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R. C. van Caenegem. *European Law in the Past and the Future: Unity and Diversity over Two Millennia.* New York and Cambridge, England: Cambridge University Press, 2002. viii + 175 pp. $34.99 (paper), ISBN 978-0-521-00648-4; $80.00 (cloth), ISBN 978-0-521-80938-2.

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The Future of Europe's Legal Past?

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This is a slim volume with a large subject: the European legal past and legal present and the probable, or possible, European legal future. It does not, however, claim to be a general survey of any of these topics nor to present substantial original research on the part of the author; rather, it is, in the main, a work of synthesis. It remains close to its origins in a course of introductory lectures on European legal history given at the University of Maastricht for students from a variety of countries in several continents, who could not be expected to know anything in advance about European legal history or about the differences between the common law and civil law systems. Its author, R. C. Van Caenegem, is professor emeritus of medieval history and of legal history in the University of Ghent, and the author of such noted studies as *The Birth of the English Common Law* and *Judges, Legislators, and Professors: Chapters in European Legal History*.

Chapter 1, "The National Codes: A Transient Phase," highlights what Professor Van Caenegem identifies as three of the most important and interesting features of the European legal past. The first is the significant role played in the history and development of three of the leading "national" legal systems of Western Europe by exogeneous legal customs or sets of legal rules. For much of its history, English law has developed quite separately from other European legal systems. It began, however, Van Caenegem argues, as only one part of a legal system spanning both England and Normandy, and an important part of the law enforced in the late-twelfth-century English courts was derived from the "feudal law" developed on the Continent from the time of Charlemagne onwards. Similarly, the family and property law sections of the French Civil Code of 1804 were largely derived from the customary law of the *pays de droit coutumier*, and that in turn was ultimately the recognisable descendant of the customary laws of the Germanic invaders of northern France of the early Middle Ages. So, too, the German Civil Code of 1896 (the "BGB") was heavily indebted to the Roman civil law as originally codified by Justinian and subsequently taught and further systematised in medieval European universities. Thus, none of the three major legal systems of Western Europe is a purely "homegrown" product. The second salient characteristic is the contrast in degrees of continuity between the English legal system and those of France and Germany. The major discontinuity in the development of German law took place in the early modern period, with the large-scale adoption ("reception") of Roman law. The major discontinuity in French legal history was the enactment in the early years of the nineteenth century of the various Napoleonic codes, even if these owed more than they acknowledged to the work of eighteenth-century jurists and legislators. The English legal system is the exception. There has been no comparable major discontinuity, despite the best efforts of the law reformers of the Puritan Revolution and notwithstanding the significant procedural and structural reforms of the nineteenth century. The third feature highlighted by Van Caenegem is that a truly European law once already existed. This is the *ius*

commune that developed in the law faculties of the universities of Western Europe in the later Middle Ages, a common "learned law" that they taught their students. This consisted in turn of two theoretically separate, but in practice closely related and intertwined, elements: the canon law of the Catholic Church as enforced in the ecclesiastical courts and the civil law of Justinian's *Corpus Juris Civilis* , as understood and glossed in the law schools. Chapter 1 is primarily descriptive; if there is an argument, it is an implicit rather than an explicit one, about the need to see the legal history of Europe from a European perspective.

Chapter 2 is misleadingly titled "*Ius Commune*: The First Unification of European Law." There is indeed a short initial section that discusses how in the Middle Ages Roman law began to find its way into the practice of the courts and thereafter came to exercise a significant influence both on the makers of legislation and on the revisers of local customary law. This helped in some measure to overcome the effects of the extreme fragmentation of jurisdiction and legal rules and practice characteristic of most of Western Europe during this period. Most of the chapter, however, addresses something quite different: the possibility of a future unification of private and public law across the whole of the European Community. Van Caenegem distills the arguments of the main participants in the debates of the 1990s about the possibility of the future emergence of a genuinely common European law, not just a law of the European Community, and adds his own conclusions as to the likelihood of this happening. He sees some major obstacles to this but suggests these can be overcome if legal scholars prepare the way and there is enough political will to bring about the change. What he does not consider is whether such a common European law is in fact desirable and why that might be so.

Chapter 3, "Common Law and Civil Law: Neighbours Yet Strangers," summarises five main contrasting characteristics of the two main families of legal systems that have developed and exist at the present day in Europe: the common law and the civil law. Van Caenegem's analysis in this chapter is largely based on the earlier work of Peter Stein. The first major contrast is a relatively modern one: that the civil law systems are characterised by the use of codes, which are intended to summarise the whole of the law, while the common law remains almost completely uncodified. A second contrast is that there is a sharp conceptual divide in the civil law systems between public and private law, whereas in the common law (despite the growth of administrative law and special administrative tribunals) the distinction has still not become a basic building block of the system. A third contrast (perhaps, as stated, more a matter of past history than current practice) is between a common law system, in which the judges are the primary makers and shapers of legal development, and civil law systems, in which professors in the law faculties have taken the primary initiative in legal development. A fourth contrast (but which is also perhaps again more of a historical than a current phenomenon) is the existence of a much clearer distinction between substantive law and procedure within civil law systems than was true of the common law. The final contrast is between the adversarial procedure that is still typical of common law proceedings, whether criminal or civil, and the inquisitorial process that is typical of the civil law, though more marked in criminal than in civil proceedings.

In chapter 4, "The Holy Books of the Law," Van Caenegem looks at, but does not compare in any comprehensive fashion, three very different authoritative legal texts: the *Corpus Iuris Civilis*, the much shorter Constitution of the United States (scarcely a document that forms part of "European Law" except in the very broadest of terms), and the French Civil Code of 1804. Only for the last of these does he provide any account of the process that led to its drafting as well as of the changing intellectual fashions later followed in its interpretation. For the Constitution of the United States he provides little more than a brief discussion of the current application of the doctrine of "original intent" to the ongoing controversy about the constitutionality of capital punishment. For the *Corpus Iuris Civilis* he gives a brief introductory survey of the changing modes of elucidation and interpretation used in the medieval and early modern periods. He suggests that the textual basis of neo-Roman law and its early exegesis in a university environment have combined to exercise a lasting influence on the nature of the civil law systems, making them especially strong on conceptual matters and theoretical distinctions.

Chapter 5, "Why did the *Ius Commune* Conquer Europe? ," has perhaps the strongest claims to originality, though it too is misleadingly entitled, for its main emphasis is on the reasons for the Europe-wide success of the *Corpus Iuris Civilis* rather than of the *Ius Commune* as a whole. Van Caenegem suggests five different kinds of reason for that success. First is the intrinsic legal quality of the text itself. Second is the text's value to the ecclesiastical and secular leaders of twelfth- and thirteenth-century Europe who were building new power structures for justifying their actions and indirectly function-

ing as the raw material for the schools that were training the administrative elite they now required. Third is the cultural setting of the rediscovery of the text in the Renaissance of the twelfth century, which provided a favourable intellectual climate for the intellectual elite's ready acceptance of this new authoritative text. Fourth is the favourable contemporary economic context of the rediscovery of the text in an era of growing urbanisation and the rise of the market economy (especially in Italy), which combined to create a need for a more sophisticated set of legal rules and procedures that could be more easily developed on the basis of classical Roman law than pre-existing legal custom. Fifth is the immediate value of the rediscovered text to lawyers in Italy wanting to win cases and judges who wanted to justify their judgments. As with all such exercises in recovering fundamental causes of major historical phenomena, it is difficult to judge whether this particular set of explanations is the correct one or how we might decide whether it is correct or not, nor are we given much guidance as to what relative weight should be attached to each explanation individually. They are plausible without being wholly convincing.

The first section of chapter 6, "Law is Politics," is best seen as a continuation of chapter 4, for it focusses on the genesis of one of the other major texts of European law, the German Civil Code of 1896, and the long disputes between "Germanists" and "Romanists" that preceded its drafting and promulgation. The second (and longer) section of the chapter looks at the careers of five German jurists (four of them legal historians) who sympathised with the Nazi regime in Germany and its ultimately abortive plans for a radical revision of the Civil Code. There is very interesting material here but the amount of detail it contains does not seem entirely appropriate to a book where so much else is painted with a very broad brush.

The misleadingly entitled epilogue, "A Look into the Twenty-First Century," in reality constitutes a final chapter on the possible future of a common European law. This gives the author's own views on this topic. He is evidently attracted by the possibility of creating a common European jurisprudence in private law that represents a consensus of legal or jurisprudential experts, which would resemble a modern version of the medieval *ius commune*. He does not, however, think it necessary, or even desirable, that there be a single European civil code with totally uniform rules across the continent. In public law, he advocates the creation of a truly federal system in which matters of common interest are decided by a higher authority but other matters are left to the existing member-states. History is invoked to provide past examples of successful confederations. But nothing is said about the one major problem of the emerging European super-state: the difficulty of ensuring democratic accountability within it when the European parliament is such a weak institution and the European executive is not accountable to it.

Those sections of the book that deal with the past and present of European law are surprisingly narrowly focussed on the legal history and current legal systems of England, France, and Germany. The legal systems and legal history of other Western European countries are occasionally mentioned in passing and the bibliography deals with them, but the non-European student of European legal history dipping into the volume might easily gain the misleading impression that there was nothing of much interest to say about the legal history of Spain or Portugal or Italy or the Low Countries, let alone of Scandinavia, Scotland, or Ireland. All this does have a bearing on the future of European law as well: it is perhaps only by playing down the legal heterogeneity of the European legal past that it is possible to be so optimistic about the likelihood of a common European legal future.

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