



Law: The Basic Concepts

General History of the State and of Law

edited by

TADEUSZ MACIEJEWSKI

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From the Editor

The general history of the state and of law is no easy subject. It takes in many issues, quite a few of which continue to be subjects of research and of scholarly controversies. Another difficulty lies in the fact that a handbook to this subject must deal with a vast array of sources and an exceptionally rich literature from all over the world.

This handbook is a comparative-legal study, taking account of the history of the state and of law in the major countries of Europe – England (Great Britain), France, Germany, Russia – and the United States of America. Thus, the text acquires a universal character.

In choosing from the enormous amount of material at their disposal, the authors have been guided by the principle of focusing on the most important issues and of avoiding particulars. Most attention has been given to perceiving state and legal connections, and to the formulation and interpretation of general issues. This method may provoke some discussion.

For the authors, the frequently reissued and highly regarded study by Tadeusz Maciejewski *Historia powszechna ustroju i prawa* [C.H.Beck, Warszawa 2000, 2004, 2007, 2011, 2015, pp. 929 (2000)] has been of fundamental importance. It constituted a point of reference in terms of the scope of what is presented and of the manner in which particular topics are discussed. Besides that, the handbook avails itself of the achievements of many recognized scholars from Poland and abroad, achievements contained in monumental studies, monographs, articles, and source texts.

This book is directed toward English-speaking students of law in Poland and abroad. For those who wish to deepen their studies,

we can direct them to the above-mentioned *Historia powszechna ustroju i prawa* and *The History of the Polish Legal System (from the 10th to the 20th century)* (T. Maciejewski, C.H.Beck, Warszawa 2016).

Professor Tadeusz Maciejewski
Gdańsk, summer 2018

Part I

GENERAL ISSUES

Chapter 1

Periodization in the history of state systems

Periodization is nothing more than a division into periods. It helps to provide order in organizing the history of state political systems according to certain regularities and knowledge of their development in the course of millennia. The matter is complex, as it refers to the general systematization of European and also world history, as well as to the political systems in individual countries, which, in some cases, fail to correspond to the general pattern, but which, in fact, do not need to be covered in a manual that offers a general common history of state systems. Thus, periodization remains the individual choice of the researcher.

As a result, I endorse the traditionally adopted concepts of the historical development of state political systems divided into epochs: antiquity, the Middle Ages, the early modern period, the late modern period, and contemporary times. This may seem to be a simplified approach, but I see no other possible one, particularly when dealing with the history of European/world state political systems, and not only with those in particular countries.

The Middle Ages lasted over a thousand years (476–1492). Patrimonial monarchy dominated in the epoch (up to the thirteenth/fourteenth centuries), but the period ends with state monarchies (legal public states). Within the first system, we can identify protofeudalism, uniform fief monarchy, and feudal fragmentation.

Protofeudal states originate from the so-called “barbarian tribes,” tribes living on territory neighbouring in the fourth century CE directly or indirectly the borders of the Roman Empire. The first to settle on Roman territory, with the consent of Rome, were the Visigoths (375), followed by the Ostrogoths and Burgundians. They were called allies. In this way the Empire’s border along the

Danube River was fixed. Shortly afterward, Germanic peoples crossed the Empire's border on the Rhine, occupying the eastern regions of the Empire in 406. To distinguish them from earlier peoples, these were named conquerors, and included, among others, Franks, Vandals, Suebi, and later Lombards. Initially, these lands were exterritorial countries with no demarcated borders. With time, the borders became permanent, contributing to the fall of the Roman Empire in 476. The tribe was the principal social organizational unit among the original Germanic peoples. Later, a neighbourhood community, a territorial based community (a march) replaced it. The political system was based on military (wartime) democracy, with primary importance assigned to the gathering. Its importance faded with time and power went into the hands of the king (*rex*). The multitude of barbarian realms was replaced by the Frankish Empire, which from the sixth century began to absorb the others.

Formally, the Kingdom of the Franks was established in 495 with the baptism of King Clovis I, who started the reign of the Merovingian dynasty. The dynasty was overthrown in 751 by Pepin the Short, who started the rule of the Carolingian dynasty. The predominance of the latter was cemented by Charles the Great/Charlemagne (emperor from the year 800). A unitary fief monarchy (*feudum* – fief) developed in this period. The system that emerged at the time began to be called in historiography feudalism or the fief system. It finally disappeared in Western Europe at the end of the fourteenth century, although it faced a crisis much earlier when the grandsons of Charlemagne divided the Frankish Empire in the Treaty of Verdun (843), laying the foundations of three new realms: France, the Frankish Empire (the Reich), and Italy. This fact and the development of the feudal system, linked with granting privileges that gave magnates authority over land, and, thus, simultaneously private and public-private powers over their huge territories, led to the emergence under patrimonial monarchy of the new systemic and legal form that was feudal fragmentation.

Gradual liquidation of territorial and political particularism and concentration of power in the hands of a monarch slowed down the process and moderated the feudal fragmentation in Europe,

with the exception of Italy and especially the Empire after 1180. Those areas experienced the formation of territorial principalities/ duchies, which numbered nearly three hundred by the end of the Middle Ages. Many of them developed estate monarchy systems, e.g. Mecklenburg, which functioned the longest under the system, that is, up to 1918. Ultimately, political unity was shaped by three main factors: the establishing of estates structures; the Kingdom Crown structure (replacing the private state system, i.e. a patrimonial monarchy, by that of a public nature, i.e. a legal public system and “common” property); and finally the representation of the estates. The estate monarchy is deemed to have appeared in France in the years 1302–1484, in England in 1265–1485, in Poland in 1320–1454, as well as in other European countries, *inter alia*, in the kingdoms of later Spain (fourteenth to fifteenth centuries), Scandinavian countries (the first half of the fourteenth century – 1523), and later in Russia (1480–to the mid-seventeenth century).

However, at the beginning of the early modern era (from 1492), this system stood at a crossroads. Absolute monarchies generally replaced the earlier political system. However, this was not a uniform structure and, what is more, it appeared in a very complicated process lasting several centuries. Three forms of absolute monarch systems can be identified: the Renaissance form (development of the theory of absolute monarchy, growth of royal power, development of administration in the form of an administrative corps, and change from a military structure to a religious and economic one); the classic form (in which there took place a legitimatization of absolutism, although from the seventeenth and eighteenth centuries this form became beyond reform and ended in revolutions, e.g. England in the years 1640–1648, and France in 1789); and the Enlightenment form (eighteenth century). We may generally assume that absolute monarchy appeared in European countries in the following periods: France (1484–1789); England (1485–1648); the Holy Roman Empire (Prussia 1688–1806, Austria – seventeenth century/1806), and Spain (1556–1808). It revived as neo-absolutism after the Congress of Vienna (1815), mainly in Prussia (up to the Springtime of the Nations in 1848 and the emergence of the Second German

Empire in 1871), Austria (up to the creation of Austria-Hungary in 1867), and, finally, Russia (up to the 1905 revolution, or perhaps as late as the revolution of February 1917). In this structure of predominant absolutism, the development of a mixed republican-monarchical system in the Polish–Lithuanian Commonwealth (1569–1795) was a true enclave in Europe.

At the turn of the nineteenth into the twentieth century, i.e. at the beginning of the late modern epoch, lasting generally to 1939, the constitutional state appeared, a structure that continues up to contemporary times. Constitutional states emerged with the promulgation of three great constitutions at the end of the eighteenth century, i.e. the U.S.A. (1787), Poland (1791), and France (1791). Some scholars see a tradition of constitutionalism in estate monarchies, which, however, have little in common with contemporary constitutionalism. Generally, states in the constitutional period can be divided into two categories according to the form of government: monarchies (dominant up to 1918) and republics. In terms of political regimes (methods and means of exercising power), we can identify three categories of states: democratic ones (monarchies and conservative-liberal-democratic republics); authoritarian ones (the first was created by Napoleon Bonaparte in the First French Empire and was continued by his nephew Napoleon III in the Second French Empire; it was resurrected in the interwar period in, among other countries, Albania (from 1922), Bulgaria (from 1923), Spain (from 1936), Portugal (from 1931), the Baltic states (Lithuania 1926, Latvia 1934), Poland (from 1926), and Austria (from 1934), etc.; and totalitarian ones (the U.S.S.R., the Third Reich, and partly Italy as well).

Chapter 2

Periodization in the history of court law

2.1. General issues in medieval and early modern period law (476 – to the mid-eighteenth century)

2.1.1. Trends and features of medieval law

The history of medieval law, covering a period of over one thousand years, underwent an evolutionary process starting with primitive law and ending with developed legal systems that provide the basis for modern law. It is a multilayer, highly complex history influenced by frequent and sometimes violent political, social, economic, and cultural transformations. These were not identical in the case of all countries and societies. Thus, certain general trends in the development of medieval law did not occur everywhere at the same time, nor did they spread uniformly over the entire territory of Europe. For these reasons, it is difficult to speak of a uniform system of medieval law.

This development of medieval law, apart from a few deviations, followed two trends – traditional local law and Roman law. The first appeared in the early Middle Ages (up to the twelfth century). It developed on the basis of local tradition, primarily based on customary law. The latter was characteristic for the late Middle Ages. It was connected with the renaissance of Roman law, which had a strong impact on systems of customary law then in force. Significant transformations of social and economic structures determined the necessity of adopting the Roman model. This trend was further supported by the influence of canon law.

A trend completely different from the European continental one marked the legal system in England, providing bases for the

development of a uniform common law system that totally differed from law in other countries.

Characteristic features of sources and the system of medieval law included the domination of customary law, particularism, an estates system, and case law.

Customary law constituted the basis of medieval law. Its source was custom – a generally recognized form of behavior accepted in a given community. With time, customs that enjoyed general approval began to be sanctioned by law, thus developing a system of customary law. It fundamentally maintained its primacy in the majority of European law systems to the end of the eighteenth century.

The flaws of customary law were obvious. Initially, laws were not written but orally transmitted from generation to generation. This fact gave rise to serious legal doubts relating to the proper acquisition of its content. In early times, elders well acquainted with legal customs explained and instructed the younger generation about its application during general gatherings. Later this function was taken over by courts in which parties calling on the existence of a norm of customary law had to prove this. Finally, these were put in written form – first, as individual norms appearing in documents or court decisions, and later as regulations, collected in lists of customary law. It led both to knowing them and to ensuring more confidence in customary law. Nevertheless, the system continued to be marked by stasis, resistance even to gradual change, considerable diversity, frequent violation by rulers, and finally by a considerable degree of uncertainty.

Changing economic conditions and social relations left customary law helpless in the face of rapid change. It required fundamental transformation of the legal order and the replacement of customary law by statute law.

Statute law is sometimes juxtaposed to customary law. The contrast between the two is used to emphasize the flexibility and greater certainty of statute law as well as its role in the organization and systematization of the legal system. These aspects,

The series Law: The Basic Concepts has been developed to meet the needs of English-speaking students of law, administration and business. In it academic staff of the Faculty of Law and Administration at the University of Gdańsk present fundamental concepts connected with three central perspectives on legal studies: the dogmatic, the historical, and the theoretical-philosophical. The editors of the series hope that the texts in the series will be an inspiration to further and deeper study of various aspects of law.

The general history of the state and of law is no easy subject. It takes in many issues, quite a few of which continue to be subjects of research and of scholarly controversies. Another difficulty lies in the fact that a handbook on this subject must deal with a vast array of sources and an exceptionally rich literature from all over the world. In order to deal with these complexities, this book takes the form of a comparative-legal study. It considers the history of the state and of law in the most important European countries from the Middle Ages through the twentieth century. It discusses the most important changes and their consequences within the legal and state systems of individual countries, but also more broadly on the level of Europe and the world. It is addressed to English-speaking students of law both in Poland and abroad, and to other readers interested in the book's subject.

