Paolo Grossi

A HISTORY *of* EUROPEAN LAW

The Making of EUROPE

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A History of European Law

Paolo Grossi

Translated by Laurence Hooper

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A History of European Law

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A History of European Law charts the development of law in Europe from its medieval origins to the present day. It examines the transformation within European societies from a medieval understanding of law centred around the role of the Church and the local community towards one in which law was codified and set apart as an expression of the centralized, secular authority of the state. Such a change reflects many broader developments within European history, in political, economic and cultural terms. This overview uses the history of law to offer a fresh perspective on these wider issues.

Throughout, the author explores the changing social context of the relationship between law and culture and the development of political ideas about the modern state. He also demonstrates the diversity of traditions in Europe: for instance, France, with its set of law codes, differs fundamentally from Britain, with its tradition of common law. For the member states of the European Union, these differing perspectives were brought together in 2003 with the publication of the European Union Constitution. *A History of European Law* not only helps us to appreciate the immense political and intellectual achievement that this document represents but also reveals its limitations in the ongoing search for common European values and goals.

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Paolo Grossi

The author (born in Florence in 1933) is Professor of History of Medieval and Modern Law at the University of Florence, and a member of the Accademia dei Lincei. He has recently been appointed judge in the Constitutional Court of the Italian Republic. His most recent publications include *Italian Civil Lawyers: An Historical Profile* (2002), *Law between Power and the Judicial System* (2005), *Society, Law, State: A Recovery for Law* (2007), *The Medieval Judicial System* (2008) and *First Lesson on Law* (2008).

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A History of European Law

The Making of Europe

Series Editor: Jacques Le Goff

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To the dear and able disciples of the universities of Brazil and Mexico – a thriving seed that promises an abundant harvest

Preface

After accepting the kind offer of Jacques Le Goff and the publisher to compile the volume in the Making of Europe series dedicated to legal history, I found myself faced with an unenviable task. I shall attempt here to sketch the outline of a historical and juridical narrative that spreads over more than fifteen centuries and the entire European continent, whilst following this series' habitual combination of unstinting intellectual rigour with an equally unstinting accessibility of discussion. I must therefore scrupulously avoid the comfortable recourse of closed scholarly debate, and instead make it a priority to communicate with those outside the limited circle of experts.

Have I succeeded? My readers will of course be my judges. I can only declare that the pages of this book are the result of considerable effort. A twofold effort in fact: it has not been easy to achieve clarity using the jurist's normal palette of terms and concepts, which tend to seem obscure to any outside the discipline; nor has it been easy to fit such a wealth of material into the format of a sketch without betraying the richness and complexity of European legal history.

Within the limits that will be laid out in the Preliminaries, this volume will describe the developments that took place from the flowering of the medieval legal system up to the 1950s, that is to say up to the period immediately after the caesura represented by the Second World War, so recently behind us. Have I left out anything essential? I am not omniscient, so I cannot say, and if the European readership, with its plurality of expertise, should notice any omissions, I cannot but humbly promise to rectify them in future editions of the book.

The nature of this volume, but also the quantity and the weight of topics covered, demand that bibliographical citations be kept to the essential minimum, usually referring the reader to works which offer a reliable but necessarily general overview. I have borné in mind that the area under consideration is Europe, and the expected reader is European; I have therefore tried to offer that reader a pan-European bibliography.

If I may be permitted one statement here: the chapter structure of this book largely reproduces the framework of the course on the History of Italian Law (recently retitled the History of Medieval and Modern Law) which I have taught for forty years at the Faculty of Law, University of Florence. If I may also be permitted one expression of satisfaction: I have always felt keenly the need for the legal historian's gaze to be broad, in order to understand fully the medieval, modern and contemporary periods as well as the whole European space (and even beyond). Only by achieving this breadth can legal history discharge its inescapable educational duty (insofar as such a duty can be discharged today).

Thanks, to those who have travelled with me on the long undertaking of drafting and editing, are due to many. I shall limit myself to listing here the names of those who took upon themselves with great good humour the burden of proof-reading the first draft: Paolo Cappellini, Giovanni Cazzetta, Pietro Costa, Bernardo Sordi.

Citille in Chianti
December 2006

Preliminaries

Terminology: Europe

This volume will follow the development of the rule of law in a geographical and historical territory conventionally termed 'Europe'. My intended reader is not a jurist, and certainly not a legal historian, but rather a person without any relevant training or knowledge. It is therefore a good idea to begin by meeting the reader halfway and clearing away a few possible, if not probable, misunderstandings.

Europe. If we place to one side the contests between the Greeks and Asian 'barbarians' in the fifth century BC, classical and post-classical antiquity experienced a fragmentation of political systems, which were then slowly but surely gathered together and subsumed into the unified, universal framework of the Roman empire. One can therefore start to speak of 'Europe' only after the dissolution of the empire, when a region began to take shape which was defined by geography, but above all by history, culture and religion. This region would pass through some very chequered circumstances, including some extremely stark internal divisions, before it became the contemporary European Union: a political structure still under construction and whose borders – at least to the east – remain flexible and provisional. To sum up, when we talk in 'European' terms, we refer only to the Middle Ages, the modern period and the postmodern period (in which we find ourselves currently).

A few more clarifications are required.

In the Middle Ages the noun *Europe* is used almost exclusively geographically. It is only with the humanism of Enea Silvio Piccolomini and of

Erasmus of Rotterdam that the term begins to connote a complex of spiritual and cultural values. The retrospective line of descent that the term *Europe* gains with humanism will later be fleshed out fully in Voltaire's formulation of the *république littéraire* (the 'republic of letters'). It is Machiavelli, meanwhile, who first depicts Europe as a land of freedoms in contrast to an Asia in thrall to despots: an image of Europe which will be revived and developed in a very distinctive manner in the eighteenth century in the pronouncements of a learned prince such as Frederick of Prussia and in the perceptive contributions of Montesquieu.

The sorts of complex currents in ideas which wreak qualitative changes upon a geographical area emerge and gain acceptance very slowly. Moreover, the political and the cultural dimensions do not always follow the same path. The all-encompassing insights of scholars can therefore all too easily be dismissed by a political order to which they remain dreams and mirages because of the frontiers, separations and fissures that have persisted in that order until recently and (alas!) continue even today. Bearing these provisos in mind, I shall define my topic and my goals very precisely. I shall recount here the development through the medieval, modern and postmodern periods of an aspect of history which is often ignored: legal history. Legal history is certainly part of more general history, but it has its own autonomous features. The law is sometimes very closely tied to political power, and is often subordinate to it, but, especially in the realities of day-to-day behaviour, and in scholarly reflection, it is often found to have the vigour and the capacity to pursue its own paths.

We will hear the stories of lawmakers, judges, scholars and even businessmen as part of a narrative that is characterized by a continual struggle between the local and individual on the one hand, and the universal on the other. Through this narrative, the law will show itself to be a reality which flourishes at the surface of the everyday, while remaining deeply rooted in the civilization that produces it and therefore capable of fostering genuine insights into that civilization. It is this connection from the everyday to the profound that gives the study of law its independence from the contingent decisions of the political order. And, because the topic of this study is *European law*, it will be guided above all by the dialectical tension between the particular and the universal, between the continent's fragmentation into nation-states and the broad sweep of trans-national legal thinking.

I have used the term *law*, and we must now dwell on this term awhile in order to root out any misunderstandings. In his or her mind, the reader will most probably have identified the idea of *law* with the idea of *legislation*, or written law, and will therefore be unable to comprehend the possibility of the law's independence from the political machinery of government. That

being the case, he or she will fail to grasp the full richness of this too often misunderstood concept.

Terminology: Law

It is certainly true that the term *law* harbours serious misunderstandings, especially because, in the European education system and in European culture more generally, the law is given very little attention, meaning that the reader of this book may lack the tools necessary to appreciate it in all its true depth. Particularly to those who live in continental Europe, with the culture of the modern period behind them, the law may appear inextricably linked to power and especially to the supreme power, political power; indeed it may appear little more than an expression of that power. The law is perceived, therefore, as a command from on high, as written law, as an authoritative and authoritarian voice that emanates from the holder of sovereignty.

The law undoubtedly is such a voice. In the context of a modern nation-state, for example, which needs to circumscribe a very complex society, the law can sometimes manifest itself, and perhaps largely does so, as a collection of general legislative acts. However, it would be incorrect and misleading to identify those acts with the phenomenon of law in its entirety. Law consists not only in *power* and *order*, but also in the manner in which society organizes itself in accordance with certain historical values, basing its rules upon these values and observing them in day-to-day life.[1]

The reader should therefore be aware that, even if the law's most visible manifestations are solemn acts of legislation, it is nonetheless part of society and therefore part of life. The law is an expression of society more than of the state. It is the invisible weft that connects the warp of our everyday experiences, permitting the peaceful coexistence of reciprocal freedoms. It is, in effect, society's means of self-preservation.

The social importance of the law is increasingly clear today, as the association between law and nation-state is being brought into question. The conception of the law as identical to the legal systems of nation-states was common amongst previous generations (as we shall see in the second part of this study, Chapter 2), but is now proving inadequate to provide order in a global society such as today's, in which the state and states in general are becoming less and less important as producers of law.

Bearing all this in mind, I shall seek, in the pages that follow, to maintain a broad enough vantage point to command a view of the entire legal landscape. Given that the law is something to be experienced, the legal historian

must be the first to refuse to limit himself or herself to mere contemplation of the acts of authority, since these acts do not render a true image of the situation, and a true image is what the historian seeks. I shall not forget that the law belongs not only to the surface of society but, as was mentioned above, is rather *radical* reality – 'radical' etymologically speaking, that is to say it is connected to the roots of society. Nor shall I forget that law is a state of mind more than a set of commandments: the law expresses the values of a society and, by ordering those values, it preserves that society.

Without obscuring the law's connections to political power, I shall therefore dedicate the bulk of my attention to the law that governs the daily life of individuals, what jurists call 'private law'. It is in private law that we can glimpse the vital functions of the law in a living tissue made up of financial transactions, leases, gifts, wills, the acquisition of goods, contracts of employment and enterprises – commercial, agricultural and industrial – in institutions such as these which permit one person to live peacefully alongside another.

The History of the Law as the History of Experiences of the Law

One final clarification is necessary. Our road is a long one – more than fifteen hundred years – and comprises an agglomeration of dates and facts which would risk overwhelming the reader were I not to organize them in a methodologically defensible manner. Do the periods which I examine here – the Middle Ages, modernity and postmodernity – show a uniform understanding of the law, of its origins and its manifestations? That is to say, can we regard these fifteen hundred years as an uninterrupted continuum? Or can we observe differing, even opposed, understandings of the law?

In my view it is clear that we can observe differing understandings of the law in the different periods. Any attempt to identify the diverse and particular shapes which the law takes in the course of the centuries cannot but lead to this conclusion, because it is only by distinguishing between different understandings of the law that we can properly historicize our legal historical material. Any other approach risks burying and smothering the distinctive features of each period under an anti-historical levelling of the landscape.

The most basic methodological precept of this study will be that of distinguishing on the basis of the divergences that I detect in the historical record – divergences that reveal different modes of perceiving, conceiving of and living out the law. It is these differences which reveal to us the different *experiences of the law* in their own manifest and undeniable individuality.

My reference to experiences of the law is intended to underline an elementary but often ignored truth: the law is written on the hide of people, it is – as I said a few lines above – a dimension of daily life. The law is inscribed in the concrete facts of life before it is written down in statutes, in international treaties and in works of scholarship. From this broad vantage point we can distinguish the stages of our lengthy route – *Middle Ages*, *modernity* and *postmodernity*. Each stage is circumscribed within very flexible chronological boundaries: from the fourth or fifth century until the fourteenth; from the fourteenth century until the beginning of the twentieth; from the beginning of the twentieth century onwards in a journey that is still under way and whose endpoint we cannot currently see.

Three experiences of the law, three historical civilizations very sharply differentiated juridically which furnish us with three different conceptions of the law and with three very different realizations of it. Ours is not a continuous journey, but rather one made up of three starkly discontinuous episodes – three episodes which present themselves to the historian as three points of maturity to be contemplated and decoded with the greatest respect for their independent foundations. Each of these three points of maturity employs a very particular palette of ideas, of terms and of techniques, and each suffers when these palettes are carelessly confused.

I have set myself here the difficult task of celebrating these differences. I am convinced that this is the only viable way to help the reader along his or her journey of understanding.

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Medieval Roots

I. A Legal Society Under Construction: The Workshop of Legal Practice

The Political Context: A Society Without a State. The Incompleteness of Medieval Political Power

The first defining feature of the medieval experience of the law, which we will now begin to examine in depth, is its profound discontinuity with the experience that precedes it. Medieval legal thought begins to define itself amongst the strategies and innovations with which the society of the fourth, and especially the fifth, centuries AD sought to reorient itself in the void generated by the collapse of the Roman political structure and of the culture that existed within that structure. Historically, the most salient point is the manner in which the society of the time dealt with that sudden absence of power. For now, we shall deal with the void as it affected the political sphere, which was the most consequential and the most problematic difficulty the new system of law had to face.

A machinery of power as robust, well-constructed and extensive as that of the Roman empire would not, indeed could not, be replaced by one of equal quality and vigour. The novel and defining feature of the era is therefore the *incompleteness* of political power in the medieval period. By incompleteness I mean the lack of any totalizing ambition in the political system of the time: its inability, and its unwillingness, to concern itself with controlling all forms of social behaviour. The political sphere in the Middle Ages