

**HU1010**

**COMMON FOUNDATIONS OF LAW IN EUROPE**

**Course Organiser**

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## Tutorial 1: Introduction

### **Structure and Contents of the Course**

#### *General remarks*

What do Europeans have in common? Part of the answer to this question is: their law. Currently, approximately 50% of all new legislation in the member states of the European Union has a non-national, European origin. This international outlook of law in Europe is not a new phenomenon. Even when concentrating on the so-called 'national laws' of the various European nations, it must be admitted that these laws find a strong foundation in a non-national, truly European tradition. This tradition dates back to the Middle Ages; the present course concentrates on this shared (legal) past. In doing so, it takes as its focal point the *ius commune*, i.e. the common, scholarly European approach to the law that originated in the Middle Ages and that was strongly based on Roman Law. This medieval tradition forms the common ground on which the present national legal systems in Europe have developed. It has strongly contributed to the creation of the idea of a common European culture.

The course starts with discussing Roman Law. After all, it was the medieval interpretation of the rules of Roman Law that provided the basis for laws in the various European territories beginning to acquire their modern outlook. The so-called *Corpus Iuris Civilis* will be used as the point of departure since most of what we know about Roman Law derives from this compilation of legal materials that was made in the 6th century AD on the orders of the Byzantine emperor Justinian. The texts that this emperor included in his collection were the product of a thousand years of unbroken legal development. During this millennium, roughly from 500 BC to 550 AD, Rome expanded from a small city-state to a world empire. While Roman law was adapted to cope with the changing society, the idea was maintained that it was essentially the same law that had been part of the early Roman way of life.

Justinian's texts have been viewed from different perspectives by different peoples at different times in European history. After having studied the main developments of Roman Law in classical antiquity, various subjects will be discussed, amongst other things:

- the revival of Roman law in the Middle Ages;
- sixteenth century France and the advent of legal humanism;
- legal development in the seventeenth century Dutch Republic, where a new vision to the discipline of law was developed;
- nineteenth century German legal scholarship that transformed the subject yet again.

The course will also address the different approach to the law that existed and still exists in Anglo-American jurisdictions. It will try to explain the legal differences today between continental European Civil Law and Anglo-American Common Law. In doing so, the many similarities that lie beneath the seemingly radically different outward appearance of law in Anglo-American jurisdictions will come to light. This exercise will demonstrate that Anglo-American law is not so different from continental European law as some writers would like us to believe.

The course will conclude with a study of today's European legal landscape. The similarities and differences that can be traced to the historical knowledge acquired during the present course will be concentrated on.

The course consists of tutorials devoted to the following topics.

- a. Introduction and Roman Law
- b. The High and Late Medieval Period, 12<sup>th</sup>-14<sup>th</sup> centuries: Glossators and Commentators
- c. Medieval Canon Law and Feudal Law
- d. Humanism, Reformation and Natural Law
- e. Enlightenment and Codification
- f. The English Common Law
- g. Law in 20<sup>th</sup> century Europe

### **Course materials**

- O.F. Robinson, T.D. Fergus, W.M. Gordon, European Legal History, London etc., 2000 or later edition
- Additional materials: these are indicated per week and will be made available for consultation.

It should be noted that part of the course materials will be used for student presentations. This means that not all of the course materials will have to be read by all of the students. An explanation will be provided during the first meeting.

### **Internet and library**

Students are encouraged to make use of the Internet and the library since not all of the questions can be answered by solely studying the course materials.

### **Course Objectives**

- To provide students with a better notion of law as a harmonising phenomenon in European culture;
- To provide students with a basic notion of similarities and differences in the approach to law in the various member states of the European Union (and the USA);

- To give students a better understanding of basic legal notions such as property, contract and delict;
- To provide students with a greater ability to evaluate the significance of the transfer of law making powers from the national to the European institutions.

### **Subjects to be studied**

1. Roman Law and the Corpus Iuris Civilis
2. The 'rediscovery' of Roman Law in the Middle Ages
3. Canon Law and its influence
4. Feudal Law and its influence
5. Legal Humanism
6. Natural Law
7. Codification
8. English Common Law
9. EU and its importance for the national laws of the Member States

### **Attendance requirements**

Students may miss 1 tutorial if announced in advance. In case they miss more meetings, they must submit an additional assignment (tutor will provide info on this in class).

### **Exam**

Paper. The paper should concentrate on one or more topics of the course. The paper topic has to be approved by the course coordinator. The paper has a word limit of 6000 words excluding footnotes. It should contain one or more research questions in the introduction, and an answer to these questions in the conclusion. Papers should be handed in at the end of the course. Further details will be given during the first tutorial.

Class performance will be taken into consideration. This means that students are required to come to their classes well-prepared in order to actively participate in the discussion. Additionally, students will be asked to present part of the course materials themselves by way of a power point presentation.

Resit: oral re-exam.



## Tutorial 2: Roman Law

The *Corpus Iuris Civilis*, promulgated in the 6<sup>th</sup> century by the emperor Justinian, is our main source of knowledge of Roman Law. It also formed the basis for legal development in Europe since the 11<sup>th</sup> century. Traces of the legal learning encompassed by the *Corpus Iuris* are still with us today. Consequently, the *Corpus Iuris* as well as its sources merit a considerable amount of attention.

### **Reading**

- Robinson, p. 1-5
- P. Stein, *Roman Law in European History*, Cambridge: Cambridge University Press, 1999, p. 1-37

### **Questions**

1. Give an overview of the main stages in the political development of Rome from 753 BC until Justinian.
2. Discuss the sources of Roman law.
3. Explain the difference between *ius* and *lex*.
4. Discuss the concepts of *ius naturale* and *ius gentium*. To what extent did these concepts differ in Antiquity?
5. What were the tasks of the *praetor* in shaping the Roman law?
6. Give an outline of the formula and the cognitio procedures. Discuss differences and similarities.
7. What was the role of the jurists in shaping the Roman law? What is the *ius respondendi*?
8. Discuss the various types of legal literature in classical Roman law.
9. Discuss attempts to order the law in the period of classical Roman law.
10. Give an outline of the process whereby the *Corpus Iuris Civilis* was enacted.
11. What are the different parts of the *Corpus Iuris Civilis* and what are their respective contents? When were they issued? When were they brought into force in the West?
12. What is the main difference between classical Roman Law and the law of Justinian's time?

13. Mention some of the factors that had a 'distorting' effect on the classical law as collected by the compilers and incorporated into the *Corpus Iuris Civilis*.
14. What is meant by the 'vulgarization of Roman Law'? Why can for example Stein call it 'legal vitality' or 'organic growth'?



### Tutorials 3 and 4:

### The High and Late Medieval Period, 12<sup>th</sup>-14<sup>th</sup> centuries: Glossators and Commentators

During this week, the ‘rediscovery’ of the Digest in Western Europe is focused on. The underlying reasons for this rediscovery are discussed as well as the manner in which Roman Law came to influence legal learning and legal practice in Western Europe. In particular, the contribution to the above process by the Glossators and Commentators will be discussed.

### **Reading**

- Robinson, p. 42-71
- J.M. Kelly, *A Short History of Western Legal Theory*, Oxford: Clarendon Press, 1992, p. 114-158 (**power point presentation by students**)
- P. Stein, *Roman Law in European History*, Cambridge: Cambridge University Press, 1999, p. 43-74
- R.C. van Caenegem, ‘Law in the Medieval World’, in R.C. van Caenegem, *Legal History. A European Perspective*, London etc.: Hambledon Press, 1991, p. 115-148 (**power point presentation by students**)

### **Questions**

1. Which social, political and economic factors brought about the legal renaissance of the High and Late Middle Ages?
2. Which parts of the Justinianic legislation were still known and in use in Italy during the 11<sup>th</sup> century?
3. What are the *Liber Florentinus*, the *Codex Secundus*, and the *Vulgata* or *Littera bononiensis*? What is their relation to each other?
4. What is a *glossa*? What did it look like in manuscripts and printed editions of the *Corpus Iuris*?
5. Which other types of juristic literature were produced during the 12<sup>th</sup>-14<sup>th</sup> centuries? In how far do they reflect their authors’ other professional activities, i.e. teaching and legal practice?
6. What does it mean to say that the Glossators saw the *Corpus Iuris Civilis* as *ratio scripta*, as reason committed to writing? How did this perception influence their approach towards the text? Are there contemporary philosophic and theological counterparts to this attitude?
7. What is the *Glossa ordinaria*? Discuss its significance.

8. Which dogmatic achievements can be attributed to the Glossators? To which criticism was the Glossators' methodology later subjected?
9. Who are the Commentators? What are the differences and the common features of Glossators and Commentators?
10. What did the Commentators describe as *ius speciale*? In which relation to Roman Law did they see it?
11. Which process is meant by the expression 'Reception (of Roman Law)'?

### Tutorials 5 and 6: Medieval Canon Law

The subject of this week is the developed classical Canon Law of the Middle Ages – the *Ius Novem*. Canon Law is the second common historical denominator of the laws of Europe. The background to and the composition of the *Corpus Iuris Canonici*, the relationship between Canon Law and Roman Law, and between Canon Law and national law will be examined.

#### **Reading**

- Robinson, p. 72-90
- J.A. Brundage, *Medieval Canon Law*, London: Longman, 1995, p. 1-69  
**(power point presentation by students)**
- P. Stein, *Roman Law in European History*, Cambridge: Cambridge University Press, 1999, 41-43, 49-52
- W. Ullmann, *Law and Politics in the Middle Ages. An Introduction to the Sources of Medieval Political Ideas*, Cambridge: Cambridge University Press, 1975, ch. 4: The Canon Law (p. 117-159) **(power point presentation by students)**, ch. 5: The Scholarship of Canon Law (p. 161-189)

#### **Questions**

1. What is Gratian's *Decretum*?
2. What is the *Corpus Iuris Canonici*? What are its constituent elements? During which period was it legally binding?
3. What are the Decretals?
4. Describe the relationship between Civil and Canon Law.
5. In how far did Canon Law enjoy advantages over Roman Law?
6. What is the *Speculum Iudiciale*?
7. Over which subject matters did the high and late medieval Church demand jurisdiction?
8. What were the distinguishing features of canonical procedure?
9. What were the differences between the procedures employed by ecclesiastical courts on the one hand and secular courts on the other?



### Tutorial 7: Humanism, Reformation and Natural Law

In this week we will first focus on Humanism and the Reformation in their relation to legal studies, especially to the study of Roman Law. Secondly, we will discuss Natural law.

#### **Reading**

- Robinson, p. 169-182, 213-227
- P. Stein, 'Legal Humanism and Legal Science', in: P. Stein, *The Character and Influence of the Roman Civil Law: Historical Essays*, London: Hambledon Press, 1988, p. 91-100 = *Tijdschrift voor Rechtsgeschiedenis* 1986, p. 297-306 **(power point presentation by students)**
- P. Stein, *Roman Law in European History*, Cambridge: Cambridge University Press, 1999, p. 74-101
- J.M. Kelly, *A Short History of Western Legal Theory*, Oxford: Clarendon Press, 1992, 159-243 **(power point presentation by students)**

#### **Questions**

1. Give a survey of the main political currents of the 16th century. What was the Reformation?
2. Define Humanism. Was it limited to law?
3. What was the contribution of Andreas Alciatus? Who were the other main proponents of legal humanism in France?
4. In which way did the humanists' approach to education contribute to its success?
5. Explain the effect of legal humanism on legal practice.
6. Is it fair to say that humanism was the first real challenge to the medieval *ius commune*?
7. Was legal humanism confined to France?
8. What is the theory of Natural Law? How had it developed prior to the 17th century? What is its connection with natural sciences, esp. mathematics?
9. What is the central issue of Natural Law?
10. What was the influence of Grotius's theory of Natural Law on the German School? How did the latter differ from it?

11. What is meant by the 'contract of society' and how does it differ from, what is its connection with the 'contract of submission'? In whose English philosopher's work did these two feature prominently, and what is the historical background of his view?
12. Which impact did the scholars of Natural Law have on the systematization of law? In how far can this be seen in connection with the wave of codification beginning in the 18th century?
13. What impact did the Spanish Scholastics have on Grotius's concept of Natural Law?
14. What is meant by the 'Elegant Jurisprudence', esp. Dutch Elegant Jurisprudence? In how far differed its approach to and dealing with the sources of law, esp. Roman Law, from the one of its predecessors? In how far is a continuance between this School and the legal humanists discernable?

### Tutorials 8 and 9: Enlightenment and Codification

This week is devoted to the process of codification that occurred in Europe during the 18<sup>th</sup> and 19<sup>th</sup> centuries. Special attention will be given to the factors that contributed to the process of codification as well as the intellectual foundations of the codes.

#### **Reading**

- Robinson, p. 249-282
- P. Stein, *Roman Law in European History*, Cambridge: Cambridge University Press, 1999, p. 104-132
- J.M. Kelly, *A Short History of Western Legal Theory*, Oxford: Clarendon Press, 1992, 244-300 (**power point presentation by students**)

#### **Questions**

1. Define 'Enlightenment'. What was the underlying relationship between 'Enlightenment' and codification?
2. Is it correct to state that codification could only occur after the works of the Natural Lawyers?
3. Outline the codification process in Bavaria. Which factors provided the impetus for codification in this instance?
4. Outline the codification process in Prussia. Which factors provided the impetus for codification in this instance? Was the code a success?
5. In which respects did the codification process in France differ from the same process in the German countries?
6. Outline the codification process in Italy.
7. Explain the intellectual approach of the German Historical School. Who was the main proponent of this movement?
8. Explain the intellectual approach of the German Pandectist School. Who were the main proponents of this movement and how did they contribute to the eventual enactment of the German Civil Code?





### Tutorial 10 and 11: The English Common Law

In England, royal justice developed so early as to preclude other forms of justice based on Roman Law. How did this take place? Through which channel did Roman Law nevertheless influence English law?

#### **Reading**

- Robinson, p. 125-154
- R.C. van Caenegem, *Birth of the English Common Law*, 2<sup>nd</sup> ed., Cambridge: Cambridge University Press, 1988, ch. 4 (p. 85-110)
- J.H. Baker, *Introduction to English Legal History*, 3<sup>rd</sup> ed., London: Butterworths, 1990, 12-70 (**power point presentation by students**), 155-194 (**power point presentation by students**)

#### **Questions**

1. Why is English law called 'Common Law'? Against the backdrop of which other, conflicting and competing jurisdictions should it be viewed? Why can it – within the medieval context – be described as royal law?
2. In how far did Anglo-Saxon socio-legal institutions survive in feudal England? Name a few of those. Which impact did they have on the Common Law?
3. What was the constitutional and political framework of English Common Law? How did this framework facilitate its development into the common law of the realm? Compare this framework to the constitutional and legal developments in other lordships and states in the medieval period.
4. At which point did 'common lawyers' in the sense of a group of legal professionals working with English law develop?
5. In how far can Roman Law be said to have had an impact on the development of the English Common Law?
6. Give a brief account of the development of the most important common law courts and branches of jurisdiction in the Middle Ages.
7. What are *Glanvill* and *Bracton*? In how far can they be seen as landmarks of the development of the English Common Law?
8. What is a writ, how did it start off in the High Middle Ages and how did it develop from the 11th to the 13th centuries?



### Tutorial 12: Law in 20<sup>th</sup> century Europe

After the devastations of World War II, the twentieth century witnessed the creation of the European Communities. The creation of the European Communities and their later development as well as the consequences of European integration in the legal field will be discussed during week 7.

#### **Reading**

- Robinson, p. 301-319
- P. Craig, G. de Búrca, *EU Law*, latest edition, ch. 1 **(power point presentation by students)**
- R. Zimmermann, 'Roman law and European Legal Unity', in: A. Hartkamp et al. (eds), *Towards a European Civil Code*, 2<sup>nd</sup> edition, Nijmegen 1998, 21-39
- R. Zimmermann, 'Savigny's Legacy. Legal History, Comparative Law, and the Emergence of a European Legal Science', *Law Quarterly Review* 1996, 576-605 **(power point presentation by students)**
- J.M. Smits, 'A European Private Law as a Mixed Legal System', *Maastricht Journal* 1998, 328-340 **(power point presentation by students)**