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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.

ANTONIO PADOA-SCHIOPPA is Professor Emeritus and former Dean of the Law School at the University of Milan.

# A HISTORY OF LAW IN EUROPE

From the Early Middle Ages  
to the Twentieth Century

ANTONIO PADOA-SCHIOPPA

*University of Milan*

Translated by

CATERINA FITZGERALD



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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

## PREFACE

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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*