

# EUROPEAN LAW IN THE PAST AND THE FUTURE

*Unity and Diversity over Two Millennia*

PROFESSOR R. C. VAN CAENEGEM

*University of Ghent*



**CAMBRIDGE**  
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK  
40 West 20th Street, New York, NY 10011-4211, USA  
477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
Ruiz de Alarcón 13, 28014 Madrid, Spain  
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

© R. C. Van Caenegem 2002

This book is in copyright. Subject to statutory exception  
and to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without  
the written permission of Cambridge University Press.

First published 2002

Printed in the United Kingdom at the University Press, Cambridge

*Typeface* Baskerville Monotype 11/12.5 pt.     *System* L<sup>A</sup>T<sub>E</sub>X 2<sub>ε</sub> [T<sub>B</sub>]

*A catalogue record for this book is available from the British Library*

ISBN 0 521 80938 X hardback

ISBN 0 521 00648 1 paperback

# Contents

<i>Preface</i>	<i>page</i> vii
1 The national codes: A transient phase	1
One code for every country?	1
Anglo-Norman feudal law	2
Germanic elements in the <i>Code civil</i>	3
The German Civil Code based on Roman law	4
Change or continuity?	7
The <i>ius commune</i> , transnational by definition	13
The English common law purely English?	19
2 <i>Ius commune</i> : The first unification of European law	22
Tribes and nation states	22
The medieval <i>ius commune</i>	24
Towards a ‘new <i>ius commune</i> ’?	26
Doubts about a ‘new <i>ius commune</i> ’	30
The chances of legal unification	33
The past inspires optimism	36
3 Common law and civil law: Neighbours yet strangers	38
Six contrasting areas	38
The common law uncoded	39
Public and private law	41
The English Bench is paramount	44
The continental professor is paramount	45
Substantive law and procedure	48
Adversarial and inquisitorial process	51

4	The holy books of the law	54
	Biblical and legal scripture	54
	The <i>Corpus iuris</i> a holy book	55
	The American Constitution and original intent	56
	The <i>Code civil</i> and the School of Exegesis	62
5	Why did the <i>ius commune</i> conquer Europe?	73
	The re-romanization of the West	73
	Legal causes	74
	Political causes	75
	Cultural causes	79
	Economic causes	80
	Opportunistic causes	82
	The <i>ius commune</i> a good thing?	84
	<i>Graeca non leguntur</i>	86
6	Law is politics	89
	The 'Realist School'	89
	German unification and the Civil Code of 1900	90
	Germanists and Romanists	92
	National feelings	94
	The 'Social Question'	95
	The 'Forests of Germany'	97
	The Civil Code becomes law	98
	Civil Code or the people's lawbook?	100
	Jurists in the Third Reich	103
	<i>Epilogue: A look into the twenty-first century</i>	134
	<i>Bibliography</i>	144
	<i>Index</i>	168

## CHAPTER I

# THE NATIONAL CODES: A TRANSIENT PHASE

### ONE CODE FOR EVERY COUNTRY?

Present-day Europeans live under their national systems of law, which are almost invariably codified. Frenchmen live under the *Code civil*, Germans under the *Bürgerliches Gesetzbuch* and the English under their own uncoded common law. A few years ago the Dutch obtained a brand-new civil code, to replace that of 1838. European courts of justice, the European Commission, the European Parliament and European laws have not yet altered the basic fact that people live under national laws which were produced by the sovereign national states. And most people, no doubt, find this a natural state of affairs, as natural as their various languages. What they do not realize and would be surprised to find out, is that this 'natural state of affairs' is, on the time scale of European history, quite recent (going back only one or two centuries) and that the rise of the European Union may turn it into a brief and transient phase. That a future United Europe will strive for some degree of legal unification is plausible but, of course, uncertain. What is certain, however, is that medieval and early modern Europe managed without national legal systems. People lived either under local customs or under the two cosmopolitan, supranational systems – the law of the Church and the neo-Roman law of the universities (known as 'the common, written laws', or the learned *ius commune*). That every country should have its own strictly national law and be unaffected by others for many centuries was quite unthinkable. Cross-fertilization was the order of the day, because the law was seen as a vast treasure house from which kings and nations

could pick and choose what suited them. We shall now present five illustrations of the transnational character of the law in Old Europe, the first three offering striking paradoxes.

#### ANGLO-NORMAN FEUDAL LAW

The first paradox is the continental origin of the English common law. To many people, who see the common law as quintessentially English, the realization of this historical fact comes as a shock. Yet, a fact it is. Nobody will deny that the common law has indeed developed in the course of the centuries into a peculiarly English phenomenon, that it has been instrumental in shaping the English character and is a great English achievement. Nevertheless at its very beginning it was the feudal law as administered by the English royal courts under King Henry II. That feudal law had been imported into England by the Norman conquerors and had basically been developed on the Continent, from the days of Charlemagne onwards. The law administered in the court of Henry II was Anglo-Norman, shared by the duchy of Normandy and the kingdom of England, and formed the legal basis of the landed wealth of the knightly class that ruled on both sides of the Channel under its common king-duke. Fiefs in England and Normandy were similar institutions and the English royal writs had their exact counterparts in the Norman ducal *briefs* (*brevia* was their common Latin name). Moreover, Henry II, who was the father of the English common law and took a great personal interest in legal problems, was a French prince who belonged to the ancient provincial dynasty of the counts of Anjou and ruled over a greater part of France (Anjou, Normandy and Aquitaine) than the king of France himself. His 'empire' was a conglomerate of national or provincial states, and it was only after the 'loss of Normandy' to France in 1204 that the kingdom and the duchy went their separate ways and the original Anglo-Norman law became purely English. It continued the work of Henry II in England, while Normandy came under the influence of Roman law (as did other parts of

France). Maitland's authoritative voice, 'The law which prevails in England at the end of the twelfth century, more especially the private law, is in a certain sense very French. It is a law evoked by French-speaking men, many of whom are of French race, many of whom have but begun to think of themselves as Englishmen; in many respects it is closely similar to that which prevailed in France', may be quoted here.<sup>1</sup>

#### GERMANIC ELEMENTS IN THE *CODE CIVIL*

My second illustration – and paradox – is that French law – and the *Code civil* of 1804 in particular – were deeply influenced by Germanic and feudal customary law. The Franks and other Germanic peoples who overran Gaul and settled on old Roman land, particularly in the north, brought with them their customary law, whose most famous monument is the Salic law (oldest version early sixth century). Whereas they gave up their tribal gods for Christianity and to a large extent gave up their language for vulgar Latin and proto-French, they stuck to their ancient laws. Consequently the northern two-thirds of France lived for centuries, not by the Roman as in ancient Gaul, but by Germanic customary law. It was only in the southern third of the kingdom that the former, in one form or another, survived. These two parts of France, which subsisted right up to the *Code civil*, are known respectively as *pays de droit coutumier* and *pays de droit écrit* (Roman law being bookish and written). Towards the end of the Middle Ages the monarchy ordered these old local and regional customs to be put in writing and published as law, so that these norms survived the impact of Roman law and deeply marked the *Code civil* itself. An important factor in this state of affairs was the Custom of Paris ('homologated' in the early sixteenth century) which became the cornerstone of

<sup>1</sup> Cambridge University Library, Add. Ms. 6987, fo. 124, quoted by J. Hudson, 'Maitland and Anglo-Norman law', 28 in J. Hudson (ed.), *The history of English law. Centenary essays on 'Pollock and Maitland'* (Oxford, 1996, Proceedings of the British Academy, 89).

an ideal general French law, and Paris was situated in the northern, customary part of France (the frontier between north and south followed a line west to east not far south of the Loire). The authors of the *Code civil* on the whole managed to establish a reasonable synthesis of the two great traditions in their new lawbook, obligations and contract being based on Roman, and family and property on Germanic and feudal customary law. But they could not always avoid heated arguments, as appeared when the articles on the estate of married people were discussed: the north was attached to the Germanic community of goods and the south to the Roman dotal system (marriage settlement in trust for the married woman): fiery patriotic southerners decried the community of goods as barbaric and stemming from the primeval Germanic forests. The *Code* eventually adopted the northern custom of the joint estate of husband and wife (administered by the husband) as the norm, but allowed the southerners to choose the Roman system if they so wished.<sup>2</sup>

#### THE GERMAN CIVIL CODE BASED ON ROMAN LAW

Our third illustration is even more of a paradox, as it concerns the Roman character of the German Civil Code of 1900. If the Germanic customs survived so strongly in (northern) Gaul, they should have totally prevailed in Germany, i.e. those lands east of the Rhine and north of the Danube that stayed outside the Roman empire. In other words, according to the rules of logic, German civil law ought to be Germanic, just as French civil law should have been Roman, France belonging to the Latin world and being situated on ancient Roman soil. But history does not always – or even usually – listen to the dictates of logic, but follows its own, wayward paths. However strange it may

<sup>2</sup> J. Hilaire, *La Vie du droit. Coutumes et droit écrit* (Paris, 1994), 44; B. Beignier, 'Le chêne et l'olivier' in *Écrits en hommage à Jean Foyer* (Paris, 1997), 355–75. The nineteenth century, in fact, witnessed the triumph of the *régime de la communauté* in the south, to the detriment of the traditional dotal system. Normandy, although situated in the north, also lived according to the latter. See J. Musset, *Les régimes des biens entre époux en droit normand du XIV<sup>e</sup> siècle à la Révolution française* (Caen, 1997).



seem, it is an incontrovertible fact that the *Bürgerliches Gesetzbuch* is profoundly marked by Roman law, even though its language is German and its public the German citizenry. This surprising state of affairs can only be explained by the peculiar course of German political history – we refer of course, to the conscious decision taken at the end of the fifteenth century to ‘receive’ the Roman learned law of the medieval universities as the national law of Germany and to abandon the existing multitude of local and regional customs: a momentous step known as the *Rezeption*.

Emperor Maximilian and the humanists in his entourage dreamt of a modern German nation state, to replace the divided medieval kingdom. Germany had missed the boat of centralization and unification because of the involvement of her kings with the Roman empire and Italian politics, but this was going to change and the new German nation state would be provided, *inter alia*, with one national law, to replace the fragmented customs. This new law was to be, not the northern *Sachsenspiegel* or the southern *Schwabenspiegel*, but the learned Roman law of the medieval schools. Thus Germany would acquire in one fell swoop one common law (*gemeines Recht*) and the best Europe had on offer. As this was a legacy from imperial Rome and known as *Kaiserrecht*, it linked the German empire to the glories of Antiquity. The *Rezeption* was ordained by the German Estates and a new supreme court, the *Reichskammergericht* or Imperial Chamber Tribunal, was instituted in 1495 to implement and supervise this momentous ‘legal transplant’. Half the judges were to be learned jurists, graduates in Roman law, and the other half knights, but by the middle of the sixteenth century they were all required to be holders of a law degree. From the sixteenth to the nineteenth century this ‘received’ foreign system was the basis of legal scholarship in Germany and its greatest triumph came in 1896 when the parliament of the German empire promulgated a civil code that was fundamentally Roman-based and professor-made (more about this in chapter 6). The decision of 1495 was all the more remarkable as medieval Germany had

produced an imposing array of law books of her own and some of her *Schöffengerichte* or aldermen's courts, such as Magdeburg and Leipzig, had developed an extensive case law, which was authoritative in large areas, particularly in the east. Nevertheless this age-old, well-documented and established tradition was – largely but not completely – jettisoned at the end of the Middle Ages. 'Receptions' and 'legal transplants'<sup>3</sup> are not unknown in other places and at other times. One of the most striking examples in our own age was the adoption by Japan, at the time of the Meiji revolution, of the German Civil Code for the modern westernized Japanese empire. When the country decided to follow western examples, it first looked to England, which was the leading world power of the time, but the absence of an English civil code proved an insuperable obstacle. So the Japanese turned their attention to France, also a successful colonizing power of world stature and provided with a famous civil code. Preparations were made for the adoption of the Napoleonic lawbook and Professor Boissonnade went to Japan to prepare the way. Students at the old Paris Faculty of Law, near the Pantheon, are reminded of his efforts by a bust of the great jurist on the first floor, with two inscriptions, one reading *E. Boissonnade. Conseiller légiste accrédité du gouvernement japonais et professeur à l'Université Impériale de Tokio 1873–1895* and the other *Au Professeur E. Boissonnade Hommages des Japonais reconnaissants Paris 1934*. Politics and military events, however, upset these plans, as the French defeat at the hands of Bismarck in 1870 suggested to the Japanese – by some weird logic – that German might be superior to French law, as German weapons had beaten the French. Hence the Japanese decision to adopt the *Bürgerliches Gesetzbuch*, two years after its promulgation in Germany (modernization was clearly an urgent business in the land of the rising sun). So the sixth-century lawbook of Justinian first became the leading textbook of western medieval universities, four centuries later the law of modern Germany, after another four centuries the cornerstone of the civil code of

<sup>3</sup> The phrase is borrowed from A. Watson, *Legal transplants. An approach to comparative law* (2nd edn, Athens (Ga.), London, 1993).

the Wilhelmine Reich and – for the time being – ended its career as the law of twentieth-century Japan. It had travelled west, then east and then further east again, in a voyage that spanned the world.<sup>4</sup>

#### CHANGE OR CONTINUITY?

Some European countries, like Germany, have experienced abrupt changes in their legal development, whereas others have known great continuity; the phenomenon deserves some comments, under the heading ‘old and new law in the European experience’. Indeed, some nations have made sharp and abrupt breaks with their past, which was rejected wholesale in order to make room for a radically new course; others witnessed a majestic, unperturbed continuity throughout many centuries with minor piecemeal adaptations, so that their legal experience is like a ‘seamless web’. We shall now briefly discuss three cases: Germany, France and England.

Germany, as we have just seen, embarked on an entirely new venture around AD 1500 when it adopted Roman law. Respectable age-old customs, which had produced scholarly analysis and a considerable body of case law, were rejected and replaced by the *ius commune* of the universities. It is not easy for us to imagine what it meant when the aldermen of Frankfurt, solid and educated burghers but no Latin speakers, were told to forget about their familiar homespun law and to give judgement according to the *consilia* of Baldus and Bartolus! As they could not take a law degree in the Open University, the best they could do was to follow the advice of the town clerk, who had a law degree and could explain the merits of the case according to *Kaiserrecht* (they could also gain some elementary instruction

<sup>4</sup> Some recent work on the Japanese code: F. B. Verwajen, ‘Early reception of western legal thought in Japan 1841–1868’ (Leiden, 1996, Doct. Diss.); Ishii Shiro, ‘The reception of the occidental systems by the Japanese legal system’, in M. Doucet and J. Vanderlinden (eds.), *La Réception des systèmes juridiques: implantation et destin. Textes... colloque... 1992* (Brussels, 1994), 239–66.

from the *vocabularia iuris* that were being printed around that time). The scene will remind some English readers of the magistrates' court, where the clerk is at hand with technical advice (and has the authoritative reference works at his fingertips) for the magistrates who have never seen the inside of a Law School.<sup>5</sup> We would, however, like to sound a cautionary note, for the break with the past was not as absolute as the official German policy envisaged. Indeed, the old native tradition survived in various ways and there was resistance to the new-fangled constitutions and rescripts. This was especially the case in Saxony, where the memory of the *Sachsenspiegel* was never lost: even in the nineteenth century, when *Pandektenrecht* (the Roman law as developed by German professors on the basis of Justinian's Digest or Pandects) was at its height, commentaries on the Mirror of the Saxons were still influential<sup>6</sup> and the kingdom of Saxony even had a civil code of its own.<sup>7</sup> In the eighteenth century the study of German history had initiated a renewed interest in the old legal lore and a romantic reappraisal of Germanic Antiquity and the German Middle Ages (we shall later refer to the two nineteenth-century Schools of the Germanists and the Romanists that were the result).

France witnessed a similar break with the past at the time of the Revolution. Previously, and right up to the seventeenth century, people had thought that 'old law was good law', but the Enlightenment and belief in progress had changed all that, and old law became synonymous with bad law which had to be abolished. This the Revolution proceeded to do. Ancient laws and the

<sup>5</sup> See the graphic description in the classic H. Coing, *Die Rezeption des römischen Rechts in Frankfurt am Main. Ein Beitrag zur Rezeptionsgeschichte* (Frankfurt, 1939).

<sup>6</sup> The medieval *Sachsenspiegel* and its later versions and commentaries were considered a subsidiary source of the law, called the *gemeines Sachsenrecht* throughout the nineteenth century. See H. Schlosser, F. Sturm and H. Weber, *Die rechtsgeschichtliche Exegese. Römisches Recht, Deutsches Recht, Kirchenrecht* (2nd edn, Munich, 1993), 94.

<sup>7</sup> The *Bürgerliches Gesetzbuch für das Königreich Sachsen* was the last great European codification before the German code of 1896/1900. It was promulgated in 1863 and replaced in general by the pan-German Code. It was based on the learned *Gemeine Recht*, combined with traditional Saxon material. It was generally considered an outstanding text and led to considerable commentaries and authoritative judgements.

ancient constitution disappeared and, after a period of unsuccessful attempts at codifying new law, Napoleon managed to publish various codes for the whole of France, the most important being the Civil Code of 1804. They had a lasting impact and are fundamental in many ways till this day. The Napoleonic codes not only introduced new law, but expressly abrogated all old laws, customs, ordinances and so on which had formed the multicoloured mosaic of the old legal landscape: a monolithic system was erected in its place. Hence the well-known divide of French law into the pre-revolutionary *ancien droit* and the Napoleonic *droit nouveau* (the intervening fifteen years being known as the *droit intermédiaire*). Until this day teaching in the French Law Faculties concerns either 'the law', i.e. the law of the codes, or 'legal history', i.e. the study of the *ancien droit*, the former being concerned with living law and the latter with museum pieces. One is either a lawyer or a legal historian and contact between the two disciplines is minimal. Yet, here again the situation is not as clear cut as would seem at first sight. The Civil Code was in reality far from containing only 'new law', as it had taken over a considerable mass of customary material, especially from the *Coutume de Paris*, and incorporated, often verbatim, the writings of eighteenth-century jurists, such as Robert-Joseph Pothier (d. 1772), who had taught at the university of Orleans and was familiar with both Roman and customary law. The Civil Code was the product of a post-revolutionary era and was deeply conservative, particularly as far as respect for property and family values and the leading role of the father and husband were concerned. Nevertheless certain revolutionary achievements, such as legal equality, divorce and the abolition of serfdom, were maintained. The most conservative of Napoleon's codes was the Code of Civil Procedure, which repeated verbatim large parts of the *Ordonnance civile pour la réformation de la justice* of Louis XIV. And although Roman law was abolished, together with all other sources of the Ancien Régime, nineteenth-century judges had no qualms in referring to it in their judgements and betraying a thorough acquaintance

with the law of Justinian, which continued to be taught at the universities.<sup>8</sup>

In contrast to the German and French experience, English legal history is the ideal type of traditionalism and uninterrupted continuity. There is no 'old common law' or 'new common law', just one ageless common law, based on the wisdom of centuries. Its course is marked by adaptation, not by change of what is in any case immutable. Even the reforms of the nineteenth century have not basically altered the ancient, uncoded common law, in spite of changes in procedure and judicial organization. Cases are quoted that go back to Sir William Blackstone (*d.* 1780) and that universal treasure house of the common law, Sir Edward Coke (*d.* 1634), who himself sometimes harked back to precedents in Littleton (*d.* 1481) and even the great Henry de Bracton (*d.* 1268), author of a massive, lonely Treatise on the Laws and Customs of the Realm of England. Death sentences were still being pronounced in the twentieth century on the strength of medieval statutes without any reservation about their antiquity. Sir Roger Casement, for example, a British subject and an Irish nationalist, who tried to raise an army in Germany against Britain, was hanged in London in 1916 on the strength of the Statute of Treasons of 1352. However, not even English lawyers go back to Queen Boadicea: there are limits, and the official 'limit of legal memory' is the date of the coronation of King Richard I on 3 September 1189, beyond which the courts do not go back. That date was fixed by the Statute of Westminster I (AD 1275) on the limitation for writs of right and the Statutes of *quo warranto* of 1289–90, probably because it was conceivable that a living man had been told by his father what he had seen in 1189, and in a proprietary action for land the demandant's champion was allowed to speak of what his father

<sup>8</sup> See the detailed survey in H. Kooiker, 'Lex scripta abrogata. De derde Renaissance van het Romeinse recht. Een onderzoek naar de doorwerking van het oude recht na de invoering van civielrechtelijke codificaties in het begin van de negentiende eeuw, 1: De uitwendige ontwikkeling' (Nijmegen, 1996, Doct. Diss.). Concerns France and The Netherlands.

had seen.<sup>9</sup> Most legal textbooks in England start with a List of Cases and a List of Statutes, both going back several centuries and without any visible caesura.

The most comprehensive, encyclopaedic history of English law was undertaken by Sir William Searle Holdsworth (*d.* 1944), an Oxford professor and fellow of All Souls College.<sup>10</sup> He personifies the belief in and love of the continuity of English law: real change never occurred, only adaptation of ancient principles. He reminds the reader of the medieval horror of *novitates*, innovations. He also embodied the traditional reverence for the Bench and belief in the pre-eminence of judges as the ‘makers of the law’<sup>11</sup> and the concomitant aversion to the legislator as an agent of legal development. One trait of the conservatism of the Bench is attachment to precedents: ‘what was good in the past must be good in our own time’ is by definition a conservative attitude. *Stare decisis* is a weighty common-law principle, even though it is not universally held and is not as ancient as is sometimes thought. There were judges in the past who maintained that they had sworn to uphold justice and not to uphold precedent, and therefore felt free to ignore existing case law, and there are famous judges in our own time – such as Lord Denning<sup>12</sup> – who dare to ignore precedent for the sake of justice; moreover the strict doctrine of *stare decisis* first emerged in the later nineteenth century.<sup>13</sup> Nor is traditionalism to be found

<sup>9</sup> F. Pollock and F. W. Maitland, *The history of English law before the time of Edward I*, 1 (2nd edn, Cambridge, 1968), 168.

<sup>10</sup> We refer, of course, to his *History of English law* (London, 1903–72, 17 vols., several posth.).

<sup>11</sup> See his *Some makers of English Law* (Cambridge, 1938), Tagore lectures 1937–8.

<sup>12</sup> Alfred Thompson Denning, who was created a Life Peer of 1957, was born in 1900. He studied mathematics and law at Oxford, was a Lord Justice of Appeal from 1948 to 1957, a Lord of Appeal in Ordinary from 1957 to 1962 and Master of the Rolls from 1962 to 1982. See on him: C. M. Schmitthoff, ‘Lord Denning and the contemporary scene. A homage . . .’, *Journal of Business Law* (1979), 97–104; R. Stevens, *Law and politics. The House of Lords as a judicial body, 1800–1976* (London, 1979), 488–505; E. Heward, *Lord Denning* (2nd edn, Chichester, 1997).

<sup>13</sup> See H. J. Berman and C. J. Reid Jr., ‘The transformation of English legal science: from Hale to Blackstone’, *Emory Law Journal* 45 (1996), 448. The authors quote Chief Justice Vaughan of the Court of Common Pleas as saying in 1673: ‘If a judge

in legal circles only. The English ecclesiastical establishment also prefers continuity to change and some people, being unable 'to eliminate the Reformation altogether', liked to see that cataclysmic break with the past as 'a small and predictable shudder in a general march of continuity'.<sup>14</sup> But, here again, things are not so absolute as they might seem. We should not be befogged by the *laudatores temporis acti*, for a critical look at the past will soon show that there was a good deal of real and important change: the majestic flow of English legal history was on several occasions diverted or interrupted. The Puritan Revolution undertook a drastic overhaul of the common law and its courts. It wanted to introduce a register of land-holding – comparable to the later *Grundbuch* in Germany – and to codify the law, and it installed the Hale Commission for that purpose, so named after its Chairman, the learned Sir Matthew Hale (*d.* 1676). It replaced the archaic and impenetrable Law French by the English language in the courts and generally attempted modernization and democratization. That the Restoration in 1660 reversed or stopped these endeavours does not make them less interesting (even though traditional legal histories tend to skate over them as being just a brief interlude). The urge to innovate arose again and in full force in the nineteenth century, when the writ system, created in the twelfth century, was abolished and the fusion of common law and equity was brought about, two ancient bodies of law with their distinct courts and rules of procedure. Also the Judicature Acts of 1873 and 1875 created a modern system of law courts. Yet, in spite of all this reforming zeal, the substance of the common law was admittedly saved: the impact of the judges on the law remained very strong (about which more in chapter 3) and, above all, English law avoided codification. Also, although common law and equity were, as we have seen, fused and there were no separate common law courts and a court of chancery,

conceives a judgement given in another Court to be erroneous, he being sworn to judge according to law, that is, in his conscience, ought not to give the like judgement . . .' See *Ibid.*, 449 for the emergence of *stare decisis* in the later nineteenth century.

<sup>14</sup> G. R. Elton, *F. W. Maitland* (London, 1985), 72.



nevertheless the age-old distinction survives till this day in the Chancery Division and the Queen's Bench Division of the High Court. And to everyone's surprise the House of Lords' jurisdiction in appeal survived the Judicature Acts and the creation of a Court of Appeal, so that England has two courts of appeal one above the other, and not one court of appeal capped by one Court of Cassation, as a continental lawyer would expect.

#### THE *IUS COMMUNE*, TRANSNATIONAL BY DEFINITION

The supranational law *par excellence* was, of course, the *ius commune*. This is not a paradox but self evident, as it was the learned system produced by the European universities and common to all Latin Christendom. Based on the study of the great law-books of Emperor Justinian (*d.* 565), in which the wisdom of the Roman jurists and the imperial administrators was recorded for all time, it became known as the *Corpus iuris civilis*. Promulgated as law in the eastern Roman empire after the west had been overrun by the Germanic peoples, it only surfaced in Italy in the late eleventh century. It became the basis of commentaries and teaching, first in Bologna and then in numerous other universities. As the *Corpus* was in Latin, so were the later commentaries, textbooks, teaching and disputations. As Latin was the spoken and written language of scholars all over western Europe, this reborn or neo-Roman law became the common law of all jurists without the interference of any national boundaries. Around the same time and in the same university of Bologna the systematic study of canon or ecclesiastical law was started, in which development Roman law played a fundamental role: the science of canon law was impossible without a basis of Roman law. Although Roman law and canon law remained two distinct disciplines, with their own Faculties, they were so closely linked that they are often referred to as the 'common learned – or written – laws' and they constitute the two parts of the *ius commune*. The symbiosis of both legal systems was facilitated by the fact that the Church was supposed to live by Roman law

(*ecclesia vivit lege Romana*), and that ever since the Gregorian reform the centralized organization of the Church came to look more and more like that of imperial Rome and that the great sixth-century compilation – containing much of the jurisprudence of heathen Rome – was published by a great Christian emperor.

The term ‘common law’ (*ius commune*, *droit commun*, *gemeines Recht*) is used in so many senses and contexts that a word of explanation may be appropriate. The English ‘common law’ is so called because it was common to all of England, in contrast to local customs. The *ius commune* is so called because it was common to all scholars. *Gemeines Recht* was the name given in Germany after the *Rezeption* to the common learned law of Germany, based on the *ius commune*. In French *droit commun* is sometimes used in contrast to the political sphere (as in *crimes de droit commun* as against treasonable wrongdoing) but there was also a *droit commun français*, created by the endeavours of Ancien Régime scholars who hoped to establish a legal system common to all of France, overarching the existing regional diversities.

Canon law shared with Roman law its learned, systematic character; both were based on written texts and the object of teaching and scholarly classification. However, before the twelfth century canon law was just a set of norms that ruled everyday life and were based on a multitude of canons of Church councils and papal decretals issued in the course of a millennium. Canon law started as applied law and later developed into a scholarly system: it was a set of rules before it became a science. The Roman law of the schools, by contrast, started as a science and eventually entered everyday practice and became applied law.

Medieval canon law was the first common law of the whole of western Europe, as it was administered, taught and studied in the whole of Latin Christendom without any regard for political, ethnic or linguistic frontiers. Even after the Reformation had disrupted this old unity, the law of the medieval Church went on to dominate ecclesiastical organization and the lives of ordinary people – especially in matrimonial matters – even in

Protestant countries. In the case of England the result of Reformation and Counter-Reformation went even further, as the modern law of the Anglican Church contains medieval elements that were eliminated in the Catholic Church by the Council of Trent (which had no authority in England). Medieval canon law was applied by separate ecclesiastical courts, competent *ratione personae* – for clerics – and *ratione materiae* – mainly in questions of sexual morality (which concerns a very important segment of personal and social behaviour). Church courts were, of course, also competent for questions of orthodoxy and heresy – the ideological debate, in modern parlance – so that their impact on the beliefs and the way of life of the people at large was immense, all the more so since their judgements were enforced by the state, the ‘secular arm’ of the Church. These courts were also the places where ordinary people came in contact with the learned law and the learned forms of process, developed by Romanists and canonists from the twelfth century onwards and therefore known as Roman-canonical procedure. For most medieval people, who never approached a university or read a book in their lives, the Church courts in their everyday activity were the only places where they came in direct contact with the *ius commune*.

At a time when many people talk about a possible, future European state, it is noteworthy that the first experiment in that line was the medieval Church, which was a quasi-state and comprised the nations of the present European Union.<sup>15</sup> It was a vast, self-sufficient, self-contained and efficient organization, extending over a very large area (from Ireland to the Holy Land, and from Sweden to Portugal) containing numerous nations, languages and cultures. Like the state, the Church had its own rules, organized its own dispute settlement and disposed of its own security arrangements – with its own organs for criminal prosecution and its own prisons. Its financial organization,

<sup>15</sup> We are, of course, not talking here of the papal territory in the centre of Italy, which was a true state with the same attributes of temporal power as so many other regional political formations in feudal times.

supported by the supranational Italian banking companies, was a model of efficiency, whereas its fiscal inventiveness for tapping new sources of revenue might be a source of inspiration to present-day ministers of finance (let us hope that not too many of them study the system of papal benefices). The Church lived under a centralized hierarchy, strictly organized from country parishes up to the Roman *curia*. It had one central government, with many departments, and it had a parliament, the ecumenical council, where representatives from many countries and walks of life met, deliberated and made laws. The power and the role of these Church councils have varied enormously – as is the case with parliaments in modern states – but there have been moments when they seriously attempted to wrest control of the Church from the papal government, and their composition was so international and so comprehensive – containing laymen as well as secular and regular clergy – that they can truly be described as the forerunners and prefigurations of the present-day European parliament (particularly since they discussed a wide variety of topics, by no means all ecclesiastical). I am referring, of course, to the great councils of Pisa, Constance, Basel and Florence in what is known as the Conciliar Epoch (late fourteenth and first half of the fifteenth century).<sup>16</sup>

However, for a variety of reasons the medieval Church was not really a state. It had no army, for though the Crusades mobilized by the papacy could be considered a sort of papal task force, they certainly were no standing army. The Church had no citizenship and no fixed territory but, above all, its *raison d'être* was different. Its aim was to guide the faithful to salvation, whereas the state was expected to ensure the external and internal safety of its citizens (even though some modern states think that they have to look after the happiness and wellbeing of their citizens as well). In some ways the medieval Church was like modern multinationals,

<sup>16</sup> See B. Tierney, *Foundations of the conciliar theory* (Cambridge, 1955); M. J. Wilks, *The problem of sovereignty in the later Middle Ages* (Cambridge, 1963); and the survey in H. Jedin (ed.), *Handbuch der Kirchengeschichte*, III: *Die mittelalterliche Kirche*, 2. Halbband (Freiburg, 1968), 490–588 (by E. Iserloh).

which also have their own hierarchy, vast budgets, no citizenship, but internal security arrangements (and even external defence mechanisms against hostile take-over bids).

Medieval Roman law keeps surprising every historian. Indeed, here was a West-European system of law, based on a compilation made some six centuries earlier in a foreign empire. Justinian, Institutes, Digest, Code and Novels belonged to the classical world, which was utterly different from feudal and agrarian Europe of AD 1100; the Digest, the most inspiring part, was even the work of pagan authors. The Roman empire, where the *Corpus* originated, was a mere memory among the emerging nation states of the twelfth century. Moreover, Justinian's lawbook, which attracted so much passionate attention, had no legal authority in the West at all. It had never been promulgated there, either by an ancient east-Roman emperor or by a medieval German king–Roman emperor (that changed only with the German *Rezeption* around AD 1500). Legally speaking the *Corpus* had as much binding force in twelfth-century Europe as the Assyrian clay tablets in their cuneiform script have today. And yet the great book and the vast superstructure of lectures and treatises built upon it acquired an authority of their own and became the cornerstone of the modern civil law that, together with the English common law, dominates our own world.

One of the attractions of that neo-Roman law was its cosmopolitanism, as it was similarly taught, using the same textbooks and in the same Latin language, in all western universities, where professors and students from every country congregated (we shall see in chapter 5 what caused this remarkable phenomenon).

At first the study of the *Corpus*, in the form of literal explanations ('glossing'), was a mere academic exercise, but soon the Schools began to take notice of the real medieval world, as the real world took notice of them, and neo-Roman reasoning and categories were applied even to feudal institutions – although the feudal system was undreamt of in the world of Ulpian and Modestinus. Roman law began to influence the courts, first the

ecclesiastical and then the secular, and so affected the social fabric in general.

Let us look at one example among many, to show how the law of Bologna was quoted as authority (*imperio rationis* if not *ratione imperii*)<sup>17</sup> in the discussion of a purely feudal, typically medieval problem and how customary law became mixed up with Justinian-inspired learning. Feudalism was based on the personal loyalty of the vassal to the lord, to whom he had sworn an oath of fealty. The vassal was expected to stand by his lord, who had provided him with a fief, in all circumstances and against all his enemies. At the top of the feudal pyramid stood the king, who was at the same time the highest feudal overlord and a monarch by God's grace (hence the term 'the feudal monarchy'). So the – very feudal – question arose whether a vassal had to stand by a lord who rebelled against the king. In terms of personal loyalty the answer was positive, but in terms of monarchic theory the answer was negative. So which was the top priority, the loyalty to one's lord or obedience to the head of state? Jean de Blanot, a civilian who died probably shortly after 1281, addressed this much debated question with arguments from Roman law. Admitting that there are arguments for the idea that, on the strength of his personal oath of fealty, a vassal is obliged to support his lord against the latter's lord, even if he happens to be the king, Jean de Blanot maintains the contrary 'because a baron who rises against the king violates the *lex Julia maiestatis*, since it would be like machinating the death of a magistrate of the Roman people; he would act against the emperor (*princeps*), as the king of France is an emperor (*princeps*) in his kingdom'.<sup>18</sup> So in order to protect the monarchic principle against what some considered feudal

<sup>17</sup> 'At the command of reason and not because of the authority of the empire.'

<sup>18</sup> Text and commentary in M. Boulet-Sautel, 'Jean de Blanot et la conception du pouvoir royal au temps de Louis IX', in *Septième centenaire de la mort de Saint Louis. Actes des Colloques de Royaumont et de Paris (1970)* (Paris, 1976), 57–68. See also R. Feenstra, 'Jean de Blanot et la formule "Rex Franciae in regno suo princeps est"', in *Études d'histoire du droit canonique dédiées à Gabriel Le Bras*, II (Paris, 1965), 885–95. See Digest, Book XLVIII, Title 4 'ad legem Juliam maiestatis'; Engl. transl. in S. P. Scott (transl.), *The civil law*, IX (Cincinnati, 1932), 25–28.

anarchy, Jean de Blanot invoked a law from Roman Antiquity on the protection of imperial majesty (and preserved in the Digest of Justinian) and assumed that this ancient *lex* overruled the feudal principle of his own time. He made his step even more daring by the fiction that the king of France was an emperor, which he clearly was not. In fact this was no more than a form of words to express the plausible notion that the king of France was the sovereign monarch of a sovereign country, who occupied in his kingdom the position the Roman *princeps* occupied in his empire. At first the writings of Jean de Blanot and his colleagues were scholarly exercises from the halls of the Schools, but soon they were quoted in court rooms and in the great political councils, and so Roman law began to conquer much of Europe.

Whether this learned *ius commune* could, in the twenty-first century, play a role in the elaboration of a common European science of private law is a question that naturally arises from the study of the past (and which we shall address in chapter 2).

#### THE ENGLISH COMMON LAW PURELY ENGLISH?

Having argued for the transnational character of the law in medieval and early modern Europe, I must now face the objection that there is one obvious exception. Surely, the critics will say, England is the great exception, since here we have a strictly national system of law that, except for a brief period at the very beginning, is quintessentially English, administered by English courts, developed by English judges, kings and parliaments and recorded in typical English Year Books, law reports and treatises. It even used its own cryptic and increasingly archaic language, called Law French, that was understood by a dwindling minority in England and diverged more and more from the French spoken on the Continent. All this is basically true and nobody denies that from the thirteenth century onwards the English common law was a truly national system, that was eventually exported by English people who settled in remote continents: English law was neither local nor cosmopolitan, it was national and it was

English (not Scottish, Welsh or Irish): it was the law of one particular nation state, one of the earliest and most enduring on the European scene.

Yet, here again, the true picture is less absolute than a first contact would make us believe. Indeed, English law also underwent the main international currents that swept all over Europe, as we shall try to demonstrate. Thus it is important to realize that the common law is not the only legal system known and followed in England. Indeed, English ecclesiastical courts applied the canon law of the Latin Church, even though customary variations were observed in the English Church as in many others. The old controversy between the Oxford medievalist and bishop, William Stubbs, and the Cambridge legal historian Frederic William Maitland was laid to rest long ago in favour of the latter, who rejected Stubbs' thesis that medieval England had applied its own national ecclesiastical law.<sup>19</sup> Moreover, the Court of Chancery, which originated in the fourteenth century and developed an important jurisdiction of its own, did not apply the common law, but produced its own equity, which in course of time became a distinct body of law, and followed its own rules of procedure, which were closer to the Roman-canonical than the common-law model.<sup>20</sup> The Court of Admiralty also followed a course of its own and applied the European *ius commune*, as was natural because of its concern with international shipping on the high seas.<sup>21</sup> Also Roman and canon law were taught at Oxford and Cambridge where future diplomats and bishops

<sup>19</sup> Elton, *F. W. Maitland*, 69–79. The occasion for Maitland's research was the 1883 report of a Royal Commission of which Stubbs was a member, which declared that 'the canon law of Rome, though always regarded as of great authority in England, was not held to be binding on the courts' in the Middle Ages (a conclusion supported by Stubbs in a long *Historical appendix*). Maitland's thesis can be found in his *Roman canon law in the Church of England* (London, 1898). The problem, far from being merely historical and academic, touched upon some raw political and religious nerves.

<sup>20</sup> The most fundamental study of the Court of Chancery in recent years can be found in the *Introduction* in D. E. C. Yale (ed.), *Lord Nottingham's Chancery cases* (London, 1961, Selden Soc. Publ., 79), 7–207.

<sup>21</sup> See the recent fundamental work of M. J. Prichard and D. E. C. Yale (eds.), *Hale and Fleetwood on Admiralty jurisdiction* (London, 1993, Selden Soc. Publ., 108), especially the 250-page Introduction. Sir Julius Caesar, whose career has been analysed extensively



were trained in the *ius commune*. Nor was the common law itself immune from Justinian's influence: its main doctrinal work in medieval times, the aforementioned Bracton's *Treatise on the Laws and Customs of the Realm of England*, is deeply marked by civilian learning, especially Azo's *Summa codicis*.<sup>22</sup> The great common lawyers of modern times, such as Hale and Blackstone, were well aware of continental jurisprudence and so were leading judges in the nineteenth century. Whether this justifies calling English law European<sup>23</sup> is a moot point, but it can certainly not be said that English law developed in splendid isolation.<sup>24</sup>

in recent times, sat as a judge in the London Court of Admiralty from 1582 to 1606. See L. M. Hill, *Bench and bureaucracy. The public career of Sir Julius Caesar, 1580–1606* (Cambridge, 1988); A. Wijffels, 'Sir Julius Caesar's notes on Admiralty cases: An alternative to law reporting?' in C. Stebbings (ed.), *Law reporting in England* (London, Rio Grande, 1995), 89–112; A. Wijffels, 'Julius Caesar's notes on POWS', *Legal History Review* 65 (1997), 349–72.

<sup>22</sup> The bibliography on Bracton is large. See for some recent assessments J. L. Barton, 'The mystery of Bracton', *Journal of Legal History* 14 (1993), no. 3, special issue, 1–142; H. H. Jakobs, *De similibus ad similia bei Bracton und Azo* (Frankfurt, 1996, *Ius Commune Sonderhefte*, 87).

<sup>23</sup> So R. Zimmermann, 'Der europäische Charakter des englischen Rechts. Historische Verbindungen zwischen civil law und common law', *Zeitschrift für Europäisches Recht* (1993), 4–51.

<sup>24</sup> We shall come back to the differences between common and civil law in chapter 3.