal historians must be more mindful of comparative law. The materials and methods of modern comparative law have much to offer.

2. England’s (and Ireland’s) Mixed Jurisdiction

For much of Western history, the legal traditions of Europe were characterised by considerable pluralism and diversity. I recently published an article arguing that, in its open nature and use of transnational, pan-European bodies of law and legal doctrine, England was, in fact, little different. A wide variety of legal sources or authorities, including many from beyond positive law, were persuasive in legislation and adjudication. The creation of genuinely common or general national laws, a legal ‘system’ centred on the state, and the elimination of competing jurisdictions was a very long historical process. Over the centuries, English, Welsh, and Irish lawyers were active participants in, and selectively incorporated significant elements of, continental law. Eighteenth-century England and Ireland—and more obviously Scotland—were, I argue, mixed or hybrid legal systems.²

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The hybrid Anglo-Norman law of England’s royal courts was a mixture of, among other sources, Saxon and Danish legal traditions with Norman feudal law. It was a general law common to the realm, but, for centuries, it was only one of many English jurisdictions. Others included a wide variety of local, urban, manorial, and commercial courts as well as the native and ‘march’ law of its Celtic fringes. If the procedural peculiarities of the writ system and the corresponding importance of the legal guild training at London’s Inns of Chancery and Court served to insulate its law from pervasive reception, there were ‘Anglo-civilian’ and ‘Anglo-canonical’ courts linked more or less directly to continental legal thought. These courts included the admiralty, chivalry, and university courts, as well as (arguably) the Court of Chancery and other prerogative courts. England’s ecclesiastical courts, too, were little different from those across the Channel, even long after the Reformation. Over time, each of these laws influenced the doctrine and structure of the common law courts—often by their absorption into the common law—to create the modern English legal system, generally, if simplistically, referred to as the ‘common law’.

With the arrival of English law and legal institutions in the twelfth century and the subsequent elimination of the native Brehon tradition in the early seventeenth century, eighteenth-century Irish courts were little different from those of England or Wales.

3. Legal Science and Legal Study

Legal study was, of course, closely connected to, indeed effectively created, European universities.\(^3\) From the twelfth-century rediscovery of Justinian’s *Digest* (533), the study of Roman law became an integral part of European education and scholarship. The texts of the *Corpus Iuris Civilis* were treated with respect second only to that afforded the Bible. Legal science was coupled with theology; the ‘Civil law’ with the Canon law.

Even in England, where common lawyers repeatedly fought a large-scale ‘reception’ or formal incorporation of European law, the universities of Oxford and Cambridge taught the ‘written reason’ of the Romans and Canon law. Subsequently, Trinity College, Dublin would also teach the civil law.

Throughout Europe, there had been training in the various national laws outside of the universities, but it was only the seventeenth and eighteen centuries that brought this study into the academy. Even so, the university study of national law was mediated by Roman forms. Elementary, comprehensive student texts offering, *if you like, compendious* views of a national law were written on the model of Justinian’s *Institutes* (533). These ‘institutional’ writings were, however, often written in the vernacular rather than in Latin.

In England and Ireland, university study of the national common law developed slowly. Pervasive criticism of the English system eventually led, by the middle of the eighteenth century, to the creation of a professorship in common law at the University of Oxford to provide a more liberal legal education to students and ‘gentlemen’. Chairs in Dublin and Cambridge, as well as in the new American republic, soon followed.

Most notable was, of course, William Blackstone, the first university lecturer in common law and author of the tremendously influential *Commentaries on the laws of England* (1765-9). Even the *Commentaries* adopted the ‘institutional’ structure. Blackstone, who’d unsuccessfully sought the Oxford Chair of civil law has even been called ‘essentially a civilian and an academic’.

\(^3\) See Donlan, ‘‘The places most fit for this purpose”: Francis Stoughton Sullivan and legal study at the University of Dublin (1761-6)” (2005) 18 *Eighteenth-Century Ireland/Iris an dá chultúr*. 
But, with the exception of work on Blackstone, little interest has been shown in eighteenth-century university legal study or the scholarship it generated. Subsequent lecturers in the common law have received scant attention. Anglo- and ‘Hiberno’-civilians are almost entirely ignored. This oversight is unfortunate as these jurists represent an important nexus for the transmission of European thought and an underappreciated British and Irish connection to the continent. Re-creating their legal discourse clarifies continental links often obscured by nationalist historiography and Anglo—or Anglo-American—exceptionalism. Both the laws, as well as the manners, of England and Ireland were not unimportantly European or pan-European.

4. **By Birth an American**

Born at mid-century (1756?), Arthur Browne was ‘by birth an American, tho’ of Irish extraction’. Orphaned by sixteen, he left America to study at Trinity College, Dublin. At Trinity after Sullivan, as at Oxford after Blackstone, legal teaching had gone into decline. It was not until late in the next, that is the nineteenth, century that university legal education was firmly established and only in the twentieth century that it become commonplace in Britain or Ireland.

Browne’s legal study at Trinity focused instead on the learned laws. He was made a Scholar (1774), received his BA (1776), and became a junior fellow (1777). He subsequently received an MA (1779), LLB (1780), and LLD (1784). As with most Anglo-civilians, Browne also studied the common law. He studied at London’s Lincoln’s Inn, was called to the Irish Bar in 1779, and subsequently received his LLD in 1784. He was a true mixed jurist.

Browne’s legal experience was as extensive as it was varied. He was both an advocate in the civilian and ecclesiastical courts (1784) and a barrister in the common law courts. He was also senior proctor and vicar-general of the diocese of Kildare and later king’s counsel (1795). Late in life, Browne was the last prime serjeant (sometimes, as a result, sitting with the assizes, 1802), a privy councillor (1802), and a bencher at Dublin’s King’s Inns (1803).

In an early work entitled *Thoughts on the present state of the College of Dublin* (1782), Browne wrote that ‘law is a regular science. To understand its theory, a knowledge of other sciences is previously requisite. To form the practitioner of unsullied fame, liberal sentiment should be early inculcated.’ Browne himself was clearly a man of diverse learning and had a distinguished academic career. He was appointed professor of civil law in 1785. A polyglot, he also served as professor of Greek for over a decade (1792-5, 1797-9, 1801-5). Browne

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5 But see RB Robinson, ‘The two institutes of Thomas Wood: a study in eighteenth-century legal scholarship’ (1991) 35 American Journal of Legal History 432 and Donlan, ‘“Our laws are as mixed as our language”.


7 *Thoughts on the present state of the College of Dublin* (1782), 47-48. The author praised the university’s talent and decried its lack of recognition. See the Fitzwilliam (Milton) Burke Collection at the Northampton Record Office, F (M) 1/1630 (3 May 1782). See also ‘The Bar’ in *Miscellaneous sketches: or, hints for essays* (1798), ii.372-81.
appears to have read French, Greek, Latin, Italian, and Spanish, had a working knowledge of German and Hebrew, and, in his own words, ‘a smattering’ of Persian.\(^8\) Browne, in fact, published a number of works on the Greek language and on Roman history as well as numerous translations.\(^9\) This diversity is illustrated, too, in his *Miscellaneous sketches* (1798), which contained essays on religion, Gibbon, Johnson, the rules of evidence, and on duelling. Browne also wrote antiquarian pieces and was a member of the Royal Irish Academy.\(^10\) The auction catalogues of his library run over a hundred pages and contain the great works of both English and continental legal scholarship.\(^11\) Browne was even, according to one writer, ‘the idol of the students’.\(^12\) He was later made a Senior Fellow (1795). He might even have been made Provost had he lived longer.\(^13\) A portrait of Browne remains in the Provost’s House today.

But Browne was no mere bookish intellectual. He was also a politician elected to the Irish parliament for Trinity College three times (1783-1800) in the years after legislative independence (1783) until the Act of Union (1800). An Irish whig, Browne was a parliamentary independent often in opposition to the executive in Dublin Castle. In his first decade in parliament, Browne was a stanch advocate of the rights of the established church, especially on the subject of tithes.\(^14\) But he was also a defender of the ‘rule of law’ in Ireland. His political protestantism underwent considerable and complex changes in the 1780s to the 1790s.

Browne is perhaps best known in Irish history for changing his mind on the subject of the political union of Britain and Ireland in the aftermath of the 1798 rebellion in Ireland. Initially opposed to the Act of Union, Browne subsequently changed his mind, believing it better for Ireland’s peace and prosperity. He lost his seat in Parliament, and many friends, as a result.\(^15\) Many modern scholars interpret the change to the government’s offer of place. I argue that place was likely a reward for arriving at a point towards which he’d been travelling for the previous decade. In any event, Browne died rather early in 8 June 1805 at the age of forty-nine.

\(^{8}\) *Miscellaneous sketches*, ii.308.

\(^{9}\) For his use of Persian, it was necessary to set type for the language for the first time in Ireland. See Brief strictures on certain observations of Lord Monboddo respecting the Greek tenses (1790, 1792); The comparative authenticity of Tacitus and Suetonius, illustrated by the question, “whether Nero was the author of the memorable conflagration at Rome?” (1796); Some few brief principles of Tacticks, extracted from Guibert (1797); Some observations upon the Greek accents (1800); Hussen O DIl. Beauty and the heart, an allegory; translated from the Persian language (1801); Translations from various languages, mostly illustrative of the old Spanish poetry and romance (1802).

\(^{10}\) Some account of the Vicars Cairn, in the county of Armagh; communicated to the Committee of Antiquities in two letters, one from Dr Browne, Senior Fellow of Trinity College, Dublin; the other from the Rev John Young, Curate of Mullabrack (1802) and An Account of some ancient trumpets, dug up in a bog near Armagh (1802).

\(^{11}\) See the very extensive library catalogues in Trinity College Dublin (the ‘Printed Catalogue’ Q.pp.42.No.2 (RR.k.82.No.3), Q.pp.42.No.3, Q.pp.42.No.5, and Q.pp.42.No.6).

\(^{12}\) [Falkland], *A review*, 31. These words are repeated verbatim in Browne’s obituary in *Walker’s Hibernian Magazine* (October 1805).

\(^{13}\) The literary miscellany, including dissertations and essays on subjects of literature, science, and morals; biographical and historical sketches; critical remarks on language; with occasional reviews (1806), 229.

\(^{14}\) A full display of some late publications on the subject of tithes and the sufferings of the established clergy in the south of Ireland, attributed to those dues; with strictures necessary for the further elucidation of that subject (1788).

\(^{15}\) See Remarks on the terms of the Union (1800).
5. Work

More important, however, for my purposes here are Browne’s legal writings. These included works based on his lectures on ecclesiastical and civil law, especially the law of admiralty. I want to briefly review Browne’s Compendious view of the Civil law, first published in 1797. The heart of the work is divided, not surprisingly into three books: ‘Of the rights of persons’, ‘Of the rights of things’, and ‘Of wrongs and their remedies’. This threefold division is familiar to any student of the Justinian’s (or Gaius’) Institutes or even Blackstone’s Commentaries.

‘It is surprising,’ Browne wrote in his preface,

how few gentlemen of the legal profession, (excepting those, and they are not numerous, who have studied in Scotland), are acquainted with this science, notwithstanding the encomiums bestowed on it by Lord Hardwicke and Lord Mansfield, and the constant references to it in the books of reports.

He reviewed the limitations of existing works on the subject. The French jurist Jean Domat’s work ‘was calculated for the meridian of France.’ The Englishman John Ayliffe (1676-1732)’s New pandect of Roman civil law (1734) was ‘learned, [but] dull and tedious, and stuffed with superfluous matter, delivered in a most confused manner’. Edward Gibbon (1737-94)’s famous forty-fourth chapter on Roman jurisprudence in his The decline and fall of the Roman empire in six volumes (1776-88) was ‘too short, and, … presupposes rather than conveys knowledge’.

Thomas Wood (1661-1722) wrote ‘institutes’ of both civil and English law almost a century before Browne’s works. The Irishman believed Wood’s New institute of the imperial or civil law (1704) was ‘an excellent work for the student, [but] pursues a method not familiar to the English lawyer.’ The elements of civil law (1755), published at mid-century by Cambridge’s John Taylor (c1704-66) was ‘highly respectable, [but] filled with heterogenous matter’. He was, with Gibbon, ‘a rambling writer.’ And, in Browne’s words,

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16 A compendious view of the Civil law, being the substance of a course of lectures, read in the University of Dublin (1797, 1802) and A Compendious view of the ecclesiastical law of Ireland, being the substance of a course of lectures read in the University of Dublin ... To which is added, a sketch of the practice of the ecclesiastical courts, with somes cases determined therein ... (1803?).
17 For this paper, I have quoted the Law Book Exchange’s reprint of Browne, A compendious view of the Civil law, being the substance of a course of lectures, read in the University of Dublin (2nd edn) 1840), i-vi. ‘I have always ascribed this defect not to want of diligence, but to the nature and quality of the treatises on the subject, for in quantity and number they are abundant.’ Ibid., i.vi.
18 Ibid., vi.
19 Ibid. Ayliffe, LLD, published on civil and canon law, wrote a history of Oxford, and served as a proctor in the University’s chancellor’s court.
20 Ibid.
21 Wood was an Oxford DCL and briefly assessor of the vice-chancellor’s court there. He was also called to the bar at Gray’s Inn.
22 Ibid.
23 Ibid. Taylor was a Cambridge LLD, a classical scholar and civilian advocate, ecclesiastic, and subsequently chancellor of Lincoln. The Elements of the civil law (1755) were published in a second edition (1769). There was also an abridged Summary of the Roman law (1773).
24 A compendious view, vi.
‘[l]astly Heineccius, an author powerful in erudition, [but] by a German dress and sectional form, disgusts the English eye.’ 25

Interestingly, Browne hoped his own work might, by adopting ‘the method and order’ of Blackstone ‘entice the student of the common law to take at least a cursory and general view of this more ancient code.’ 26 But he ended his preface by suggesting that

The English forum sometimes treats the study of the civil law with levity, but may its disciples be permitted to say, that it never was despised but by those who were ignorant of it. The very numerous cases in our books of reports … in which the utility of this knowledge was eminently conspicuous, are so many irrefragable proofs of its advantage to the common lawyer.27

This apologia continues in the first two introductory chapters of the work.

In the first chapter, entitled ‘On the utility of the study of the civil law’, Browne argued that the civil law was ‘the most perfect system of justice and equity between man and man, which has ever been produced by human invention’ and ‘as a collection of written reason; as a great body of principles, founded in natural equity, it has no rival.’28 He mentions other European laws, including England’s, being born in ‘rudeness and barbarity’; they were, he said, ‘laws of shreds and patches’. 29 In contrast, the ‘civil law’ was, he argued—in a Burkean key—‘the offspring of philosophy and science’ built on the ‘labors and compilations of many ages and countries’. 30 As such, it was ‘an excellent repository of those rules, which ought to guide the natural conduct of states, and contains in its bosom the law of nations, as well as of nature.’31

Browne cites the importance of the civil law to Grotius and others and briefly discusses its application in Holland, Germany, and Italy. He noted, too, that, its place in England ‘[i]n the courts, military, maritime, and ecclesiastical’.32 Indeed, Browne suggests that ‘the man whose philosophic ambition aims at something beyond the skill of an able attorney … ought to be a disciple of Justinian as well as of [Lord] Coke.’ 33 Perhaps of most interest, Browne writes:

In the process of time, when the rude spirit of ancient chivalry was calmed, when the shackles upon alienation [of property] were struck off, and wiser policy calling the attention of the nation to its commercial advantages and insular situation, expanded our sails over every field of the ocean, a new series of transactions arose amongst men—new subjects of controversy—new sources of litigation and difficulties, which found no resolution in feudal regulations. Hence much of the civil law, which had

25 Ibid.
26 Ibid., i.vi-vii. On Blackstone, see 166 et seq and note differences.
27 Ibid., i.viii-ix.
28 Ibid., i.1, i.1-2.
29 Ibid., i.2, 2.
30 Ibid., i.3. ‘The civil law, (says an eminent author) as a system of jurisprudence framed by wise men, and approved by the experience of many ages, must, in every age and every country, furnish principles which, modified and applied as the altered circumstances of the times may require, will greatly contribute to the real interests and advantages of society’. Ibid., i.391.
31 Ibid., i.4.
32 Ibid., i.9-10. See Ibid., i.10.
33 Ibid., 11.
diffusively treated of these matters, was incorporated with our own, though by long
use the debt is forgotten, and we are apt to consider it as part of our original stock.34

Indeed, the ‘maxims, rules, and reasonings of the civil law, have often been adopted, or used
by way of illustration, by our common lawyers.’35 In a more modern flavour, Browne noted
the value to law reform of studying different approaches to law.36

These comments, as well as the continental influence on Equity, ‘induced’ Browne in
his project
to make the experiment, whether an attempt to read a course of lectures, instituting a
comparison between the Roman and English laws—expounding the former, and
marking the rules, principles and practice, which it has transmitted to the latter, might
be acceptable to the public and the University. [That these] forensic studies are very
properly made a branch of university learning, has been ably argued by the celebrated
commentator on the Laws of England and every plea which can hold for introducing
into this place the study of the common, has tenfold force when applied to the civil
law…37

Browne here cites the examples of Cambridge’s Samuel Hallifax (1733-90) and Oxford’s
Thomas Bever (c1725-91).38 The former had published An analysis of the Roman civil law
compared with the laws of England in 1774; the latter had published A discourse on the study
of jurisprudence and the civil law somewhat earlier in 1766. Beyond England, Browne singles
out John Millar (1735-1801) of the University of Glasgow for special praise and ‘deserved
celebrity’.39

The work is not without its ‘whiggish’ elements, especially on the association of the
civil law with ‘arbitrary’ government and the praise of the English jury and criminal law, ‘the
glory of Britain and of Ireland’.40 But in the second introductory chapter, ‘On the comparative
excellence of the civil and common laws’, Browne discussed the ‘contest of prevalence’
between the common and civil law in England.41 This contest, he noted, had ‘long since
ceased, but [had been] conducted on political rather than philosophical grounds, [and]
engender[ed] a cloud of heat and prejudice, which long obscured a fair comparison of their
merits.’42 Similarly, he notes later in the chapter that, in respect to the courts of Equity, past
‘charge[s] of encroachment on the legal jurisdictions [of the common law], was prompted by
ignorance, or instigated by party.’43 There he also notes that ‘the debt of our code to the civil,
is most conspicuously shewn in the branch of title arising from contract.’44

34 Ibid., i.12-13.
35 Ibid., i.12n19.
36 Its value was ‘see[ing] whether any, and what changes would be advisable to be introduced … into our own
laws.’ Ibid., i.194n10.
37 Ibid., i.13-14. The ‘celebrated commentator on the Laws of England’ is obviously Blackstone.
38 Hallifax, LLD, professor of civil law at Cambridge, and bishop of St Asaph, wrote on law and religion. Bever,
DCL and professor of civil law at Oxford at mid-century, was judge of the cinque ports and chancellor of the
dioeceses of Lincoln and Bangor.
39 Ibid., i.14.
40 Ibid., i.18-19, 43-6.
41 Ibid., i.21.
42 Ibid.
43 Ibid., i.40-41.
44 Ibid., i.34.
But Browne also noted, too, Roman principles similar to the ‘double jeopardy’ and ‘habeas corpus’ provisions of English law. He cited the work of William Jones (1746-94) extensively, in which the famous comparativist drew parallels between Roman law and English common law. He noted the role of ‘Churchmen’, who he called ‘our first jurists’. In fact, the first volume of the Compendious view contains a long section ‘On the Practice of the Ecclesiastical Courts’, the second is concerned almost exclusively with the ‘law of the admiralty’. The latter drew heavily on William Murray, lord Mansfield (1705-93) and Sir William Scott, lord Stowell (1745-1836), but underscored the general importance of Roman law. Browne ‘beg[ged] that he may not be accused of plagiarism [sic], if on controverted questions he has adopted the very words of Lord Mansfield, and Sir William Scott, even at considerable length.’

There are comments, too, on the law of nations, itself in significant part a pan-European development rooted in Roman sources. Browne is not uncritical of Blackstone and Coke. His comments on Blackstone are admittedly complicated. Especially critical of the Englishman in the first of the two volumes, the second includes an extended footnote explaining:

The truth is, Blackstone’s Commentaries are a most useful, great, and precious work, but by no means implicitly to be depended upon. Let not the author of this be suspected of vanity; if he, or any elementary writer, be guilty of as few errors as Sir W Blackstone, he will be fortunate indeed. Such works as this bear no proportion in importance or extent to his, any more than in the abilities of the author: but let us not be blind. Besides the political errors often marked in that great work, there are many legal ones.

More to my purpose here, he notes Blackstone’s ‘reluctance … to admit our debts to the civil law’. And, of Lord Coke, Browne writes that he ‘could not endure any thing connected with the civil law.’

Finally, a quick comment on Irish matters. Curiously, Browne discussed ‘gavelling’, the equal division of property between heirs at death. Although the term applies to the legal practice of Kent, the phrase had been associated in the past with the Brehon laws. Those laws were effectively eliminated in the early seventeenth century only to return in the penal laws against catholic and dissenters. As Browne put it, gavelling is ‘with us … almost considered a punishment, and has actually been made the instrument of penal laws. Yet gavel[ing] is the policy of republics’. Indeed, he writes, primogeniture ‘originated with barbarians’. There are few other Irish comments. Browne makes brief remarks on Trinity in footnotes relating to the corporate nature of universities and the revival of Roman learning. He even voices his

45 See Ibid., i.429-30.
46 Ibid., i.350n11 et seq (on ‘An essay on the law of bailments’).
47 Ibid., i.39. On the ecclesiastical courts, see Ibid., i.449-508.
48 See, eg, Ibid., ii.43-4.
49 Ibid, ii insert between pages 20 and 21.
50 Ibid., ii.217n13 (continued from ii.216).
51 Ibid., i.218n. This, he says, ‘frequently appears.’ Ibid.
52 Ibid., ii.84n16 (continued from ii.83).
53 Ibid., i.27.
54 Ibid., i.28.
55 Ibid., i.151-3.
concern, interesting given the destruction of so many public records in the last century, about the danger posed by fire to ‘wills, those most important muniments of property’.  

6. Conclusion

The late eighteenth- and early nineteenth-centuries saw the intellectual and institutional foundations of Europe’s ancien régimes change forever. The pluralism that had characterised Europe was largely eliminated in favour of greater legal uniformity. In addition to important local causes, the British-Irish Union (1800) and the ever-expanding encroachment of the common law on England’s other jurisdictions parallel these developments. Browne’s writings, coming after the revolution in France, but before promulgation of the Code Civil offers an important internal insight into legal study and legal science in this crucial period. Indeed, the debt owed to Browne and other Anglo- or Hiberno-civilians is too often forgotten.


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56 Ibid., i.339n123. They were ‘in no manner protected from fire, but on the contrary in the most remarkable manner exposed to it’. Ibid. In the second volume, he refers to his work on the Treaty of Limerick. Ibid., ii.11-12. See Ibid., 17 on the ‘tribunal of history’.

57 When republished in two volumes, the second focused on the law of admiralty and was very successful in America. See Sweeney, 59-132.