

Sources of Law

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1 What Is Law?

The main question that any introduction to law must answer deals with the nature of law. Although the need for the characterization of the nature of law is obvious, it is a need that is not easily satisfied. The law is multifaceted, and arguably has been in flux over the centuries. In this current age of globalization and Europeanization, it is changing at such a high speed that it is impossible to give a short definition of law from the outset. What is possible, however, is to mention a few characteristics of law. The majority of legal phenomena share most of these characteristics, but not all legal phenomena share all of them.

Rules

A substantial part of law exists in the form of rules. These rules do not only specify how people should behave («Do not steal», «Everybody with an income must pay income tax»), but they also contain definitions of terms, create competencies, and much more.

An example of a rule that gives a definition of a term can be found in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which defines racial discrimination as

«... any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life».

Article 37, Section 1 of the International Covenant on Civil and Political Rights provides an example of a rule that creates a competency for the Secretary-General of the United Nations. It states, in connection with the Human Rights Committee:

«The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations».

Society is governed not only by legal rules but also by other types of rules. In the next section, we will have a closer look at the law's most important relative – morality and moral rules – but there are also other types of rules, such as the rules that belong to:

- A religion (e.g., the Ten Commandments)
- Etiquette (e.g., «Eat with a knife and fork»)
- Special organizations such as student associations (e.g., «Every member must perform bar service twice a month»)

Legal rules are normally enforced by collective means and in particular by organs of the State, while other rules typically are not. Moreover, legal rules have very specific sanctions, such as incarceration, fines, compensation of damage, etc., while the sanctions of non-legal rules are less specific. For instance, someone who has committed a crime and broken a legal rule is liable to be punished by State organs such as the police and the prosecution service. However, from a moral point of view it is wrong to lie. While liars may be liable to informal and private sanctions such as reproach and avoidance, they will seldom be sanctioned by collective means.

Collective enforcement

At present, most laws are explicitly created by means of legislation or judicial decisions. These laws are called «positive law». The word «positive» in this connection is derived from the Latin *positus*, which literally means «laid down». The idea that law is explicitly created seems so obvious that the expression «positive law» has almost become synonymous with «the law that is valid here and now». However, the increasing importance of non-State rules is a reason to question this obviousness.

Positive law

It is often easy to establish the contents of positive law. The rules only need to be looked up in legislation or in judicial decisions. This may take some time, but in the end, it is often possible to establish the contents of the law beyond a reasonable doubt: positive law offers *legal certainty*. Therefore, it is usually unnecessary to invoke an authority such as a judge to settle a legal dispute. The parties can predict what the judge's decision would be, and in that way save both them and society at large, time and money.

Legal certainty

If the issue at stake is not what the positive law is, but rather what is «really» right, it may be much harder to reach an agreement. People often disagree about what is right or wrong. This predicament creates less favorable conditions for a smooth functioning society than the certainty of positive law. Often it is better to have no conflicts or fast solutions for conflicts, than to have a laboriously reached «right» solution. Therefore, law often prefers the certainty of a clear result over the uncertainty of the «best» solution for a problem.

Positive law also offers legal certainty in a different manner, namely by providing collective support for the enforcement of legal duties. If people are left to their own devices when it comes to enforcing their rights, this decreases the certainty that the rights will be respected.

A third aspect of legal certainty is that similar cases are treated in a similar fashion or – in other words – that the law will be applied consistently. For instance, if one citizen is granted a building permit, legal certainty requires that another citizen in exactly the same position should also be granted a building permit.

So legal certainty has at least three aspects:

1. Certainty about the content of the law
2. Certainty that the law will be enforced
3. Certainty that the law will be applied consistently

2 Roman Law

Our present-day law did not fall out of the blue sky; it is rather the outcome of a historical development in which the *sources of law* play an important role. As the easiest way to obtain an understanding of legal sources is through history, we will sketch the development of the law in Europe through time. In this examination, Roman law and common law play a central role.

Historical descriptions of the development of law in Europe often start with the impressive legal system built by the Romans in the period ranging from the eighth century BCE (Before Common Era) until the sixth century CE (Common Era). Impressive as the Roman system may have become over the course of these centuries, it started out in a simple form: tribal customary law.

2.1 Tribal Customary Law

Nowadays, we are very much accustomed to the idea of law as being the law of a particular country, such as German law or English law. More recently, we have seen the emergence of European law existing concurrently with national laws in the countries that make up the European Union. Moreover, for a number of centuries, a body of law has existed that governs the relations between States. This body is called «public international law».

However, the law of the Romans was not the law of a country or a State, but the law of a *people*, namely the Roman people. Since they were comprised of a tribal group whose members were connected mostly by family ties, the early law of the Romans was *tribal law*.

It is also possible to have law that is not connected to a particular territory or a particular people, but to a particular religion. Examples are Talmudic law, attached to the Jewish religion, and Shari'a law, attached to the Islam.

As a people grows larger, the main ties between its members can no longer be family ties, or at least not close family ties. The binding factor will then be a shared culture, for instance based on a common religion or language. We call such a people with a shared culture a «nation».

As are most tribal laws, early Roman law was customary law. Customary law consists of guidelines for behavior that have grown spontaneously in a society, such as a tribe, in the form of mutual expectations. After some time, these expectations are accepted as binding.

Customary law

An example would be that the head of the tribe gets the first pick when an animal is caught in a hunt. For the first few times, this may be merely a kind gesture by the hunters towards the tribal leader. However, if it is repeated over a period of time, members of the tribe will count on its reoccurrence and there will be reproaches if the chief does not get the first pick. In the end, these reproaches may become so serious that the hunters will be punished if they do not offer the chief the first pick.

These guidelines are transmitted from generation to generation and are considered to be «natural» and rational. As such, their origin is frequently attributed to a historical, often divine, legislator.

An example would be the Ten Commandments and other rules that were, according to the Torah, given to the Jewish people by God on Mount Sinai, through the intermediary of Moses.

This ascription to a historical legislator explains another characteristic of customary law, namely that it is taken to be immutable. The law was such since time immemorial and will never change. However, as customary law starts as unwritten law, there may be gradual changes that go unnoticed because there are no texts that facilitate the comparison of recent law

with that of older generations. As a consequence, customary law may change slowly over the course of time, adapting itself to circumstances, while its image of being natural and immutable may remain intact.

Although customary law is often retrospectively ascribed to a legislator, it is typically *not* the result of legislation. It consists of rules that are actually used in a society to govern the relations between the members of this society and are usually not easily distinguishable from religious and moral precepts. It is only at a later stage of the development of a legal system that the distinction between legal, moral, and religious precepts can be made.

Arguably, such a sharp distinction presupposes a separation between church and State, a separation that has gradually grown in the Western world since the late Middle Ages. It should be noted that this separation has not been accepted in a number of non-Western countries, particularly those that aim to follow some form of Islamic law.

2.2 Codification

Customary law starts as unwritten law, but this does not preclude it being written down at some stage. Part of Roman law, for instance, was written down in 451 BCE on what is now called the «Twelve Tables». The reason for this was that if there was any doubt, customary law could be interpreted by the *pontiffs*, officials who came from the cast of *patricians*, the societal upper class. The *plebeians*, the lower social class, objected to this practice of interpretation, because they feared that the pontiffs might use their power to interpret the law to the advantage of the patricians. If customary law were written down and published, its contents could be inspected by anyone who could read. This is another example of why the certainty of law is important: it makes it more difficult for rules that govern society to be manipulated to the advantage of a few.

If customary law is written down, the law is then described as having been *codified*. All codified laws are written law, and in this sense resemble law that was created by means of legislation. Still, there is a difference: law that was codified already existed before the codification, while law that was created through legislation did not exist before it was written down.

The terminology concerning codification is not always consistent, however. Sometimes the expression «codified law» is used in general for law contained in legislation.

2.3 Praetor and iudex

If two parties have a dispute about a particular case, the legal solution will depend on two factors: the facts of the case and the contents of the law. In Roman law, these two factors were linked with two roles in the legal procedure, namely the role of the *praetor* and the role of the *iudex* (judge).

If one party wanted to sue another, he had to first approach a *praetor* and explain his case. If the *praetor* was of the opinion that the case might be successful, he would formulate a kind of legal instruction (the *formula*) for the *iudex*, in which this judge would be told to grant the suing party a legal remedy if he believed that the factual conditions had been fulfilled. It was then up to the judge to determine what the facts of the case actually were and whether these facts, in light of the formula provided by the *praetor*, justified the remedy. This division of roles made the *praetor* responsible for establishing the precise content of the law and the *iudex* responsible for the determination of the case facts. As the role of the *iudex* did not require any special legal knowledge, it was fulfilled by laymen.

In modern times, we find a role similar to that of the *iudex* in juries, consisting of laymen who must decide about the facts of the case. In criminal cases, the finding of the juries will be «guilty» or «not guilty». If a jury fulfills the function of the *iudex*, the function of the judge will resemble that of the *praetor*.

Because the *praetor* had the task of interpreting the law, he had a considerable influence on the content of the law. However, the function of the *praetor* was first and foremost a political one, a stepping-stone to becoming a *consul*. The *praetor* was therefore not necessarily a trained lawyer, and perhaps to remedy this deficiency, was advised by *jurists*, who also advised the process parties. As a consequence, *jurists* had, through their advice, a great degree of influence on the development of Roman law.

Jurists

2.4 The Corpus Iuris Civilis

In the year 395 BCE, the Roman Empire, which had come to encompass large parts of Europe, North Africa, and parts of the Middle East, was split into Western and Eastern halves. Not long thereafter, the Western Empire succumbed to an invasion by the Germanic tribes, precipitating the fall and plunder of Rome in 455 CE.

The Eastern Empire survived until the fall of its capital Constantinople (now Istanbul), in a war against the Turkish Ottoman Empire in 1453. However, long before that, the Eastern Empire reached a cultural summit with the *Corpus Iuris Civilis*. This *Corpus* was an attempt to codify the existing Roman law and was published in several parts on the order of Emperor Justinianus from 529 to 534. The first part, the *Codex*, contained imperial legislation spanning several centuries. The second part consisted of the *Digest*, a collection of excerpts from writings of jurists from the period of about 100 BCE until 300 CE. The third part, the *Institutions*, was a student textbook.

3 Common Law

After the fall of the Western Roman Empire, the law of Western Europe to a large extent returned to customary tribal law, namely to the law of the Germanic tribes that had taken possession of the area. In the High Middle Ages (the eleventh century until the fifteenth century), several developments took place that had an enduring influence on the evolution of law in Europe. One of them was the rediscovery of Roman law, starting from the eleventh century. This rediscovery and subsequent «reception» of Roman law turned out to be very influential on the development of private law on the European continent. In England however, Roman law had much less influence, due to another important development, specifically the rise of common law.

3.1 Royal Justices

The development of common law as a separate legal system dates back to 1066 when the Norman King William I (the Conqueror) invaded and conquered England. This initiated a movement towards the unification of the English legal system, which until then mostly consisted of local customary law.

The unification was brought about by means of a system of royal representatives who traveled through the country to administer the law. The task of these royal justices was to apply everywhere the same law, the law which would eventually become the *Common Law of England*. The emergence of central courts of justice in the thirteenth century further contributed to the promulgation of common law as they facilitated

uniform application of the law all over the country. For law to be uniform, it is not only essential that the rules are the same everywhere, but also that these rules are applied in the same way. The law consists as much of its rules, as it does in the way these rules are applied.

The existence of a uniform legal system in England is one of the reasons why the rediscovery of Roman law, while having tremendous influence on the development of continental European law, left English law largely unaffected. As a consequence, the English legal system and the legal systems of the continent developed more or less independently of one another. One of the most conspicuous differences resulting from this separate development is that continental legal reasoning focuses on the creation and the application of mostly statutory rules, while the emphasis in the common law tradition has been on reasoning by way of analogy to previous cases. This is a consequence of the doctrine of *stare decisis*, to which we will now turn.

3.2 Precedent

Customary rules come into being if they are actually used by judges and other legal decision makers, among others. An example would be the following: A peasant sells a cow to another peasant. The cow turns out to be sick and dies within a few weeks. The second peasant wants his money back. The seller refuses to return the money and says that the buyer should have paid more attention to his purchase. If he had done so, he might have known that the cow was sick. The case comes before a judge, who agrees with the seller: the buyer should have been more attentive, since the illness of the cow would have been detected had there been a more careful inspection of the animal. In future cases, there is no longer a need to go to a judge about the sale of an unhealthy animal, if the animal's bad condition might have been discovered through careful inspection. In such cases, no money will be returned from the seller to the buyer. The decision of the judge will function as a *precedent* for future cases. Moreover, after some time, the rule that previously discoverable illnesses in cows does not constitute a reason to request the return of the sale price will be considered customary law.

Judicial decisions can and often will function as precedents. There are two ways to interpret this. The first interpretation is that the decision of the judge is *evidence* of the law

already existing before the judge gave his decision. If the rule already existed, it is clear that the same rule should be applied in future cases and by other judges. A second interpretation is that the judge, in giving his decision, created a new rule that did not yet exist, but will exist from that moment onwards. It is also understandable that in this interpretation, other judges will have to apply the rule in future cases. It is this second interpretation, namely that courts' decisions *create* the law rather than merely state it, that has become prevalent in the twentieth century.

In earlier centuries, the view that judicial decisions were merely evidence of pre-existing law was the fashionable one. Blackstone, a famous English lawyer from the eighteenth century, wrote that: «[...] the decisions of courts of justice are the *evidence* of what is common law». (Emphasis added.)

Stare decisis

The second interpretation is confirmed in the doctrine of *stare decisis* (Latin for «stand by your decisions»). According to this doctrine, if a court has decided a case in a particular way, then the same court and the courts that are inferior to it, must give the same decision in similar future cases.

In 1966 the highest English court, the House of Lords (since 2009: the Supreme Court, and to be distinguished from the political «House of Lords»), announced that it would not consider itself bound by its own previous decisions anymore. By this announcement, it created for itself an exception to the *stare decisis* rule.

Case-based reasoning

The custom to decide cases by analogy to previous cases combined with the doctrine of *stare decisis* means that common law has developed on the basis of precedents and case law. English legal reasoning has therefore become a form of case-based reasoning, comparing and contrasting new cases with old cases that have already been decided. Although legislation also plays a role in English law, the emphasis has traditionally been on common law, which consists of a large body of cases. It may be argued, however, that this focus on cases instead of legislation has lost importance with the United Kingdom's membership in the European Union, as the laws of the European Member States are converging.

Common Law tradition

The English legal tradition has been exported to the members of the British Commonwealth. Consequently, it is not only England using common law, but also Ireland, Wales, most States in the USA, Canada, Australia, and many of Britain's former colonies. While the common laws of these countries have their basis in old precedents stemming from the time the British Empire, they have grown apart since

becoming independent. Nevertheless, precedents set in one common law country may often still play a role in another common law country. In this way, common law is a major legal tradition, standing side by side with the civil law tradition of continental Europe.

3.3 Equity

This picture of the common law tradition would be one-sided if it did not pay some attention to the phenomenon of *equity*. Just like case law and legislation, equity forms part of the law in common law countries. Following the tradition of common law, equity is also a kind of judge-made law. However, there are some important differences.

Equity originated in the fourteenth century in England, when those who were unhappy about the outcome of common law procedures petitioned the King to intervene on their behalf. If the outcome of the common law for a particular case was found to be very inequitable, the King, or rather his secretariat, the Chancery, might ask the common law courts to reconsider the case. In time, the Chancery began to deal with such cases itself, and petitions came to be directed immediately to the Chancellor (the King's secretary) rather than to the King. A subsequent Court of Chancery eventually developed over centuries, creating a separate branch of law: equity.

Equity consists of a body of rules and principles that were developed to mitigate the harsh results that may, in some cases, arise from the application of common law. As the term "equity" suggests, this part of the law is particularly focused on obtaining fair results.

Fairness

Originally, equity may have been merely a correction to common law. However, in the course of time, some branches of law were only developed in equity, the law of trusts being the most prominent example.

The following example illustrates how equity differs from the common law. Angela is an unmarried woman of means who has a 2-year-old son Michael. Angela wants to give £50,000 to Michael, in the unexpected case that she might die. However, Michael is too young to deal with this sum of money. Therefore, Angela trusts the money to her friend Jane, who will act as a safe keeper for Michael's money. Under the regime of the common law, Jane would be the sole owner of the money and it would depend on her benevolence whether she keeps the

money for Michael. Michael would have no legal remedy if Jane abused her position. That is unfair, since the money was meant for Michael, and Jane was entrusted with it for Michael. In equity, it is possible to provide Michael with a more robust legal position. Jane will be the legal owner of the money (in common law), but acts as a «trustee». Michael will be the «beneficiary owner» (owner in equity) of the same money, and has a legal remedy against Jane if she does not keep the money for him.

Although nowadays it may be correct to state that equity is part of the common law tradition, originally equity was meant as an exception to the law. This difference is still reflected in English terminology, where the distinction is made between what holds *at law* (the common law) and *in equity*.

The historic roots of equity, namely that equity was applied by the Court of Chancery as a correction to «ordinary» common law courts, explains that equity was originally applied by separate courts. Reforms in the court structure of England in the nineteenth and twentieth centuries have meant that a single court can now apply both common law and the principles of equity to resolve disputes.

It is a matter of on-going debate whether this fusion of courts has also led to the fusion of common law and equity, or that – as metaphor would have it – «the two streams of jurisdiction, though they run in the same channel, run side by side and do not mix their waters».

4 **Ius Commune**

For most of the Middle Ages (roughly the fifth to fifteenth centuries), Western Europe was divided into a variety of smaller and larger territories, inhabited by different peoples. These territories had their own local customary law, and as a consequence the law in Europe was diverse. As far as legal science was concerned, this situation gradually changed after the rediscovery in Northern Italy of the *Digest*, around 1100. The *Digest* became an object of study at the newly founded University of Bologna.

Alongside the *Digest* becoming the renewed object of scientific study, so did the law of the Roman Catholic Church, Canon law. Canon law dealt with the internal organization of the church, but also with civil affairs such as marriage, contracts, and wills.

There were a lot of diverse texts which discussed this Canon law and they were not always consistent. In 1140, the *Decretum Gratiani* was compiled: a collection of existing texts that were relevant for Canon law. This document was an attempt to make these diverse texts consistent.

Roman law and Canon law were usually studied together. This is still reflected in the titles «Bachelor of Laws» and «Master of Laws» (plural). In the abbreviation «LLM», which stands for «Master of Laws» the two Ls represent these two branches of law.

The law schools in an increasing number of universities (such as Bologna and Orléans) became quite popular and attracted students from all over Europe. When the students returned home, they took knowledge of Roman and Canon laws with them. In this way, the same body of legal knowledge was spread over Europe.

Reception of Roman law

At first, the practical relevance of this European «common law», which is known under the Latin name *ius commune*, was not very substantial because local customary law was still the standard. Gradually however, local customary law was found to be inadequate, either because of its less sophisticated contents, or because it was difficult to access given its unwritten character, and the *ius commune* became more influential. This process, in which Roman law in a sense «conquered» legal science in Europe from the twelfth to the seventeenth century, has become known as the «Reception» of Roman law.

One of the reasons why Roman law gained acceptance is that it was considered to be rational; well-informed people would readily see that it contained good, if not the best possible, rules. Roman law was seen as *ratio scripta*, «reason written down».

Natural law

Being rational has always been one of the modes of existence of the law: rules were considered to be legal rules because they were rational. We can find evidence of this in the definition of law given to us in the thirteenth century by the Christian theologian and philosopher Thomas Aquinas.

According to his definition, the law is «a *rational* ordering of things which concern the common good, promulgated by whoever is charged with the care of the community». This definition was, by the way, not intended as a characterization of Roman law.

During the seventeenth and eighteenth centuries, there was a strong movement among learned legal writers emphasizing the rational nature of the law, and many authors attempted to

establish the contents of law purely by means of reasoning. Law that was established by means of reason was usually discussed under the heading of «natural law».

Hugo Grotius (1583–1645) developed in his book *De iure belli ac pacis* (On the Law of War and Peace) the outlines of international law and private law on a rational basis.

Samuel von Pufendorf (1632–1694) in his book *De officio hominis et civis juxta legem naturalem libri duo* (On The Duty of Man and Citizen According to the Natural Law) developed large parts of private law, also on the basis of reasoning alone.

Christian Wolff (1679–1754) undertook a similar enterprise in his *Jus naturae methodo scientifica pertractatum* (Natural Law Dealt With by the Method of Science).

5 National States and Codification

Peace of Westphalia

England was already, to a large extent, united by the eleventh century. On the European continent however, the unification, in which small territorial units combined into bigger ones, was a longer process. Although the unification of Italy and of Germany took place only during the nineteenth century, it is often assumed that the process of State formation on the continent reached a provisional end point in 1648, when a number of wars were ended with the peace treaties of Westphalia. In this series of treaties, Europe was divided into individual Nation-States (each corresponding to a nation), which were assumed to be sovereign, meaning that each State would have exclusive power over its own territory.

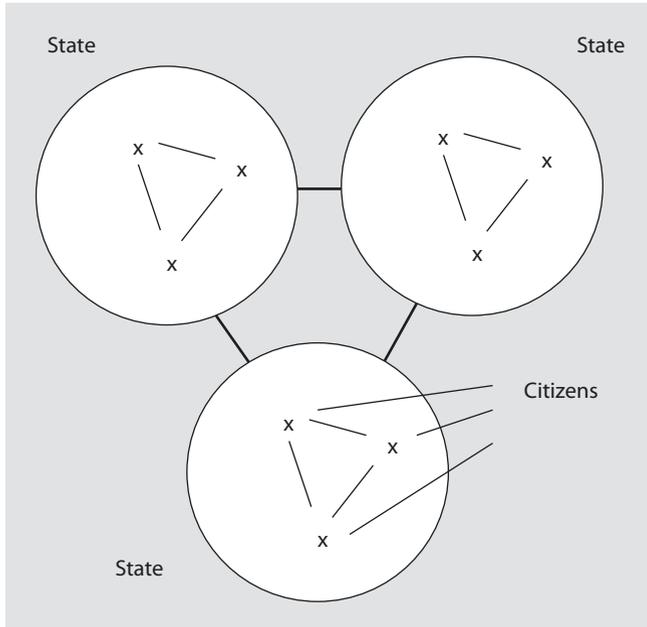
National law

One of the consequences of this development was that law was to become primarily national law. Originally, the law was the law of a people or tribe rather than that of a territory. Later, when the different peoples who had flooded Europe in the period of mass migrations (fourth to sixth centuries CE) had settled down and began to mix, the law became local law and attached to territories of varying sizes. Only when the national States had formed could the law become the law of a Nation State.

Westphalian duo

Alongside this national law, there was law that dealt with mutual relations between the national States. This law is called *International Public Law*. National State law and international public law were taken to exhaust the forms that the law could take. These two became known as the «Westphalian duo». See

■ Fig. 1.1.



■ Fig. 1.1 The Westphalian duo

5.1 Codification

With the arrival of national States, law could become national law, but it still took several centuries before this process of nationalization was finished. A major step was taken with the French Revolution (1789–1799), in which the line of French kings was replaced, first by revolutionary agents and later by an emperor, Napoleon Bonaparte. It was Napoleon's reign that led to the codification of French law.

Shortly after the French Revolution, French law was codified in the form of a number of «Codes». They included the *Code civil* (private law), the *Code de commerce* (commerce law), the *Code de procédure civile* (law of civil procedure), the *Code pénal* (substantive criminal law), and the *Code d'instruction criminelle* (procedural criminal law). This codification, like others, served several purposes:

- It brought about legal unity in France, where the law, at least in part, had differed from region to region.
- It created legal certainty as the law was written down and could, at least in theory, be inspected by anyone.
- It emphasized the legal power of the central lawmaking agencies as opposed to the local judges.

- It guaranteed the influence of the people on the contents of the law because democratic organs have influence on the legislative process. (This last purpose only became relevant later, when democracy became more important).

Partly under the influence of the Napoleonic conquest of large parts of Europe, codifications were introduced at the beginning of the nineteenth century in several European countries, including Belgium and the Netherlands.

Historical School

Germany notably lagged behind because a strong resistance movement rose against codification. This is remarkable since some codifications in Germanic countries such as Bavaria and Prussia actually preceded French codification. However, on the whole, codification for the full German empire was (temporarily) postponed.

Under the leadership of Von Savigny (1779–1861), a famous law professor in Berlin, it was argued that the law of a nation reflected the «spirit» of that nation (the *Volksgeist*). Codification would fossilize the law, meaning that the crucial connection between the law and the spirit of the people would be lost. Respectively, codification should be preceded by historical research on the origins of law and the reasoning behind the law. The perspective of this movement, of which Von Savigny was one of the most important representatives, gave the «Historical School» its name.

In practice, this alleged relationship between the spirit of the people and the development of law was maintained by legal scholars. They wrote comments on the *Digest* and, in doing so, gradually adapted the law to the needs of society. The development of law in Germany was as a consequence driven by legal scholars. By the end of the nineteenth century, the resistance against codification lost its battle. In 1900, a codified German civil code, the *Bürgerliches Gesetzbuch*, entered into force.

5.2 Legal Families

Common law family

Developments in the law of Europe during the second millennium divided the national legal systems in Europe into two «legal families». The common law family, which includes England, Wales, and Ireland, were not as influenced by the reception of Roman law as were their counterparts on the continent. This is because common law development was driven by the judiciary, as judges made new law through their decisions. It must be said that more recently, legislation has

become an important source of the law in common law countries as well.

Scottish law was influenced by both the common law and the civil law tradition. It is a «mixed legal system».

The great counterpart of the common law family in Europe is the civil law family. The law of most countries on the European continent has been greatly influenced by the combination of Roman and Canon laws. However, it is also possible to detect a further subdivision within this civil law tradition. On the one hand, there are countries that have been strongly influenced by the French codification movement. This movement emphasized the role of parliament and democratic input in making the codification. The creation of law is, from this viewpoint, firstly a political process. Countries that belong to this *French family* include France, Belgium, Spain, and Portugal. On the other hand, there are countries that belong to the *German family*, in which the development of law was driven by legal scholars. Countries that belong to this tradition include Germany, Austria, and Switzerland.

Civil law family

The Nordic countries do not fall neatly in this twofold division, and many European countries, including Italy, the Netherlands, and Poland, have been influenced by both the French and the German tradition.

5.3 Transnational Law

The period of codification initiated a development towards the use of more and more positive law, although until the twentieth century, codifications still largely reflected preexisting law. However, during the twentieth century, and especially after World War II, legislation was increasingly used to create new law. This development took place both on the European continent and in Great Britain. In particular, it was the large increase in administrative law, which regulates relations between a government and its citizens, that caused a growth in the overall amount of law. This law was mostly positive, State-made, national law.

However, after World War II, there were also several developments that challenged the *Westphalian duo*. This led to the claim that national State law and public international law exhaust the kinds of law, to appear obsolete. These developments included the rise of human rights, the creation and development of the European Union, and the revival of the *Lex Mercatoria*.

Human rights

Traditionally, human rights were conceived as rights of individuals against their governments. They were part of the national law of States and were safeguarded in national constitutions. The scope of these human rights was determined by national judges, who decided in concrete cases whether a State had violated a human right.

After World War II, human rights came to be protected under treaties. Some of the most important ones have been created under the aegis of the United Nations.

Examples of treaties with a global scope are the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both 1966). The Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations in 1948, is very important. It is not a treaty properly speaking, as it was not created by an agreement between States. In Europe, the European Convention on Human Rights (1953) has also been an influential source of human rights.

When human rights were proclaimed and protected by international treaties, they were no longer the exclusive domain of national law. Although States can theoretically withdraw from treaties, in practice this is often not a viable option. States that have committed themselves to the protection of human rights have undertaken commitments towards their citizens, commitments which are, to a large extent, outside of their control. This phenomenon is enforced even if the application and interpretation of the treaties are assigned to judicial bodies that are beyond the power of national States.

An example of such a body is the *European Court of Human Rights*, which can deliver rulings that interpret the application of the European Convention on Human Rights, and is binding on States.

As such, while States can still determine to which human rights they bind themselves by means of treaties, it is independent courts that determined the scope. In this way, States have lost control over part of the law that is binding on their territories and which also binds them.

European Union law

In the treaties that created the European Union (EU), the institutions of the European Union have been given powers to make new and independent European legal rules. In two famous decisions – *Van Gend & Loos* (CJEU Case C-26/62) and *Costa/ENEL* (CJEU Case C-6/64) – the Court of Justice of

the European Union decided that these European legal rules belong to a separate and autonomous legal system.

The rules that stem from the EU do not only bind the Member States but also their legal subjects. Moreover, these European legal rules have precedence over the States' domestic legal rules. As a consequence, the Member States of the EU and their legal subjects are bound by a legal system that is neither the system of a Nation State nor a system that regulates the mutual relations between Nation-States. In other words, the existence of EU law does not fit in the Westphalian picture that takes national States as its starting point.

The *Lex Mercatoria* is a set of rules created by merchants to regulate their mutual commerce. In principle, commercial relations are already governed by the rules of private law, the law that deals with mutual relations between private actors. However, the existing rules of private law were not always suitable for the particular needs of trade relations. Therefore as early as in the Middle Ages, a separate and independent body of rules emerged. For the same reason, separate courts originated, which had more expertise in commercial matters and which operated more swiftly.

Lex Mercatoria

Today, there still exists a body of rules that govern international commercial relations. This body consists of treaties such as the *Vienna Convention on the International Sale of Goods* (1980), and conventions that are not officially binding, but nevertheless exercise influence on the behavior of commercial partners (soft law). A typical example is the *Unidroit Principles of International Commercial Contracts*.

Because much of the *Lex Mercatoria* operates outside the traditional framework of national States and their relations towards each other and towards their legal subjects, it also provides counterevidence to the exhaustive nature of the Westphalian duo.

What is illustrated by the emergence of human rights, European Union law, and the revival of *Lex Mercatoria* is that there are many important legal phenomena that do not fit into the description of law created by the Treaties of Westphalia. These types of law have been categorized under the name of *transnational law*. Transnational law might be characterized as law that is neither made nor enforced by national States. This is a negative characterization: but simply put, transnational law is law that does not belong to the Westphalian duo. The increasing importance of this branch of law marks an important development in the long history of the law, which gives rise to new questions about the nature of the law.

Transnational law

6 Conclusion

In this chapter, we have seen how the law has taken different shapes over the course of time. Originally all law was customary law, but the oldest legislation that is presently known appeared around 2100 BCE (the *Codex Urnammu*), from the area that is now known as Iraq. The oldest legislation from the Roman tradition consists of the Twelve Tables. After the French Revolution, much of the existing law on the European continent was also codified, using the five aforementioned French Codes as examples.

Although it is likely that decisions made by judges had been a source of law long before the era of codification, case law as an official source of law in the common law tradition started with the conquest of England by William the Conqueror in the eleventh century. On the European continent, precedents also play an important role; however, they are seen as not officially binding.

Treaties and conventions are kinds of contracts between States. In theory, contracts only create obligations between States. Recently, however, some treaties such as ones pertaining to human rights or the treaties of the European Union, also assign rights to individuals as legal subjects. These legal subjects can in turn invoke their rights in court. As a consequence, the function of these treaties has started to resemble that of legislation.

The Peace of Westphalia (1648) established a kind of State system in Europe, and with it the idea that this system includes two kinds of law (the Westphalian duo). The first, National Law, concerns the citizens of a State, their mutual relations, and their relation to their own State. The other, International Public Law deals with the mutual relations between States. These two kinds of law were considered mutually exclusive and together exhaustive of all law. This idea of only two kinds of law was already incorrect for the time preceding the Westphalian Peace Treaties, and has become more incorrect over the last few decades with the rise of transnational law.

Recommended Literature

- Merryman JH (2007) *The civil law tradition*, 3rd revised edn. Stanford University Press, Redwood City
- Stein P (1999) *Roman law in European History*. Cambridge University Press, Cambridge