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On the Status of Custom as a Historical Source of Law

—The Historical Flow of the Pluralistic Sources of Private Law as a Clue

Chuyan Wu[1]

[1] Law school, Macau University of Science and Technology

Correspondence: Chuyan Wu, Law school, Macau University of Science and Technology.

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Abstract

Private law norms emerge from a self-generated order and follow the rules of proper behavior. No matter how advanced the development of lawmaking is, it is difficult to cover all aspects of citizens' private life, which is the root of the emergence of plural sources of private law. Civil custom is a rule formed spontaneously in social interactions, and Article 10 of the *Civil Code of the People's Republic of China*, following the *General Principles of the Civil Law*, once again recognizes the status of civil custom as a source of law. Therefore, the present study was designed to analyze the supporting basis from the perspective of legal history.

Keywords: private law, legal source theory, customary law, custom

1. Introduction

Article 10 of the *Civil Code of the People's Republic of China* (hereinafter referred to as "the *Civil Code*") provides that "civil disputes shall be handled in accordance with the law; if the law does not provide for it, custom may be applied, provided that it is not contrary to public order and good customs." The source of law provision of the *Civil Code*, following the General Principles of the Civil Law, once again recognizes the proper status of custom as a source of Chinese civil law, which is a significant step forward in the open character of the Chinese Civil Code. In ancient times, China was a monarchical feudal society dominated by small peasant economy, with villages and towns as the constituent units, and had a wide and rich resource of customs such as village rules and regulations. The affirmation of the legal source status of customs in the *Civil Code* is of great significance to the inheritance of China's excellent legal tradition and the creation of China's own legal characteristics.

In the view of F.A.von Hayek, private law arises from the self-generated social order, created by the interaction of citizens, which upholds the rules of just conduct, as opposed to the rules of organization of public law (F.A. Hayek, 1982). In the field of criminal law, criminal law adheres to the so-called "no crime without express provision, no punishment without express provision" principle of "crime and punishment", if there is no clear provision of criminal law, regardless of the criminal suspect, the defendant for the human a priori feeling of guilt, should be made in favor of the criminal suspect. Correspondingly, in the field of administrative law, the public power of administration comes from the express authorization of the enactment of the law in the case of "loopholes" in the enactment of the law should be made in favor of the administrative counterpart.

However, in the field of private law, private law norms arise from social interaction, no one enactment can cover the whole of social life, that is, there is a legal loophole in the enactment of the law. The legal loophole is about a legal issue, the law according to its normative plan should be provided and not provided for, is a violation of the legal plan of the unsatisfactory, which includes the loophole from the beginning and the subsequent changes in

social values and normative environment generated by subsequent (Wang Zegan, 2019). In such cases, the judge can neither handle the case in favor of the defendant on the grounds of the absence of express provisions in the law, nor deny the plaintiff's right to claim on the grounds of the absence of authorization in the law. Therefore, the field of private law in addition to the enactment of the law still need to adjust the civil relations of multiple sources of law, to provide substantive and authoritative basis for adjudication in order to undertake to supplement the enactment of the law, custom is one of the most important, the historical status of the exploration of custom is of great significance.

2. Overview of the Source of the Law

2.1 Etymology of the Word "Law Source" and the Law Source in the Roman Period

The Latin word for the source of law is "*fons juris*", which is generally believed to have been first proposed by Cicero in his work *The Laws of the State*. However, it seems difficult to draw this conclusion in the light of Cicero's original text (Peng Zhongli, 2014). The Oxford Latin Dictionary explains "*fons*" as "1. the flow of water from a spring; 2. the son of the ancient Greek god *Janus*, the god of springs; 3. the source of a river; 4. the origin, the source (*Oxford Latin Dictionary*, 1980)." *The "jus*" in "*fons juris*", as there is no "J" in ancient Roman Latin, so the "*jus"* here "jus" in "fons juris" refers to "*ius*". There are different interpretations of the meaning of "*ius*", which can refer to all good and just things, as well as to rights, and when compared with the concept of "*lex*", it also refers to good and just laws. In contrast to the concept of "lex", it also refers to the good law of goodness and justice. Roman private law consisted of *ius naturale*, *ius gentium*, and *ius civile. The ius civile* was the law that regulated all natural things, the ius *gentium was the law that* regulated all human beings and was the source of modern private international law, and the ius *civile was the* law that regulated Roman citizens and was also considered the source of civil law. At that time, the concept of rights in the subjective sense (subjektives Recht) did not exist, so "*fons juris*" should be understood as the "source of law", not the "source of rights". The term "fons juris" should be understood as a "source of law" rather than a "source of rights".

In the more than two thousand years of Rome's history, a plurality of sources of law, including ancient customs, civic law, the law of nations, jurists' interpretations, jurisprudence, and the emperor's edicts, emerged. In the end, only the *Corpus Juris Civilis was* reduced to one form of law.

2.2 Sources of Law in the Medieval Period

In medieval times, jurisprudence was the handmaiden of theology, and *ecclesiastical* law (*ius canonicum*) controlled almost all aspects of people's lives, and the so-called divine oaths and divine judgments were popular. At that time, the judiciary invoked the gods with certain rituals or demonstrated their will in some way and used it directly as a basis for judgment, such as the "hot iron trials" popular in medieval Europe. After three days of fasting, the clergy would sprinkle holy water on a red-hot iron, have the defendant walk nine feet with the iron in his hand, then tightly bandage his hand, and check the wound after three days for pus, discoloration, etc. If there was, he was guilty, and if the wound was clean, he was innocent (He Jiahong & Liu Pinxin, 2020). The unpredictability of the basis of this kind of decision causes the public to be unsure about the judicial trial and greatly undermines the stability of the law. It became a consensus to look for an abstract, stable, and predictable basis for adjudication, away from mental evidence, conscience, and divine oath. In the eleventh century A.D., the *Corpus Iuris Civilis* reappeared, and secular jurists used it to compete with ecclesiastical law, and the theory of normative sources reappeared with a new veneer.

2.3 Sources of Law in the Rationalist Period

With the rise of the civic class and the concept of rationality, the connotation of the sources of law underwent a tremendous transmutation, but also seemed to go to the other extreme. During this period, the civic class discourse gradually dominated, and stable, abstract, general, codified norms that judges had to invoke were pursued based on the needs of the civic class for commercial interactions and the preservation of rights.

Rationalism, rooted in René Descartes, dominated the mainstream of thought. At that time, it was generally believed that human reason was the supreme thing, and that human reason was independent of the order of natural birth and the laws of historical development, and could be the criterion for measuring and transforming all things in the world. Human beings can create a perfect code of law that covers all social life based on their own reason. In this way, judges have to abandon their subjective views and confine their judicial activities to the objective text of the law (Savigny, 2001). The emergence of legal positivism also greatly squeezed the space for the survival of customary law. In the eighteenth century, an unprecedented legislative movement, the "codification movement" culminated in the creation of the French Civil Code, also known as the Napoleonic Code, which became one of the landmarks of this legislative movement and embodied the use of a perfect code to The Napoleonic Code became one of the landmarks of this legislative movement, which also embodied the value of weaving all social life of human beings into a huge legal net with a perfect code. Customary law faded away, and the pluralistic system of legal sources was destroyed, making lawmaking the only source of law.

2.4 The Basic General Statement of the Present Source of the Law

Rechtsquelle, the source of law, has a broad and narrow meaning today. In the broad sense, it is the so-called soziologische Rechtsquellen (sociological sources of law), which includes all the facts that can influence the law, such as scholarly opinions, jurisprudential writings, and public opinion (popular legal feelings). Narrowly defined sources of law (präskriptive Rechtdquellen) (F. Röhl/C. Röhl, 2008) are those with "authoritative reasons" or "substantive reasons" (The source of law in civil law generally refers to the narrower sources of law that can be invoked by judges. The sources of civil law generally point to the normative sources in a narrow sense, which are the forms of existence of civil law in the substantive sense of the common law as private law (Mitsuwa Ichihiro & Hirai Kazuo, 1989). The main differences between normative and sociological sources of law are as follows: the former has a normative character, while the latter is only a social fact; the former can be invoked by judges when deciding cases, while the latter is not binding on judges (Zhu Qingyu, 2016).

Because of its abstractness and generality, and the fact that the source of law involves the judge's reference to the basis of the decision and is closely related to the litigation, the academic research has paid much attention to its procedural characteristics, and the source of law theory has gradually faded out of the field of empirical research. The question of source of law is as important as the basic question of "what is the original" in the field of philosophy, which is related to the fundamental understanding of "law" in human society and is the basic question in the field of law. As in the field of philosophy, the core of the controversy among different schools of thought in the field of philosophy lies in the question of what is the origin of the world, which has led to different schools of thought, such as ancient simple materialism, modern metaphysical materialism, subjective idealism and objective idealism. In the field of jurisprudence, too, the different views on the origin of law have led to different schools of doctrine, such as natural law, conceptual law, legal positivism, interest law, historical law, etc. The differences in theories of the origin of law are the basis for the distinction between the various schools of doctrine (Tang Wei, 2005).

3. Evolution of Customary Law as a Source of Law

Custom as a source of law has always occupied an important position in the history of the evolution of Roman private law. For a long time, Rome did not form a monolithic and definite system of sources of law, nor was there a ruler with a monopoly of legislative power (Wang Yang, 2018). The validity of Roman private law norms did not come from the ruling public power of the legislator, nor did the legislator intend to shape the social life of the people, but the validity of private law norms came from the substantive rationality of their content (Xue Jun, 2003). In the early days, Roman private law was nothing more than customary law in the guise of lawmaking. With the rise of the concept of the state, the only remaining form of Roman private law in its pluralistic origin was codification. In the medieval period, the Roman law was at an unprecedented low, and custom reappeared in the guise of monastic law with a divinely inspired will, as the secular sword of the Church in control of the world (Harold J. Berman, 2008). With the growth of civil class discourse, the dominance of idealism, the decline of historical jurisprudence, and the rise of conceptual jurisprudence, interest jurisprudence, and legal empirical justice, which were based on the critique of historical jurisprudence, the space for the survival of customary law was squeezed, and the lawmaking code once again became the only source of regulated private law.

3.1 Ancient Roman Kingship (Queritifa Period)

The "ancient customs" (*mores*) were the only source of law before the founding of Rome, and they arose out of the need to interact with people. When the Roman city-states were founded, there were tribes, villages, clans, families, and other social units at the same time. The emerging city-states were weak in power and had no right to get involved in private disputes. In these units, the father of the Roman family had the so-called "*patria potestas*" (Vincezo Arangio-Ruiz, 2003). This right allows the father to regulate the relationships within the family. It also requires a higher duty of care on the father's part, called "*prudent et diligens paterfamilias*", from which the principle of "*bonus paterfamilias*" is derived. This kind of family is called "*familia proprio iure"* (family of law). The "*ius*" of this period corresponds to the "*mores" and is a* primitive custom arising from a spontaneous order, also known as "*ius Quiritium* " , the "law between the fathers" (Giuseppe Grosso, 2009).

The city-state grew through the deconstruction and absorption of other social units. As the city-state grew in size and power, the "*mores*" were elevated to *"ius"*, and under the continuous cross-coupling with the city-state system, they eventually became unified, and the true meaning of civil law was formed. At this time, the "*ius*" was no longer the law of the fathers, but the "law of the city-state itself" (*ius proprium civitatis*), as opposed to the other city-states (Aldo Betrucci, 2014). In this period, there was no proper legislature in the Roman city-state, nor was there any legislative activity, and the civic law at this time was based only on spontaneous custom as the only vehicle, and its legal binding force came from the people's conviction of the law of ancient customs and respect for historical traditions. The concept of civic law in this context actually refers to the customary law applicable to Roman citizens (Henry Main, 1959).

3.2 The Period of the Roman Republic (Pre-Classical Law Period)

In 510 B.C., the Roman people expelled the tyrant *Lucius Tarquinius Superbus*, bringing an end to the era of Roman kingship and the establishment of the Roman Republic. In 450 B.C., the Council of Ten, an official legislative body composed of nobles and commoners, codified and promulgated the ancient customs, and the first written law of the Roman city-state, the *lex Duodecim Tabularum, the first written law of the Roman city-state,* was born. The lex Duodecim Tabularum was the first codification of ancient customs in Rome, and the first intervention of the official legislature in the "*ius*" through legislative activity. "The promulgation of The lex Duodecim Tabularum did not squeeze the existence of custom, but was merely an official confirmation of the validity of the ancient customary law (Cfr. Mario Talamanca, 1968). The lex Duodecim Tabularum gave the *"ius civile"* the appearance of a *"lex civile"*.

In the late Roman Republic, with the development of the commodity economy, Rome gradually transformed from an agricultural city-state into a huge commercial trading state, and based on the needs of the commodity economy, the "city-state's own law", the civil law, no longer met the needs of foreign trade. The *ius gentuim, which was the* medium of notices issued by the foreign magistrates, emerged. The ius gentuim transformed the practices of commercial transactions into the norms of Roman private law, and was regarded as the "common law of Rome and the foreign states" and "commercial law" (Xu Guodong, 2005). It was derived from ancient Greek philosophical theory and was influenced by ancient Greek natural thought, which discarded a great deal of formalism and emphasized "commercial integrity" (Francesco de Martino, 2014).

In the Roman Republic, the legislature did not create private law norms through the legislative activity of lawmaking, except for the Twelve Bronze Tables and the "*lex Aquilia*", which dealt with the interests of public order and is known as the source of tort law. The legislative activity in Rome during this period was usually concerned only with the public law order. For the naturally occurring private law order, custom in the name of "law" remained as the first-order source of law, and the legislature's *lex* is only the official confirmation of it, and can only supplement and improve it.

3.3 Roman Imperial Period (Classical and Post-Classical Law Period)

3.3.1 Headship Period (Classical Law Period)

Since the Roman Senate conferred the title of *Augustus* on Octavian, the Roman system of government entered a period of patriarchal rule, and the republican system of government was no longer in name (Huang Feng, 2003). With the growing centralization of autocratic power, the Roman emperors of this period were no longer willing to cede the power to legislate private law to the people, allowing them to create their own private law codes. Although customary law was in decline during this period, it was not entirely without room for survival, and the expanding Roman territory left a glimmer of life for customary law (Yu, Chengfeng, 2018).

As the Roman state expanded and the number of foreigners increased dramatically, it was technically impractical and conceptually no longer necessary to distinguish between Roman and non-Roman statesmen by the law of nations. In 212 A.D., *Caracalla the Great* issued the Edict of *Antoniana*, which granted citizenship to all Roman inhabitants, eliminating the unequal status of Latins and provincials, and gradually eliminating the boundary between the civil law and the universal law (Meng Zhenxiang, Chen Tao & Lu Pu., 2011). The boundary between the civil law and the civil law was gradually eliminated. Based on the integration of the civil law, the civil law was further coupled with the magistrates' law and encompassed by the concept of *Roman law*. During this period, the study of Roman jurisprudence became popular, the doctrines of various schools of thought flourished, and an elaborate legal system developed, which is called the "period of juridical prominence". Although customary law was still one of the sources of law, it had lost its primary status. In order to win the hearts and minds of the people, jurists were granted the right of "public interpretation" (*das ius respondendi*) during this period, and their interpretations were given the status of sources of law (H.F. Cholowitz & Barry Nicholas, 2013). The power of the Senate as a representative of the republic was gradually withdrawn by the emperor, and at the end of the second century, the Senate's resolutions died forever as a source of law. The Emperor's edicts (*constitutio principis*) once ranked it as the main source of law of the period.

3.3.2 Monarchical Period (Post-Classical Law Period)

In the 4th century A.D., when Justinian the Great came to the throne, the autocratic monarchy was fully established and the centralization of autocracy was greatly enhanced. At the same time, the Roman emperors intended to exclude customary law by means of a comprehensive code, and even by express provisions, so that the system of sources of law (Eugen Ehrlich, 2009), died out in this period. The study of Roman law tended to be mediocre, and the level of justice deteriorated dramatically. Customary law survived only in the name of "*diuturni mores consensuutentium comprobati"* (things that are believed and observed for a long time), and it was second to the law, and only played a complementary role.

3.4 The Period of Codification (Under Justinian the Great)

With the preconditions provided by unofficial codifications such as the Codex *Gregorianus* and the Codex Hermogenianus, the reign of Justinian the Great continued with the *Codex* Theodosianus, which comprehensively presided over the compilation of the Corpus Juris Civilis The Codex Theodosianus, which gave the ultimate form to Roman law, was the most important book of Roman law (Jiang Ping & Mi Jian, 2004). The Codex Theodosianus was the most glorious standard product in the history of Roman law, but it also almost monopolized the existence of other sources of private law. Custom was given a breath of life in the guise of the Corpus Christi by an edict of Emperor Constantine, which was compiled into the Corpus Christi. The weak existence of custom at a time when the plurality of legal sources was in complete decline was due, on the one hand, to Rome's expanding territory, and the need to regulate new territories and the heterogeneous culture of the population made the total rejection of customary law impractical (Weber, 2008). On the other hand, the establishment of Christianity as the state religion in the 4th century A.D., the fact that the autonomous judicial power of Christian Jews in the Roman Empire was never affected, and the freedom to choose between bishops and secular judges in civil lawsuits if the parties were Christians, etc., (Aldo Betrucci, 2014) suggest that the flourishing of religious communities and the rise of religious ideas also provided certain conditions for the survival of customary law in Roman law (Oswald Spengler, 2006). For these reasons, Justinian the Great realized that it was impossible to completely abandon those customs, and customary law survived the unprecedented revolution in Roman law under these conditions. The Roman Empire was obliged to recognize the validity of these foreign cultural practices and to make them applicable in the borders of the Empire (Paul Winograve, 2010).

3.5 Medieval Period (from the Period of Codification to the Period of Revival of Roman Law)

After the death of Justinian the Great in 565 A.D., the Eastern Roman Empire was plagued by social corruption and warfare, and the Roman Empire was plagued by internal and external problems. The Church was no longer satisfied with the control of the spiritual realm of the people, but stressed the need to control *the* "secular sword" as well. The king became the "voice" of the Church, and the decline of the concept of kingship and state brought Europe to what is now called "anarchy", providing the political ground for the heyday of the customary law of the Church (Wang Linmin & Wang Liang, 2019). Custom became dominant with the will of divine inspiration and encroached on the existence of other sources of law.

At that time, the law of divine judgment was widely spread in Europe. The divine judgment law first appeared in Europe in the *Germanic* law (barbarian code), which also included the law of divine oath, the law of duel, etc. The ecclesiastical law absorbed the part of the divine judgment law (*indicium dei*) in the barbarian code and swept through the European region in the Middle Ages (Zheng Weimei, 2008). The methods of divine judgment included hot iron trial, cold water trial, communion trial, candlelight trial, and so on. The law of divine judgment and the law of divine oath was itself a kind of legal custom, and this divine oath and divine judgment in turn observed more specific customs in the course of their operation (Robert Bartlett, 2007). At that time, a large number of decisions were based on conscience-checked custom, and the judicial process was practiced with fear and trepidation under the watchful eye of custom, while legislative activity was almost non-existent.

3.6 The Period of the Roman Law Revival Movement and the Construction of Modern Private Law Theory

3.6.1 The Period of the Roman Law Revival Movement

In the late Middle Ages, when urban crafts and commerce reemerged after centuries of decline, the unpredictable law of divine judgment was abandoned by merchants and no longer fit the dynamics of the commodity economy of this period. The rise of the civil class gave the merchants a greater voice, and the civil class needed to find a stable code of adjudication that could be predicted, and Roman law had already described the private law codes of commercial transactions hundreds of years ago (Li Zhongyuan, 2006).

On the other hand, the emperors, dissatisfied with their submission to the "lustful authority" of the Church, were anxious to regain their royal power, to revive the idea of statehood, and to establish a unified kingdom. The Roman law was a powerful legal weapon with "secular authority" for the citizens and the emperor against the ecclesiastical law, which was the political basis for the revival of Roman law (Franz Wieacker, 1997).

As long as the philosophy of scripture did not decline, the monastic law based on it would not leave the stage of history, and the study of Roman law would not truly flourish. In the 12th to 18th centuries, Europe witnessed the Renaissance, the Reformation, the Enlightenment and other cultural revolutions, during which rational thought flourished and Christian thought ceased to dominate, providing spiritual and cultural conditions for the Roman law revival movement. In the end, due to various factors, Roman law was revived, ecclesiastical law was withdrawn from the stage of history, and custom was secularized again without the veneer of divine inspiration.

The Roman law revival movement began at the end of the eleventh century with the revival of the study of Roman law in Bologna, Italy. *Trnerius*, the originator of The School of Glossators, founded the Academy of Roman Law in Bologna (now the University of Bologna), which recruited students from all over Europe and was

once influential throughout medieval Europe. *Civilis*) was discovered in the Italian city of Pisa (Li Dong, 2011), and the study of Roman law became feverish. The exegetical school of jurisprudence sank into the commentary and interpretation of the original Roman law, and they closely followed the original text of Roman law for exegesis, without paying enough attention to other sources of law, such as customary law and feudal law. The originator of the exegetical school, Inarius, and his disciples, Placentiuns and Gosia, denied that custom could be a source of law of the first order (He Qinhua, 1996). However, some scholars of the exegetical school, such as J. Bassianus, consider customary law to be a very important source of law (Ernst Andersen, 1974).

In contrast to the exegetical school, the School of Commentatores, which emerged at the end of the 13th century and was represented by Bartolus, focused more on the social reality. On the one hand, the post-commentary school inherited the approach to the exegesis of the original Roman law, and on the other hand, the post-commentary school was more concerned with the social application of the exegesis of Roman law (Junichi Bikai, Masayuki Ito & Junichi Murakami, 1976). The post-exegetical school, instead of the exegetical school's practice of "not listening to what is outside the window, but only concentrating on the original Roman law", began to study and comment on sources other than Roman law, such as customary law, ecclesiastical law, and barbarian law, because of their significant influence on society. On this basis, the European common law (Gemeines Recht) was formed (Sir John Macdonell & Edward Manson, 1914). The Roman law revival movement reached a new height in this period. The post-exegetical school of jurisprudence also had its historical limitations, as exegesis on top of exegesis led them further and further away from the original text of Roman law, and their disconnection from the Renaissance movement led them to fall back into the shortcomings of medieval scriptural philosophy (Maitland et al., 2008). This was strongly criticized by the humanist school of jurisprudence that emerged after the exegetical school of jurisprudence in the 16th century.

Humanistische Jurisprudenz broke away from its dependence on scriptural philosophy and broke the shackles of the four centuries of exegetical and post-exegetical jurisprudence from the end of the eleventh century onwards, which held exegesis of Roman law to be the standard, and began to use the historical and bibliographical methods brought by humanists such as Lorenzo Valla and Antonin Agustin to conduct jurisprudence. They began to use the historical and bibliographical methods brought by humanists such as Lorenzo Valla and Antonin Agustin to conduct legal research and to explore Pure Roman Law, formally joining the embrace of the Renaissance and building a new paradigm of legal research, which is also known as legal humanism (Der jurisprudence). This approach was approved by the French authorities (Kenneth Pennington, 2007). This approach was approved by the French authorities, and Francis I, during his reign, hired A. Alciatus and C. Cujas, famous masters of humanism, as professors at the University of Bourges, to give special lectures on Roman law.

The original aim of early humanist jurisprudence was to liberate the original texts of Roman law from the "vulgar" exegetical school of jurisprudence by means of a bibliographic and historical approach, using "elegant" Latin. They studied Roman law as "Altertumswissenschaft" (ancient culture), and in their view only a knowledge of Latin would make a "true jurist" (esse Iurisconsulturn) (Guido Kisch, 1955). Paradoxically, however, things did not work out as the early humanist jurists had hoped, and the early humanist jurists' advocacy of a return to classical Latin for the restoration of Roman law texts instead provoked the rise of national languages everywhere, which no longer relied on Latin for their research, reflected in the field of legal studies as "juridical nationalism" (This was reflected in the initial birth of juridical nationalism) (Martin Loughlin, 2010). Humanist jurisprudence took a "methodological turn" and began to focus on the codification of national and ethnic customary law (Olivia F Robinson, T David Fergus & William M Gordon, 1994).

Professor Shuguoying speculates that there may be two reasons for this (Ying Shu, 2014): one is that with the development of the commodity economy, the original Roman law can no longer adjust social relations well, especially in some emerging areas are weak. In this situation, it is necessary to return to the customs and practices of the country and to study the legal reality. Secondly, scholars gradually discovered that the Digesta Justinianus, the core part of the Book of Civil Law, had been processed by others, or to be precise, they were abridged and added to the original text by the Eastern Roman jurist Tribonianus and other members of the codification committee, known as the "Tribonian mosaic". The emblemata Triboniani, also known as Justinian's interpolations, were abridged and appended to the original text by the Eastern Roman jurist Tribonianus and other members of the codification committee (David Johnston, 1989). This led some humanist jurists to question the digesta, and an "anti-Romanism" emerged among humanist jurists, which directly or indirectly led to the demystification of the original Roman law. In his 1567 article "Anti-Tribonian", the famous French jurist Fmneois Hotman wrote: "*The Corpus Juris* is almost useless for jurists, they are not the real laws practiced in the Roman society, but are entirely the work of a group of people who do not know Roman law. people's crude work after the fall of the Roman Empire, and that French law should be rooted in the customary law of the country for codification."

Influenced by this trend, humanist jurists, whose national consciousness was thus awakened, began to construct

a "vernacular humanism", writing in their own language instead of Latin, and turning their attention to local customary law and its exegesis. A series of famous commentaries on customary law emerged during this period: *Consuetudines Biturícenses* by the French jurist Nicolas de Bohier in 1507, *Commentaria in consuetudines ducatus Burgundiae* by Barthélemy de Chasseneuz in 1517, and *Commentaire sur la Coutume de Paris* by Charles Dumoulin in 1539. *Commentaria in consuetudines ducatus Burgundiae* by Barthélemy de Chasseneuz in 1517, *Commentaire sur la Coutume de Paris* by Charles Dumoulin in 1539, etc (Donald R. Kelley, 1979). Local customary law received unprecedented attention, and classical Roman law began to fall from the throne of "common European law". Later, at the end of the 18th century, the school of historical law also emphasized the importance of customary law as a source of private law, and its representative, Savigny, argued that customary law, representing historical experience, was the most direct and important source of law.

3.6.2 The Period of Construction of Modern Private Law Theory

The rise of legal analysis positivism and the establishment of the nation-state set a tragic tone for the fate of customary law in the 19th century. On the one hand, the rise of monarchical and centralized power, the rise of the idea of the nation-state, and the theory of the social contract began to be put into direct practice in society. As Marx put it, "the first French revolution aimed at the establishment of a unified nation-state and the elimination of all local, provincial, and territorial differences" (Marx, Engels, 1972). To break up localism, strengthen centralization, and establish a unified nation-state is the proper way to practice the concept of the nation-state. The sources of private law, including customary law in addition to the enacted law, were naturally unsettling factors for the ruler to shape and unify the private life of citizens through the code, and customary law was thus excluded. This is evidenced by the provision of the first French Civil Code which completely denies the validity of customary law: "From the date of the entry into force of these laws, Roman law, royal decrees, local customs, ordinances, and regulations no longer have the validity of general or special laws" and the generalized orientation of the French Civil Code (Shen Zongling, 1998).

On the other hand, the extremes of rational thinking have convinced people that by virtue of human reason it is sufficient to create a perfect code that covers the whole of social life. Rationalists believed that human reason had to be the measure of everything, and they asserted that "true intellect is natural, logical, and metaphysical" (Chen Xuanliang, 1988). Prior to this, the historical, natural formation of law was ignored. It was believed that the old legal system had to be overhauled by a code that embodied human reason and logic, and that a written, logical, objective code would allow judges to abandon subjectivity and confine the application of law to an objective text. The French Civil Code, also known as the Napoleonic Code, was one of the landmarks of this legislative movement (Bodenheimer, 1999). The focus was no longer on customary law and other naturally occurring laws, but only on how to create a perfect code.

This vast movement toward codification soon spread to Germany. At the beginning of the German Civil Code, Friedrich Carl von Savign, a representative jurist of the German school of historical law, advocated the study of custom as a representative of historical experience, emphasizing that private law is discovered rather than created. However, this article was deleted after the introduction of the German Civil Code due to the influence of the rise of the conceptual law school, which was based on the critique of the historical law school (Xu Zhongyuan, 2004). The conceptual jurisprudence school was keen on conceptual games and logical reasoning, immersed in the precise calculations of the conceptual paradise and indifferent to the secular customs, believing that the answer to any case could be found in the code according to logical reasoning. This is the "dogma without loopholes" (Lückenlosigkeit), one of the three characteristics of conceptual jurisprudence, which is the delusion that empirical law has loopholes. The law does not need anything to be filled, and the law is logically complete at all times (Wu Congzou, 2011). In this context, custom, which is an important source of filling legal loopholes, is naturally excluded by conceptual jurists. The filling of legal gaps in empirical law by means of "extra-legal space" (rechtlicher Raum) is, in the opinion of conceptual jurists, "arbitrary construction of law in a non-wilful way" (Yato Kaufmann, 1999).

The status of custom as a source of law was regained to some extent in the 20th century, but the influence of legal positivism has relegated customary law to a secondary and complementary source of law in most civil law countries, and it has not regained its former glory. Customary law is again recognized, on the one hand, because after World War II, legal positivism was influenced by "Nazi jurisprudence" and became infamous in civil law countries (Vyacker, 2004). (Legal positivism has had a much better time in the law of the sea system because of the difference in source theory, after all, the denial of the source status of unwritten custom in case law countries is different from the direct denial of its fundamental source, case law. Unlike civil law systems, which are bound to fall into the fate of rigid provisions in the context of legal positivism, the starting point of legal positivism's arguments in the law of the sea system directly counteracts its own shortcomings (Tang Wenping, 2020), opponents of positivism have given more attention to custom.

On the other hand, the decline of conceptual jurisprudence and the continued development of modern private law

theory have also led to the recognition of the need to maintain an open character in the field of private law, and the recognition of custom as a source of law is the proper way to keep private law open. The strong vitality of custom as a source of law determines that even if it is strictly prohibited at the legislative level, its application in judicial practice is still inevitable. The Swiss Civil Code, for the first time, once again recognized the status of custom as a source of law, after emerging from the gloom of conceptual jurisprudence. German jurists afterwards ceased to indulge in sophisticated calculations in the conceptual paradise and recognized the importance of custom as a source of law, which is now recognized in German doctrine as a binding source of private law, and civil custom applies in the same way as statutory law (Karl Larenz, 2003). In France, even though Napoleon said that "it is forbidden to interpret my code", in judicial practice, civil custom still survives in the jurisprudence, and today's French scholars even say that "the status of the first source of law should be given to custom, because custom is open and realistic" (Henri Levy, 1987). All of them reflect the intrinsic value and strong vitality of customary law sources determined by the objective laws of human society, and also support the historical trend of the rise of customary law in the diversified sources of private law.

4. Conclusion

Based on the need for legal certainty, legal scholars should focus more on the theory of interpretation than on the theory of legislation, as Chinese legal scholar Professor Zhang Mingkai said in the preface of "The Unfolding of Criminal Law Aphorisms", "The law is not an object of ridicule, and the major task of jurisprudence is to explain the law rather than to ridicule it" (Zhang Mingkai, 2013), I agree. However, the German prosecutor Julius von Kirchmann's lecture "On the worthlessness of jurisprudence as a science" (Die Wertlosigkeit der Jurisprudenz als Wissenschaft), delivered at the Berlin Law Society in 1847, is a good example of this. Wissenschaft), "All the legal literature will become a pile of scrap paper if the legislator changes three words" is still the sword of Damocles on the head of every interpreter. As Chinese scholar Professor Zhu Qingyu said in the preface of his *General Theory of Civil Law*, "the more legal works are based on empirical law, the more helpless footnotes are added to their theories". The author here has no intention to refer to the debate between the theory of legislation and the theory of interpretation, but only wants to put forward a shallow caution: any legislation that goes against the historical trend and the objective law will return without success.

References

F.A. Hayek. (1982). *Law, Legislation and Liberty*, Vol. 2. Routledge & Kegan Paul, p. 31.

Wang Zegan. (2019). *General principles of Civil Law*. Beijing University Press, pp. 68-69.

Peng Zhongli. (2014). *A Treatise on the Sources of Law*. Fangzhi Press, p. 18.

Oxford latin dictionary. (1980). Oxford University Press, p. 720.

He Jiahong and Liu Pinxin. (2020). *Jurisprudence of Evidence*. Law Press, p. 2.

Savigny. (2001). *On the Contemporary Mission of Legislation and Jurisprudence*, translated by Xu Zhangrun. China Legal Publishing House, p. 6.

F. Röhl/C. Röhl. (2008). *Allgemeine Rechtslehre*, 3. Aufl., S. 519 f.; Bernd Rüthers. (2007). Rechtstheorie, 3. Aufl., Rn. 217.

Mitsuwa Ichihiro and Hirai Kazuo. (1989). *To say the General Principles of the Civil Law*. Arabsensha Heisei Gen, pp. 5-6.

Zhu Qingyu. (2016). *General Theory of Civil Law.* Beijing University Press, p. 36.

Tang Wei. (2005). *Sociology of Law in China—Reflections on a Doctrinal History*, Ph.D. dissertation. Shanxi University, p. 30.

Wang Yang. (2018). The Concept, History and Chinese Practice of Plural Legal Sources of Private Law—Theoretical Construction and Judicial Application of Article 10 of the General Principles of Civil Law. *Chinese and Foreign Law, 1*(1), p. 129.

Xue Jun. (2003). *The Roman School and the Paradigm Shift of Roman Law Studies* in Zhao Haifeng and Jin Banggui, eds, European Law Newsletter (4th series). Law Press, pp. 321-333.

Harold J. Berman. (2008). *Law and Revolution* (Vol. 1)—*The Formation of the Western Legal Tradition*, translated by He Weifang, Gao Hongjun, Zhang Zhiming and Xia Yong. Law Press, p. 107.

Vincezo Arangio-Ruiz. (2003). *Storia del Diritto Romano*. Napoil, p. 55.

Giuseppe Grosso. (2009). *History of Roman Law*, translated by Huang Feng. China University of Political Science and Law Press, 2009 edition, p. 72.

Aldo Betrucci. (2014). *From Civic Law to Civil Law*, translated by Xue Jun, in Thi's book, Roman Law and Latin Law Families, edited by Xu Guodong. China University of Political Science and Law Press, p. 27.

Henry Main. (1959). *Ancient Law*, translated by Shen Jingyi. Commercial Press, p. 35.

Cfr. Mario Talamanca. (1968). *Lineamenti di Storia del Diritto Romano*. Roma, pp. 91-94.

Xu Guodong. (2005). The Unfolding of the Meanings of the Law of Nations-Reality and Ideal of the Roman Empire in the Classical Period. *Social Science, 9*, pp. 91-99.

Francesco de Martino. (2014). *A History of the Roman Political System* (Vol. II), translated by Xue Jun. Beijing University Press, p. 57.

Huang Feng. (2003). *Introduction to Roman Private Law*. China University of Political Science and Law Press, p. 5.

Yu, Chengfeng. (2018). The Origin and Flux of 'Customary Law' in Roman History. *Comparative Law Studies, 3*(3), p. 184.

Meng Zhenxiang, Chen Tao, and Lu Pu. (2011). *Roman Law*. China University of Political Science and Law Press, p. 30.

H.F. Cholowitz, Barry Nicholas. (2013). *An Historical Introduction to the Study of Roman Law*, translated by Xue Jun. Commercial Press, pp. 462-467.

Eugen Ehrlich. (2009). *Principles of the Sociology of Law*, translated by Ying Shu. Encyclopedia of China Press, p. 14.

Jiang Ping and Mi Jian. (2004). *Foundations of Roman Law*. China University of Political Science and Law Press, 2004 edition, pp. 98-99.

Weber. (2008). *The Sociology of Law*, translated by Kang Le and Jane Huimei. Guangxi Normal University Press, p. 83.

Aldo Betrucci. (2014). *The Influence of Religion and Religious Norms on Roman Law*, translated by Xue Jun, in Thi's book, Roman Law and Latin Law Families, edited by Xu Guodong. China University of Political Science and Law Press, pp. 8-9.

Oswald Spengler. (2006). *The Decline of the West* (Volume II—Perspectives on World History), translated by Wu Qiong. Shanghai Sanlian Bookstore, p. 60.

Paul Winograve. (2010). *Roman Law in Medieval Europe*, translated by Zhong Yunlong. China University of Political Science and Law Press, p. 6.

Wang Linmin and Wang Liang. (2019). On the Feudal Foundations of Medieval Customary Law in Western Europe. *Civil Law, 1*(1), p. 489.

Zheng Weimei. (2008). *A Study of the Principle of Free Heart Evidence—A Perspective on Criminal Proceedings.* People's Public Security University of China Press, pp. 21-26.

Robert Bartlett. (2007). *Medieval Divine Judgment*, translated by Xu Xin, Yu Zhongsheng and Xu Yun. Zhejiang People's Publishing House, 2007 edition, pp. 17-37.

Li Zhongyuan. (2006). The Growth of Roman Law in the Middle Ages. *Global Law Review, 1*, pp. 80-92.

Franz Wieacker. (1997). *A History of Private Law in Europe-with Particular Reference to Germany*. Germany, p. 40.

Li Dong. (2011). The Continuation and Revival of Roman Law in Western Europe in the Pre-Medieval Period. *Journal of East China University of Political Science and Law, 5*, pp. 28-37.

He Qinhua. (1996). A Review of the Medieval Western European School of Commentary Law. *Chinese and Foreign Law, 5*(5), p. 13.

Ernst Andersen. (1974). *The Renaissance of Legal Science after the Middle Agdge*. Copenhagen, p. 10.

Junichi Bikai, Masayuki Ito, and Junichi Murakami. (1976). *The History of Jurisprudence*. University of Tokyo Press, pp. 101-115.

Sir John Macdonell and Edward Manson (1914). *Great Jurists of the World*. Boston, p. 51.

Maitland et al. (2008). *An Overview of Continental Legal History: Events, Sources, People and Movements,* translated by Wensheng Qu. Shanghai People's Publishing House, 2008 edition, p. 116.

Kenneth Pennington. (2007) Politics in Western Jurisprudence, Andrea Padovani, and Peter G. Stein (eds.): *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*. Springer-Verlag, Dordrecht, pp. 204-205.

Guido Kisch. (1955). *Humanismus und Jurisprudenz: Der Kampf zwischen mos italicus und mos gallicus an der Universität Basel.* Helbing & Lichtenhahn, Basel, pp.71-72.

Martin Loughlin. (2010). *Foundations of Public Law*. Oxford University Press, Oxford, p. 53.

Olivia F Robinson, T David Fergus and William M Gordon. (1994). *European Legal History: Sources and Institutions*, 2nd ed. Butterworths, London, p. 177.

Ying Shu. (2014). The Methodology and Genealogy of Knowledge in European Humanist Jurisprudence. *Tsinghua Law, 1*(1), p. 144.

David Johnston. (1989). Justinian's Digest: The Interpretation of Interpolation. *Oxford Journal of Legal Studies, 9*(2), pp. 149-166.

Donald R. Kelley. (Jun. 1979). Gaius Noster: Substructures of Western Social Thought. *The American Historical Review, 84*(3), p. 634.

Marx, Engels. (1972). *Marx Engels: Selected Works of Marx Engels* (Vol. 2), People's Publishing House, p. 409.

Shen Zongling. (1998). *Studies in Comparative Law*. Beijing University Press, p. 119.

Chen Xuanliang. (1988). *Rationalism*. Sichuan People's Publishing House, p. 19.

Bodenheimer. (1999). *Jurisprudence: Legal Philosophy and Legal Method*. China University of Political Science and Law Press, p. 64.

Xu Zhongyuan. (2004). On the Civil Code and the Development of Private Law in China. *Private Law, 3*(3), p. 100.

Wu Congzou. (2011). *Conceptual Jurisprudence, Interest Jurisprudence and Value Jurisprudence*. China Legal Publishing House, p. 45.

Yato Kaufmann. (1999). *Analogy and the Nature of Things*, translated by Wu Congzhou and edited by Yan Huo-an, Xue Lin. Culture Business Press, p. 7.

Vyacker. (2004). *A History of Modern Private Law*, translated by Chen Ai'e and Huang Jianhui. Wunan Book Publishing Company, p. 405.

Tang Wenping. (2020). On the Road of Juridical Positivism in Chinese Civil Law. *The Jurist, 1*(1), pp. 9-10.

Karl Larenz. (2003). *General Theory of German Civil Law*, translated by Wang Xiaoye, Shao Jiandong, Cheng Jianying, Xu Guojian and Xie Huaibai, and edited by Xie Huaibai. Law Press, pp. 14-16.

Henri Levy. (1987). *The Sociology of Law*, translated by Xu Jun. Shanghai People's Publishing House, p. 87.

Zhang Mingkai. (2013). *The Unfolding of Criminal Law Aphorisms*. Peking University Press, pp. 1-35.

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