A HISTORY OF Law in Europe

From the Early Middle Ages to the Twentieth Century

ANTONIO PADOA-SCHIOPPA

CAMBRIDGE

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A HISTORY OF LAW IN EUROPE

With its roots in ancient Greece, Roman law and Christianity, European legal history is the history of a common civilisation. The exchange of legislative models, doctrines and customs within Europe included English common law and was extensive from the early Middle Ages to the present time. In this seminal work, which spans from the fifth to the twentieth century, Antonio Padoa-Schioppa explores how law was brought to life in the six main phases of European legal history. By analysing a selection of the institutions of private and public law most representative of each phase and each country, he also sheds light on the common features in the history of European legal culture. Translated into English for the first time, this new edition has been revised to include the recent developments of the European Union and the legal-historical works of the past decade.

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PREFACE

Legal regimes reveal their identities in their sources of law. According to a traditional division, these sources are legislation, legal doctrine and legal practice. Legislation is the authoritative source of rules of behaviour imposed on subjects living under its provisions. Legal doctrine is the intellectual activity engaged in by professionals and legal scholars trained not only to identify, interpret and systematise legal norms for the purpose of making them explicit, coherent and applicable to real-life cases, but also to envisage new and different ones that might better address the values or interests deemed worthy of safeguarding. Legal practice is the expression of the legally relevant behaviours rooted in the customs of a community and is established over time by its members or rulers, or in judicial decisions made in settling disputes in private or criminal law.

These sources are essential to our understanding of legal regimes from antiquity to the present day. Each of them in the first instance sheds light on one aspect of the historical context to which it belongs, but invariably also bears the traces of other aspects which provide further information, essential for a clearer understanding of a legal system.

Indeed, not only is legislation the product of a ruler's will, but it also reflects the intellectual framework and the customs current at the time it was enacted. Legal doctrine is embedded in the ideas and in the methods of the intellectual framework of the time, but it can also be an indicator of parallel normative rules and customs. Legal practice shows the tendencies and concrete choices made by individuals or communities and by the law courts in real-life cases, but it also directly or indirectly records – through transactions, contracts and court decisions – the normative framework and the culture of the legal profession.

The relevance of each of these sources was to vary over time. The early Middle Ages shows a profusion of customary laws; the following period, from the twelfth century onwards, was to see the emergence of a new legal science as an autonomous source of law. Beginning from the late eighteenth century, legislation was to achieve the role of the dominant source

of law throughout the reforms, the subsequent codifications and the feverish increase in statutory laws produced in the nineteenth and twentieth centuries. To show the transformations and the connections between these sources is a major task of the legal historian. Such osmotic relationships have persisted throughout even lengthy phases in which one or other legal source was to dominate. The dissonances between them must also be taken into account: between law and practice, between the lawgiver's will and learned opinion, between law in books and law in action; these are essential to the understanding of a legal regime, and as such they need to be seen in their historical context. To this end, non-legal sources are also relevant, beginning with literary sources, novels, poetry, plays and films, which often effectively portray the *actual* reality of the legal order (or disorder) of their time.

It is important to clarify the methods by which legal doctrine and legal practice shaped normative bodies, their way of tackling legally relevant facts and how these methods evolved over time, and also to try to detect the ways in which in the different epochs attempts were made to meet two basic demands on which the entire legal world hinges: the need for justice and the need for certainty. These two poles should be seen through their relationship to each other and the political power.

Law has always interacted with the organisation of civil society as well as with economics, political powers, philosophy, culture and religion. The study of legal history is fascinating also because of these multiple interrelations.

In law, the history of facts and the history of ideas are continually intersecting, as proven by the constant interrelation between legislation, legal doctrine and custom. In legal life, not only are the interests (often conflicting) but also the values (often dissonant and in conflict with the interests) both extant and intertwined: any court decision or statutory law, any opinion uttered by a legal scholar, incorporates a mixture of interests and values, and this is true in every branch of law, from constitutional to criminal law, from private law to procedure. The legal historian must attempt to untangle the strands of this mixture, though unexpressed by – and often implicit and concealed to – the lawyers and jurists themselves.

Because the conceptual structure, the normative bodies and the judicial decisions are essentially the work of individuals, this account includes brief references to the protagonists of this long history. In its evolution over time, from the early Middle Ages to the present, the correlation between the laws and the role played by professional jurists – both as individuals

and as a class, roles which did not always coincide – underwent very significant transformations.

The reciprocal influence of customs, norms and jurists as well as of law books, and their broad circulation throughout Europe, including England, have been a constant feature in the evolution of European law. Therefore, the legal history of each European country cannot be thought or understood in isolation: this justifies the European perspective of this book. This assumption in no way underestimates the astonishing variety of local and regional features – as attested by customs, city statutes and the laws of principalities and kingdoms – which are among the greatest riches of European civilisation; nor does it overlook the very different legal rules applied to individuals of each social order, the progressive removal of which took place in the modern age. Over and above local and particular laws were the two imposing general normative bodies – the Roman *ius commune* and canon law – which, though showing different features at different times, made a unifying mark on the entire evolution of European law.

Indeed, the history of law in Europe traces the evolution of a common civilisation, one which might be defined as a common 'republic of legal culture'. We owe the awareness of this common legacy, at least in part, to the process of European unification of the past seventy years, which has contributed to reshaping our understanding of the past: '*vita magistra historiae*'.

The emphasis in this outline will be on the ways in which *new law* was brought to life in different phases of medieval and modern times, underlining the discontinuity of certain moments and topics within a continuous process of evolution. In order to shed light on the historical picture as a whole, a selection has been made of the institutions of private and public law which the author considers among the most representative of each historical phase – though space will not allow each of them to be dealt with in depth. The choice might be greatly expanded upon, due to the extraordinary wealth of models offered by legal evolution in Europe over hundreds of years.

In order to follow the development of law both in single countries and other regions of the continent, the focus is on countries and developments which have had the greatest significance as innovative in each historical period. In different ways and in different centuries, Italy, France, Spain, the Low Countries and Germany have played a central role – in political, economic and cultural terms as well as in law. Though different in its genesis, developments and features, English law has

nevertheless had such significant interchanges with continental law that it would be misleading to exclude it from any account of the legal history of Europe. One need only underline some fundamental features of European continental law which are of English origin. Among these, the constitutional model that established three *distinct* public bodies, the legislative, the executive and the judicial powers; the industrial revolution and its institutional and normative effect on commercial law, labour law, social services and the market rules; and a criminal justice system based on the popular jury. No less noteworthy is the reverse continental influence on Great Britain – in legal doctrine, canon law, law merchant, equity law and in several other fields, as historical research has shown.

Besides these, other countries too have significantly contributed to the polyphony of European legal history: from Ireland to Scandinavia, from Portugal to Switzerland, from Scotland to Hapsburg Austria and Eastern Europe (consider e.g. the ramifications of the Norman institutions and customs, from northern France to Sicily, from England to Russia), not to mention the fundamental role played by the Church and canon law. Rome, Constantinople, Bologna, London, Orléans, Perugia, Bourges, Salamanca, Leyden, Paris, Vienna and Brussels: at one time or another, a large portion of European law of the past two millennia was to emerge from within these cities.

This historical process implies a constant reference to the three major components of our intellectual heritage from the age of antiquity – Greek philosophy, Roman law and Christianity – all of which were ever present and constantly reinterpreted over the centuries. It would be unthinkable not to take these into account in any history of European law.

The weight given to the medieval era in this book is due to the fundamental role played by medieval customary law and the new legal science of the twelfth century in shaping some aspects of law which are still alive and discernible in modern and contemporary law. Some areas – particularly in private law and in the methods at the basis of the work of jurists, judges, advocates and notaries – are the fruit of a genesis and a tradition that reaches far back in time, from antiquity to the Middle Ages. To ignore this is to risk misunderstanding not only the past, but also the foundations of the laws in force today.

It is undeniable that there have been some phases of deep discontinuity in medieval and modern legal history – particularly in the sixth, twelfth, eighteenth and twentieth centuries – concerning which, albeit with very different approaches, the term 'revolution' (Berman, 1983/2003; Halpérin, 2014) might be fittingly used. This does not contradict the

statement by Maitland that 'the only direct utility of legal history (to say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law' (Maitland to Dicey, 1896, in Fifoot 1971, p. 143).

Due to space requirements, reference to primary and secondary sources has been limited. Their purpose is for verification and more in-depth study of the texts themselves for those inclined to go further. Corrections of any errors or inconsistencies in the text will be gratefully received.

This book is dedicated to my wife, Pini.

Antonio Padoa-Schioppa
Milan, March 2007

The English translation of this work has given me the opportunity of introducing updates which at least in part take into account the wealth of recent publications; several further short paragraphs and remarks have also been added, particularly on the early and late Middle Ages, as well as on the recent economic and institutional developments within the European Union.

The Italian poet and philosopher Giacomo Leopardi observed that 'the surest way of concealing the limits of one's knowledge is never to surpass them' (*Zibaldone*, 4482). In this book, such limits have undoubtedly been crossed: understandably, only a few of the sections of this history are the fruit of the author's first-hand research on primary sources, and the amount of secondary literature that should be considered is enormous. However, the risk seemed worthwhile taking, the author's intent being to present an outline which in several respects is different from those drawn in other recent and valuable works on European legal history.

Milan, March 2017

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PART I

Late Antiquity to the Early Middle Ages (Fifth–Eleventh Centuries)

The transition from the ancient to the medieval world, between the fourth and sixth centuries, and the concurrent influx of Germanic settlers who in previous centuries had dwelled on the outskirts of the Empire engrafted Europe with a corpus of new institutions and customs which were far from Roman law but equally far from the traditional customs of the Germanic races. The law of the late Roman Empire nevertheless had a considerable influence on the public precepts and private law itself of the Germanic people, who had by then relinquished their original nomadic state and were permanently settled throughout the territory.

Thus began an era which was to last around 600 years, until the end of the eleventh century, during which time what had survived of Roman law within the Germanic kingdoms of Western Europe variously intermingled and coexisted with Germanic customs, part of which were set down in writing, mostly in Latin, from the sixth century onwards. The Church was to exercise its authority and with it a fundamental cultural, religious and pastoral role, but also a social and political one. It contributed by transmitting to civilised society many rules of law derived from Roman law which the Church had made its own, but also and more importantly the inestimable heritage of ancient Greek and Roman culture, of which all that has survived are the texts chosen and transcribed by medieval clerics and monks.

Although the written laws of the Franks, the Lombards, the Visigoths, the Anglo-Saxons and other Germanic peoples include many rules willed by the kings who issued them, their primary root is undoubtedly that of custom. Following the ninth-century resurgence of the Western Empire under Charlemagne, for the first time in history the premises were created for a political and juridical union of Western Europe.

These were the centuries during which custom dominated the sources of law, ultimately giving life to new and complex institutions which cannot be considered either Roman or Germanic. The feudal

relationships which were to take root on the continent through custom were to develop by the same route. Custom is not static, but transformed in time and space, at different times in different areas. Neither was custom always nor solely spontaneous: feudal law and the servile condition, at once flexible and stable, resulted from the forces which had been present in the arena for centuries and in the course of which public power underwent profound changes, which were then reflected in the laws of the time. Personal status, family structure, contracts, the criminal system and trials were wrought by a harsh and often violent reality, in which the exercise of force coexisted with the very different values of the Christian message.

Despite the extraordinary variety of local customs, many fundamental common elements exist in early medieval European law, deriving both from common religious beliefs and the similar conditions in which the predominantly rural and military societies lived.

This historical condition of Europe was to undergo a profound change with the great 'renaissance' of the legal system in the eleventh and twelfth centuries.

1

Law in Late Antiquity

1.1 Political Structures

In the last centuries of the ancient world – the centuries between the age of Constantine (313–334) and the age of Justinian (527–565) – Roman law experienced a series of profound changes, which were to have an influence on the entire successive cycle of legal history in Europe. The vast territory of the late Empire included the area of the whole Mediterranean basin extending as far as the Rhine, the Danube and southern England. It was divided into 114 administrative provinces, equally split between the Eastern and Western Empires, the first with a capital to begin with in Rome then in Milan and Trier; the second with a capital in Constantinople. The bipartite political, juridical and administrative division between the empires of East and West was emphasised at the end of the fourth century [Demougeot 1951], becoming irreversible with the fall of the Western Empire in 476. This did not prevent the leadership being centred on a single man during some phases of late antiquity, under the governance of some great emperors, among them Constantine, Theodosius I and Justinian. The apogee of power was at once powerful and fragile. Succession to the throne entailed two emperors (the *Augusti*) and two designated successors (the *Caesars*), in a partnership which was in practice often disregarded and in any case characterised by mutual diffidence, so well expressed in the fourth-century sculpture in Venice representing four personages forming a single group: one hand leans on the shoulder of a colleague, but the other grasps the hilt of a sword.[1]

Civil and military administration had been separated from the time of Constantine [E. Stein 1968], by a radical reform in antithesis with the classical Roman principle of the indivisibility of the *imperium*. Three distinct hierarchies stood side by side in the territory, in a legal order whose articulated complexity induced a great historian to state that in comparison 'all hierarchical settings of successive eras seem the mediocre

[1] The 'Four Tetrarchs', relief in porphyry from St. Mark's Basilica, Venice.

work of beginners' [Mommsen 1893]. The military hierarchy revolved around *duces* and *magistri militium* posted in various parts of the Empire, as well as mobile military units that followed the Emperor as needed. After the decline of the classical formular procedure and the advent of the *cognitio extra ordinem*, the functions of the civil hierarchy were both an administrative and public order, but also included the function of civil and criminal judiciary. This was separated into as many as five levels, which included, in ascending order, the city *defensores*, the governors of the provinces, the vicars at the head of the dioceses (there were six in the Western and six in the Eastern Empire) and the four prefects of the *praetorium* in Italy, Gaul, Constantinople and Illyricum. A third hierarchy of functionaries, itself divided into two branches, exercised the vast tax and financial competencies of the Empire. Above the three hierarchies operated the Imperial Court.

By this time, the Emperor had a legitimate hold on all powers. It was he who was in charge of nominating the provincial governors, he who also nominated all other posts for civil, judicial, military and financial administrators. Legal cases, on which he made a final decision, reached him from every part of the Empire. And finally, it was to him that the exclusive right of legislative power was reserved.

Imperial bureaucracy, centrally recruited from the vast Eastern and Western territories, was certainly not devoid of vice and abuses such as corruption, greed and arrogance [Jones 1964]. Nevertheless, the high professional level of the offices is undeniable, particularly that of the central offices whose task was to set in motion the course of the legislative and jurisprudential evolution of law. The hundreds of edicts and rescripts that have come down to us are a clear evidence of this. It has been said that with the post-classical age 'the spirit of Roman law did not die out but migrated to another body' [Schulz 1946].

1.2 Post-classical Legislation

As to the sources of law, the distance from the preceding age could not have been greater – the age in which a number of great jurists had elaborated the admirable set of principles, categories, rules and methods which constitute the backbone of classical Roman law having ended; every task in the production of norms during the late Empire rested solely in the hands of the Emperor. He officiated through the agency of his central offices which were under the direction of a handful of high commissioners whom he selected and could dispose of at any time.

The *Quaestor* of the Holy Palace (responsible for questions of law) and the Master of Offices (head of the Imperial Chancellery) – with the aid of designated officers equipped with advanced technical skills – drafted the constitutions (*edicta*)[2] which, upon the Emperor's approval, became binding law in either the Eastern or Western part, if not throughout the entire territory of the Empire.

To this was added the judicial function at the highest level, also exercised by the Emperor through his central judges. Cases were assigned to him in the phase of final appeal, after at least two inferior levels of judgement. There were direct appeals to imperial justice on the part of imperial subjects. Not infrequently there were requests from local officer-judges, mostly provincial governors, regarding questions which were not resolvable with existing laws. The imperial court, through its central office (*scrinium a libellis*), solved such cases by issuing a rescript or a consult in the name of the Emperor, a brief text in which the controversial question was set in legal terms based on the facts provided by whoever had submitted it for superior judgement.[3] As the parties were not present, the rescript often contained a clause in which the solution of the case was conditional on the facts included corresponding to the truth, to be duly verified *in loco*.[4]

The rescript was then used not only for the specific case that had originated it, but also for similar cases occurring in other parts of the empire, by other judges who had come to have knowledge of the imperial judgement. Emperors intervened forbidding the rescripts issued by the central office to go against general rules (*contra ius elicita*)[5] and to prevent the surreptitious spread of the contents.[6] Rescripts were in fact to acquire a normative role, a role which became official and was formalised when a select number became part of Justinian's compilation.

As a result the classical system of sources was profoundly transformed. Customs and uses (*mores*), opinions (*responsa*) of accredited jurists, the *senatumconsulta* and other sources still referred to by Gaius in the second century were already relegated to the background, whereas the only

[2] All the constitutions in the Theodosian Code, as we shall see, belong to this category. For example: *Cod. Theod.* 11. 30. 17, incorporated with modifications in *Cod. Iust.* 1. 21. 3: the Justinian compilators replaced the penalty of deportation inflicted on those who had addressed a plea to the Emperor rather than appealing a decision, with the less severe penalty of infamy.

[3] Only one example among the hundreds of rescripts included in Justinian's Code, Cod. 1.18.2 of the year 211–217, denies an adult who had appealed to the Emperor in a case involving inheritance the possibility of pleading ignorance of the law.

[4] Cod. 1. 22. 5: '*Si preces veritate nitantur*'. [5] Cod. 1. 19. 7. [6] Cod. 1. 14. 2.