CHAPTER 1

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 uncodified 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.[1]

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

[1] 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.[2]

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

[2] J. Hilaire, *La Vie du droit. Coutumes et droit écrit* (Paris, 1994), 44; B. Beignier, 'Le chêne et l'olivier' in *Ecrits 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 XIVe 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'[3] 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

[3] 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.[4]

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

[4] Some recent work on the Japanese code: F. B. Verwaijen, '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.[5] 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[6] and the kingdom of Saxony even had a civil code of its own.[7] 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

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

[6] 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.

[7] 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.[8]

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, uncodified 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

[8] 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, I: De uitwendige ontwikkeling' (Nijmegen, 1996, Doct. Diss.). Concerns France and The Netherlands.