Part B.

Comparative and historical perspectives

Chapter 2: Comparative Perspectives

A. *Introduction: The interrelationship of sources in comparative legal thought*

The purpose of this chapter is to illustrate debates on the interrelationship between written and unwritten law from comparative legal perspectives as background for reflections on contemporary developments in public international law. These comparative historical perspectives complement accounts which analyze the sources of international law by way of reference to the discussion of the Committee of Jurists.[1] It is submitted here that article 38 of the Statute of the Permanent Court of Justice should not be understood out of the context of the wider development in municipal and international legal theory for several reasons. While a focus on the discussions in the Committee of Jurists is helpful, one must at the same time acknowledge that these discussions were rather short and focused only on selected issues, such as the avoidance of *non-liquet* situations and the importance to find a formula which would secure the acceptance of the statute by states.[2] Also, experiences in municipal law informed the discussion of sources.[3] The drafts

1 See also below, chapter 3.

2 Ole Spiermann, ''Who attempts too much does nothing well': The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice' (2003) 73 BYIL 212-218, 230; Jean d'Aspremont, 'The Decay of Modern Customary International Law in Spite of Scholarly Heroism' [2016] The Global Community Yearbook of International Law and Jurisprudence 13-14.

3 Lord Phillimore's critique of the distinction between customary international law and general principles of law mirrored William Blackstone's assimilation of custom and so-called maxims under the notion of "common law", Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* (Van Langenhuysen Brothers 1920) 295, William Blackstone, *Commentaries on the Laws of England* (vol 1, Oxford, 1765) 68; on this observation see also Kleinlein, 'Customary International Law and General Principles Rethinking Their Relationship' 146; according to Tomuschat, 'Obligations Arising For States Without Or Against Their Will' 290, theories developed by Savigny and Puchta informed the drafting of article 38(1)(b) of the PCIJ Statute; Spiermann, ''Who attempts too much does nothing well': The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice' 240 ("While national lawyers may have agreed, broadly speaking, to the scope of international law, their

submitted by states prior to the discussions of the Advisory Committee of Jurists already resembled article 38 and its three sources.[4] One cannot ignore the similarities between the teachings of François Gény and article 1 of the Swiss Civil Code, article 7 of the Prize Court Convention and article 38 PCIJ Statute[5] which invite one to read article 38 against the background of developments in both public international law and municipal law.

Studying the interrelationship of sources in the municipal legal context reminds one that the success and the viability of a legal concept depend on the care that concept continues to receive by judicial practice and scholarship (*Rechtspflege* in its literal meaning, in the sense of caring for legal concepts). When a legal concept or institute has ceased to find support, some of its functions will likely be assumed by different legal categories.[6] This phenomenon which applies to the relationship between written and unwritten law finds illustration, for instance, in the works of Raymond Saleilles and François Gény.[7] Both authors are commonly associated with the so-called

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conception of the content of international law would almost unavoidably have been coloured by national tendencies and traditions."), 259.

4 See below, p. 170.

5 See below, p. 100 and p. 167.

6 Cf. in the context of US constitutional law Kenji Yoshino, 'The New Equal Protection' (2011) 124 Harvard Law Review 748, noting that due process rights functionally replaced claims under the equal protection doctrine: "Squeezing law is often like squeezing a balloon. The contents do not escape, but erupt in another area [...] The Court's commitment to civil rights has not been pressed out, but rather over to collateral doctrines." Already Louis Henkin, 'Privacy and Autonomy' (1974) 74 Columbia Law Review 1417 coined the term of "constitutional displacement" to describe how the concept of substantive due process in essence was functionally replaced by other doctrines.

7 On the relationship between Gény and Saleilles see Eugène Gaudemet, 'L'œuvre de Saleilles et l'œuvre de Gény en méthodologie juridique et en philosophie du droit' in *Recueil D'Etudes Sur Les Sources Du Droit En L'Honneur De François Gény* (Recueil Sirey 1934) vol 2 5 ff.; Wolfgang Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Frühe und Religiöse Rechte, Romanischer Rechtskreis* (vol 1, Mohr Siebeck 1975) 453 ff.; Edward A Tomlinson, 'Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking' (1988) 48(6) Louisiana Law Review 1307-1310; Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* (Beiträge zum ausländischen und internationalen Privatrecht 72, vol 1, Mohr Siebeck 2001) 330-336. On Gény see also Jaro Mayda, *Francois Gény and Modern Jurisprudence* (Louisiana State University Press 1978) 5 ff., and Wolfgang Friedmann, *Legal Theory* (5th edn, Stevens & Sons 1967) 328-332; Alf

École scientifique.[8] This school was a response to a rigid statutory positivism (*Gesetzespositivismus*, in the French context represented by the *l'école de l'exégèse*) which postulated that every legal interpretation must stem from the statute as intended by the lawmaker; the statute was the sole source, any pre-revolutionary customary law or jurisprudence was regarded to be dubious.[9] In the second half of the 19th century[10], a new generation of scholars increasingly questioned the premises of the *Ecole de l'exégèse* and its explanatory force for the law applied in practice: the legal outcome in a case could not be regarded fully predetermined by the text of the statute. Saleilles and Gény went into the same direction but on different doctrinal vehicles. Saleilles did not work with customary law as an additional source of law next to the statute.[11] However, he refuted the idea that the interpretation of a statute was confined by the subjective intent of the legislator. Rather, statutes would have to be interpreted in an evolutionary fashion, taking into account new ideas of justice and the social transformation that might even run contrary to the initial subjective intent of the legislator.[12] In contrast, Gény maintained that statutes had to be interpreted according to the subjective intent of the

Ross, *Theorie der Rechtsquellen: ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* (Deuticke 1929) 48 ff.

8 Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Frühe und Religiöse Rechte, Romanischer Rechtskreis* 453.

9 Ross, *Theorie der Rechtsquellen: ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* 35, 37, 44; see also Dieter Grimm, *Solidarität als Rechtsprinzip: Die Rechts- und Staatslehre Léon Duguits in ihrer Zeit* (Altenhäum Verlag 1973) 8-26, describing how the revolutionary ideals of individualism and voluntarism together with only restrictive (social) legislation began over the 19th century to favour the establishment. Against the background of statutory petrification, new approaches arose which focused on natural law and on substantive criteria to legal interpretation.

10 As noted by Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Frühe und Religiöse Rechte, Romanischer Rechtskreis* 454, the French discipline was influenced by similar movements in other countries at that time, he referred to Rudolf von Jhering in 1860 and to Oliver Wendell Holmes in 1884.

11 François Gény, *Méthode D'Interprétation et Sources en Droit Privé Positif: Essai Critique* (2nd edn, vol 1, Pichon et Durand_Auzias 1954) xx.

12 See Saleilles' preface to Gény's book ibid xiii ff., in particular xv-xvi. On the importance of external elements for the judge to take into account see Raymond Saleilles, 'L'École historique et droit naturel' (1902) 1 Revue trimestrielle de droit civil 102; see also Ross, *Theorie der Rechtsquellen: ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* 45-46.

legislator[13]; however, statutory law would not be the only source to draw on by a judge, it needed to be supplemented by a set of principles outside and above the statute (*"en dehors et audessus de la loi"*).[14] Gény postulated the existence of customary law[15], albeit not in derogation of statutory law[16], and in addition he stressed the legal relevance of tradition and authorities.[17] Central in Gény's account is the recognition of the creative task to be performed by the judge in the act of interpretation:[18] As the judge did not enjoy the free discretion of a legislator, he had to conduct free scientific research (*"libre recherche scientifique"*) and to apply the scientific method and study customary law and social science.[19]

Both approaches differed conceptually from each other: Gény's approach to statutory interpretation focused on the legislator's subjective intent. At the same time, his broad concept of law included customary law. Saleilles adopted a broader, evolutive approach to statutory interpretation, while not recognizing the need for the existence of other legal sources next to statutory law. In practice, the differences between both approaches were more apparent

13 In this sense, his approach was characterized as conservative, Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* 331.

14 François Gény, *Science et technique en droit privé positif: nouvelle contribution à la critique de la méthode juridique* (vol 1, Recueil Sirey 1914) 39.

15 Gény, *Méthode D'Interprétation et Sources en Droit Privé Positif: Essai Critique* No 117 ff. Another author to be mentioned here is Lambert who stressed the importance of customary law as made by the judge and of the so-called "droit comparé, Ross, *Theorie der Rechtsquellen: ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* 45. See in this regard also Mayda, *Francois Gény and Modern Jurisprudence* 14 according to whom Lambert's and Saleilles' ideas of comparative law might have been precursors to substantive supranational law and the general principles of law in article 38.

16 Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Frühe und Religiöse Rechte, Romanischer Rechtskreis* 459; in contrast, both Savigny and Windscheid derived from the equal rank of the written source, statutes, and the unwritten source, customary law, the capacity of customary law to dergoate from statutory law, see Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* (vol 1, Veit 1840) 83, and Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (4th edn, vol 1, Buddeus 1875) 49.

17 Gény, *Méthode D'Interprétation et Sources en Droit Privé Positif: Essai Critique* 238.

18 ibid 207 ff.; Gény's approach inspired Eugen Huber when drafting the Swiss Civil Code; on the relationship between Gény and Huber see Mayda, *Francois Gény and Modern Jurisprudence* 31 ff.

19 For an overview, see Friedmann, *Legal Theory* 329.

than real.[20] Saleilles' approach should become influential in French jurisprudence, whereas Gény's approach was to some extent codified in Article 1 of the Swiss Civil Code of 1907, according to which a judge shall apply the statute, in case of the statute's silence, customary law, in the case of the latter's absence according to the rule which the legislator would be expected to enact, based on an assessment of doctrine and tradition.[21] Not only did this provision later give inspiration to article 38 of the Statute of the Permanent Court of International Justice, Gény's and Saleilles' focus on the "law in action" was taken up by US scholars like Pound and Cardozo and became a source of inspiration for theories on "principles" as legal concepts.[22]

Having in mind the significance of the experiences in municipal legal thought for public international law, this chapter will now focus on the relationship between common law and statutory law as the common law metaphor continued to be invoked in international debates in order to describe the role of customary international law (B.).[23] A comparison of the discussions of

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20 Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* 336.

21 Article 1 of the Swiss Civil Code of 1907 reads: "Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde. Es folgt dabei bewährter Lehre und Überlieferung."

22 See below, p. 118. On differences between Article 1 of the Swiss Code and article 38 see Alfred Verdross, 'Les principes généraux de droit comme source du droit des gens' (1932) 37 Institute de Droit International Annuaire 296.

23 See for instance Waldock, 'General course on public international law' 54 ff. (with respect to the relationship between customary international law and the general principles of law), Georg Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations' (2002) 13(5) EJIL 1093; cf. Staubach, 'The Interpretation of Unwritten International Law by Domestic Judges' 115 footnote 14 (arguing that a common law methodology might focus more on individual precedents of courts "instead of undertaking a complete survey of the relevant state practice"); Stephan W Schill and Katrine R Tvede, 'Mainstreaming Investment Treaty Jurisprudence The Contribution of Investment Treaty Tribunals to the Consolidation and Development of General International Law' (2015) 14 The Law and Practice of International Courts and Tribunals 97; Andrew T Guzman and Timothy L Meyer, 'International Common Law: The Soft Law of International Tribunals' (2008) 9 Chicago Journal of International Law 515 ff.; Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007); it has also been argued that common law should be understood as customary law, Alfred William Brian Simpson, 'Common

the interrelationship in the USA and in the UK demonstrates differences, as UK scholars discussed the relationship in less dynamic terms (B. I.) than their US colleagues (B. II.) who, influenced by continental scholarship on the application of the law, developed a doctrine of legal principles. This doctrine, in turn, informed the discussion in Germany and in the United Kingdom, where, as exemplified by way of reference to the case-law on the Human Rights Act, a new interest in the relationship between common law and written law has emerged. The experiences in municipal law contexts illustrate the significance of institutional support by courts and scholars: whereas the UK Supreme Court has continued to support the concept of common law even instead of solely and exclusively interpreting and applying the Human Rights Act, German legal history shows how a legal concept such as customary law could lose its significance in relation to other techniques such as doctrines of interpretation relating to the written law (C.).

The experiences in domestic legal systems are insightful not only with respect to the relationship between written law and customary law or common law, but also with respect to the doctrine of legal principles. This chapter presents a comparative legal perspective on general principles of law (D.). The concept of "general principles of law" gives expression to the insights that law develops through its interpretation and application, to the systematic character of the law and to the significance of the judicial application and creation of law, for which the concept of general principles is said to provide guidance. The chosen perspective here sides with the view that general principles of law may be found within many legal orders, including, but not limited to, international law.[24] The purpose of this comparative historical

Law and Legal Theory' in Alfred William Brian Simpson (ed), *Legal Theory and Legal History: Essays on the Common Law* (The Hambledon Press 1987) 362, 373 ff.; Neil Duxbury, 'Custom as Law in English Law' (2017) 76(2) Cambridge Law Journal 337 ff.; cf. also Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75(1) Cambridge Law Journal 99 (suggesting to base common law in the legislative practice).

24 Cf. Kolb, 'Les maximes juridiques en droit international public: questions historiques et théoriques' 412, 424, 430; cf. also Schwarzenberger, 'The fundamental principles of international law' 195: "Experience with any of the systems of municipal law teaches that all of them take for granted a stratification of legal principles. Thus, *prima facie*, it may be assumed that the same is true of international law." See also Matthias Goldmann, 'Sources in the Meta-Theory of International Law: Exploring the Hermeneutics, Authority, and Publicness of International Law' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 456-458 on principles' role for hermeneutics.

perspective is to complement the perspective in international legal scholarship on general principles of law in international law. General principles are more than mere gap-fillers. They are not just an alternative to treaty law and customary international law but interwoven and interrelated with both. While article 38(3) PCIJ Statute could be read as a recognition of the role general principles play in the law, general principles need not be understood solely by way of reference to this provision.[25] Article 38(3) PCIJ Statute did not invent general principles. Rather, it was inspired by and gave further inspiration to this concept. In identifying this comparative legal historical background of general principles, this chapter seeks to lay the foundations for this book's understanding of general principles in the international legal order.

B. *Example: The common law and the interrelationship of unwritten and written law*

This section turns to the relationship between unwritten common law and written statutory law. As will be described below, the discussion of the relationship in the United Kingdom and in the United States of America differed significantly. Scholars used to portray the relationship between common law and statutory law as static, with different preferences given to each concept according to the respective spirit of the time.[26] Institutional conflicts between the judiciary and the legislature are said to explain the understanding of the relationship between the written branch and the unwritten branch of law as one of two separate compartments,[27] which Jack Beatson named the "'oil and water' approach', a form of legal apartheid"[28]. In contrast to the United States, where the relationship used to be discussed in a more dynamic fashion[29] and a doctrine of legal principles developed on the basis of the interaction

25 For the recent ILC project on general principles see below, p. 386.

26 Patrick S Atiyah, 'Common Law and Statute Law' (1985) 48(1) The Modern Law Review 7-8, arguing that it might have been more accepted in the 16th century to rely on statutes for the identification of common law than it was in the 18th century.

27 Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* (Mohr Siebeck 1956) 264, 129-130, 229.

28 Jack Beatson, 'Has the Common Law a Future?' (1997) 56(2) The Cambridge Law Journal 308.

29 Harlan F Stone, 'The Common Law in the United States' (1936) 50(1) Harvard Law Review 12 on comparing the US approach and the British "Blackstonian conception"

between written law and unwritten law, it was even argued in relation to the United Kingdom that, because of the strict compartmentalization and because of the slow case-by-case development of common law, the concept of legal principles had no place in UK common law.[30] Over time, the picture of "oil and water" gave way to a more dynamic relationship, under the influence of the reception of the US approaches on the relationship between common law and legislation. Neil MacCormick argued that it would be "false to suppose that there is any essential difference between statute and common law as to the force and function of arguments by analogy and from principle [...] For the Scottish and English legal systems, at least, there does appear to be abundant evidence in favour of the account of principles".[31] The recent experience in the UK with the Human Rights Act demonstrates how the concept of common law thrived under the support of the judiciary and scholars. In particular, the debate on a modification or termination of the Human Rights Act has led to a discussion about common law as basis for constitutional rights.[32]

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which explain the failure to realise the "ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication."

30 Cf. Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung. Anglo-amerikanischer Rechtskreis* (vol 2, Mohr Siebeck 1975) 83 ("Man darf dabei jedoch nicht aus den Augen verlieren, daß eine andere Rechtsordnung des common law, die englische, methodisch ohne jene Grundsätze, principles, auskommt.").

31 Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford University Press 1978) 194; Rupert Cross, *Precedent in English Law* (Clarendon Press 1961) 167-169: "in England, a legislative innovation is received fully into the body of the law to be reasoned from by analogy in the same way as any other rule of law" (169); see also Beatson, 'Has the Common Law a Future?' 310; Axel Metzger, *Extra legem, intra ius: allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (Mohr Siebeck 2009) 193-200.

32 See below, p. 120; see especially Richard Clayton, 'The empire strikes back: common law rights and the Human Rights Acts' [2015] Public Law 3 ff.; Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 Current Legal Problems 85 ff.; Paul Bowen, 'Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?' [2016] (4) European Human Rights Law Review 361 ff.; Alan Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69(1) Current Legal Problems 67 ff.; Eirik Bjørge, 'Common Law Rights: Balancing Domestic and International Exigencies' (2016) 75(2) Cambridge Law Journal 220 ff.

I. The Historic discourse of the relationship between the common law and the written law in the United Kingdom

Debates on the relationship between statutory laws, or legislation, and common law often reflected the respective spirit of the time.[33] One may briefly recall the early generation of common lawyers around Coke, Davies and Hale.[34] Common law was regarded to be the general law, the general standard ("the common Custome of the Realm"[35]), "nothing else but Reason".[36] Coke distinguished conceptually between customs applying only locally and the law that would apply throughout England, which was called "the common law".[37] Statutes affirmed or supplemented common law, "a statute made in the affirmative, without any negative expressed or implied, does not take away the common law".[38]

In the *Bonham* case of 1610, Coke even argued that "common law will controul Acts of Parliaments, and sometimes adjudge them to be utterly void" in case that an Act of Parliament would be "against common right or reason, or repugnant, or impossible to perform".[39] It has been subject to debate whether Coke envisioned judicial review of parliamentary acts or whether he intended to state the principle to construe acts of parliament in consistence with common law.[40] In any case, common law was in relation to legislation

33 See Atiyah, 'Common Law and Statute Law' 7-8, arguing that it might have been more accepted in the 16th century to rely on statutes for the identification of common law than it was in the 18th century.

34 Gerald J Postema, 'Classical Common Law Jurisprudence (Part I)' (2002) 2(2) Oxford University Commonwealth Law Journal 169 ff.; Jeffrey A Pojanowski, 'Reading Statutes in the Common Law Tradition' (2015) 101(5) Virginia Law Review 1377-1378.

35 John Davies, Irish Reports (1674), quoted after Gerald J Postema, *Bentham and the Common Law Tradition* (Clarendon Press 1986) 4; Matthew Hale, *The history of the common law of England ; and, An analysis of the civil part of the law* (6th edn, Henry Butterworth 1820) 5.

36 Edward Coke, *The first part of the Institutes of the laws of England, or, A commentary upon Littleton: not the name of the author only, but of the law itself* (1st American, from the 19th London ed., corr, Robert H Small 1853) Sect 138, 97b.

37 ibid 110b Sect. 165: "but a custome cannot be alleged generally within the kingdome of England; for that is the common law."

38 Edward Coke, *The Second Part of the Institutes of the Laws of England* (1824) 200.

39 *Thomas Bonham v College of Physicians* Court of Common Pleas (1610) 77 Eng. Rep. 638.

40 Gerald J Postema, 'Classical Common Law Jurisprudence (Part II)' (2003) 3(1) Oxford University Commonwealth Law Journal 19; Philip Allott, 'The Courts and

the general law which countered fragmentation tendencies in English law[41] and subjected the monarch to the rule of law.[42]

Matthew Hale pointed to the possibility of innovation by parliamentary legislation. He integrated statutory legislation into common law theory and recalled that past statutes had given rise to common law[43] and that law had always evolved.[44] He listed three "formal constituents [...] of the common law [...]. 1. The common usage, or custom, and practice of the kingdom in such parts thereof as lie in usage or custom; 2. The authority of parliament, introducing such laws; and, 3. The judicial decisions of courts of justice, consonant to one another, in the series and succession of time."[45] Whereas some acts of parliament "are perished and lost" and did not stand the test of time, others became "incorporated with the very common law", the "great substratum".[46]

1. Different law preferences: William Blackstone and Jeremy Bentham

After the glorious revolution in 1688/1689, parliamentary sovereignty conceptually changed the relationship between statutes and common law, and between the legislature and the judiciary, in the work of writers to different

Parliament: Who Whom?' (1979) 38(1) Cambridge Law Journal 82-86; David Jenkins, 'From Unwritten to Written: Transformation in the British Common-Law Constitution' (2003) 36 Vanderbilt Journal of Transnational Law 884 ff.

41 According to Holdsworth, Coke's emphasis on common law served to rescue English law from internal fragmentation given the many judicial systems that existed in England, William Holdsworth, 'Sir Edward Coke' (1933) 5 Cambridge Law Journal 334-344; on this point, see already Hale, *The history of the common law of England ; and, An analysis of the civil part of the law* 39.

42 As Coke elaborated: "[H]is Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law [...]", Edward Coke, 'Prohibitions Del Roy' in John Henry Thomas (ed), *The Reports of Sir Edward Coke in Thirteen Parts* (Joseph Butterworth and Son 1826) 282; on the conflicts between Coke and the Crown, see Holdsworth, 'Sir Edward Coke' 334-336; Leo Gross, 'Der Rechtsbegriff des Common Law und das Völkerrecht' (1931) 11 Zeitschrift für öffentliches Recht 358-360.

43 Hale, *The history of the common law of England ; and, An analysis of the civil part of the law* 4.

44 ibid 83 ff.

45 ibid 88.

46 ibid 89, 91.

degrees.[47] According to William Blackstone, legislative innovations posed a risk to the symmetry of the common law.[48] Blackstone distinguished between written and unwritten law the latter of which would consist of general customs ("common law properly so called") and particular (regional) customs.[49] In the view of Blackstone, common law encompassed both customs and maxims and legal propositions.

> "Some have divided the common law into two principal grounds of foundations; 1. established customs; such as that, where there brothers, the eldest brother shall be heir to the second, in exclusion of the youngest; and, 2. Established rules and maxims: as, 'that the king can do no wrong', 'that no man shall be bound to accuse himself,' and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception; and the only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it."[50]

It was in this Blackstonian tradition that Lord Phillimore during the drafting of article 38 PCIJ Statute criticized the "unjustifiable distinction" between custom and general principles of law, which he described as "maxims of law", in the PCIJ Draft Statute.[51] Blackstone maintained that customs were recognized or "found" as preexisting law by judges. However, since he did not suggest a list of criteria for a general custom to meet,[52] Blackstone *de facto* deprived custom from its extrajudicial and popular character.[53]

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47 Postema, *Bentham and the Common Law Tradition* 14. See also David Lieberman, *The province of legislation determined: legal theory in eighteenth century Britain* (Cambridge University Press 2002) 219, describing "the relationship between common law and legislation [...] a basic problem for legal theory" in the eighteenth century.

48 Blackstone, *Commentaries on the Laws of England* 10-11.

49 ibid 63-64.

50 ibid 68.

51 Permanent Court of International Justice – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* 295, 335; see also Kleinlein, 'Customary International Law and General Principles Rethinking Their Relationship' 146.

52 Particular customs, in order to be binding, would have to meet a list of requirements, such as long usage, in accordance with acts of Parliament, continuation without interruption, uncontentiousness, reasonableness, certainty, consistency, Blackstone, *Commentaries on the Laws of England* 76-79.

53 Ross, *Theorie der Rechtsquellen: ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* 83.

A different approach to common law was advocated by Jeremy Bentham.[54] Bentham was an advocate of codification[55], in his view, the common law system produced injustices by its retroactive application of newly made rules under the pretense of their existence in the past.[56] Bentham criticized in relation to common law the "unaccommodatingness of its rules"[57] to time and circumstances: common law was sait to admit "of no temparaments, no compromises, no compositions: none of these qualifications which a legislator would see the necessity of applying".[58]

His assessment of the role of common law in relation to the harsh criminal law legislation throughout the 18th century differed from Blackstone's position: Blackstone stressed the importance of common law in protection individual liberties and rights.[59] For Bentham, however, the legislative shortcomings were rooted in the common law attitude as just described, the unaccommodatingness of common law.[60] Bentham wanted to strengthen the written law and protect it from invalidating effects of some form of natural

54 The following lines are concerned with Bentham's contribution to the discussion of the relationship between common law and statutory law. Bentham also coined the term "international law", replacing Blackstone's law of nations. Whereas Bentham's term was narrower than Bentham's in that it focused on inter-state relations only, Bentham advocated also the codification in international law and the establishment of an international court; on the international law legacy of Bentham see Mark Weston Janis, 'Jeremy Bentham and the Fashioning of 'International Law'' (1984) 78 AJIL 405 ff.

55 Jeremy Bentham, *A Comment on The Commentaries and A Fragment on Government* (James Henderson Burns and Herbert LA Hart eds, Athlone Press 1977) 320 ("the Common Law must be digested into Statute. The fictious must be substantiated into real. [...] Whatever is to make Law should be brought to light [...]").

56 Postema, *Bentham and the Common Law Tradition* 208.

57 Jeremy Bentham, *Of Laws in General* (Herbert LA Hart ed, Athlone Press 1970) 194.

58 ibid 184, 192-195, quote on 194-195; see also Bentham, *A Comment on The Commentaries and A Fragment on Government* 43, 119-120; see also Bentham, *Of Laws in General* 153: "Written law then is the law of those who can both speak and write: traditionary law of those who can speak but can not write: customary law, of those who neither know how to write, nor how to speak. Written law is the law for civilized nations: traditionary law, for barbarians: customary law, for brutes."

59 See for instance Blackstone, *Commentaries on the Laws of England* 114 ff.

60 This has been illustrated in Postema, *Bentham and the Common Law Tradition* 264-266, 274-278.

law.[61] The other target of his critique next to common law was the judiciary.[62] In Bentham's view, the common law that was actually applied was no custom *in pays*, describing a "regularity in the behaviour of people", but a custom *in foro* which was basically judge-made law as it became legally binding through judgments.[63]

2. John Austin and the will of the sovereign as source of all law

Building on Blackstone's and Bentham's insights regarding the role of the judge in relation to common law, John Austin integrated common law into his system that was based on the will of the sovereign.

Austin distinguished at the beginning of his treatise four types, namely divine law, positive law (both "commands"[64] and "laws properly so called"), "positive morality" (laws properly so called or laws improperly so called) and "laws metaphorical or figurative" (laws improperly so called).[65] According

61 Bentham, *A Comment on The Commentaries and A Fragment on Government* 55-56: "Nothing is unlawful that is the clear intent of the Legislature. Nothing can be void: neither on account of opposition to a pretended Law of Nature, nor on any other."

62 On this institutional aspect relating to the separation of powers, see Jeremy Waldron, 'Custom Redeemed by Statute' (1998) 51(1) Current Legal Problems 96, 99-100, 107-108, 112-113.

63 Bentham, *A Comment on The Commentaries and A Fragment on Government* 180-183, and 230, 232; See Bentham 185-191, criticizing Blackstone's equalization of customs and maxims. In Bentham's view, a maxim can be deduced "from Statutes as from the Common law" (191); see also 302-309. See also Postema, *Bentham and the Common Law Tradition* 220-221.

64 John Austin, *The province of jurisprudence determined* (John Murray 1832) 6, 18.

65 ibid vii. For Austin, international law would be "positive morality" (130-133) as it relied only on public opinion. The term "positive" should denote the fact that this morality was made by men. In his view, this positive morality can be part of the "science of jurisprudence". In this light, Lobban submitted that Austin regarded international law as some "kind of law" which in its nature differed from municipal law and that his views were more subtle than the way in which they have been criticized, Michael Lobban, 'English Approaches to International Law in the Nineteenth Century' in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhof Publishers 2007) 79, 83-84, 89. The prevailing view however characterizes Austin as one of the "deniers" of international "law", see Frédéric Mégret, 'International law as law' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 73-74, and Manfred Lachs, *The Teacher in International Law: Teachings and*

to Austin, all positive laws were, directly or indirectly, commands of this sovereign. He therefore distinguished four categories, laws made directly by the sovereign or the supreme legislature, and laws which are not made directly by the supreme but by a subordinate legislature, "although they derive their force from the authority of the sovereign".[66] Furthermore, he distinguished between law established directly, "in the legislative manner [...] in the way of proper legislation" and law "introduced and obtained obliquely [...] in the judicial mode [...] in the way of judicial legislation".[67]

According to this system, law could have different "modes" but only one ultimate "source", the sovereign[68]. Consequently, a custom could become legally binding only through the judge whose authority derived from the sovereign will. Before then, custom would constitute a positive form of morality.[69] Austin disagreed with Blackstone who had regarded custom to be preexisting law which only required to be found by the judge. In contrast to "the grandiloquous talk [...] customary law has nothing of the magnificent or mysterious about it. It is but a species of *judiciary* law, or of law introduced by sovereign or subordinate judges as properly exercising their judicial functions."[70]

Teaching (2nd edn, Martinus Nijhof Publishers 1987) 15. See also the critique of the "narrow conception" of law in John Westlake, *International Law Part I* (2nd edn, Cambridge University Press 1910) 8.

66 John Austin, *Lectures on jurisprudence. Being the sequel to "The province of jurisprudence determined", Vol II* (J Murray 1863) 1, 208.

67 ibid 217.

68 He therefore rejected Bentham's term "judge-made law", ibid 217.

69 Austin, *The province of jurisprudence determined* 29: "Now when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are tacit commands of the sovereign legislature." See also Austin, *Lectures on jurisprudence. Being the sequel to "The province of jurisprudence determined", Vol II* 222: "Now a merely *moral*, or merely customary rule, may take the quality of a *legal* rule through direct or judicial legislation." A similar view had already been expressed by Thomas Hobbes: "When long Use obtaineth the authority of Law, it is not the Length of Time that maketh the Authority, but the Will of the Sovereign signified by his silence (for Silence is sometimes an argument of consent); and it is no longer law, than the sovereign shall be silent therein", Thomas Hobbes, *Hobbes's Leviathan: reprinted from the edition of 1651* (Clarendon Press 1909) 204. For a critique, see Hart, *The concept of law: With a postscript* 46-48.

70 Austin, *Lectures on jurisprudence. Being the sequel to "The province of jurisprudence determined", Vol II* 227-229 (quote at 229).

3. Subsequent perspectives in UK legal theory: Thomas Holland, H.L.A. Hart and Brian Simpson

In the following, authors built on Austin's insights and explored ways to better define judges' role. Thomas Holland suggested that it was not the individual judge who transformed a certain custom into a legal rule but "an express or tacit law of the State" which stipulated conditions a custom must meet in order to constitute law.[71] Whereas the classical common law lawyers had stressed that statutes could not detract anything from common law, it was now required for common law to be in accordance with statutory law and meet certain requirements which include reasonableness, conformity with statute law and consistence with other common law.[72] Statutes, however, would not have to meet such requirements in order to be considered law.[73]

Holland's idea of a tacit law establishing conditions for a custom to meet in order to be legally binding resembles H. L. A. Hart's approach. Hart did not accept that judges, as agents of the sovereign, would turn non-binding customs into binding ones. Hart pointed out that, just as statutes constitute law already prior to their first judicial application, the same must be possible for

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71 Thomas Erskine Holland, *The elements of jurisprudence* (Clarendon Press 1916) 62, and 59-63. For Holland, this rule of general reception is itself judge-made. In contrast, Kiß submitted that the legal status of customs would not derive from a judge-made law but from statutes, in particular from equity as inherent principle of the written law, Géza Kiß, 'Die Theorie der Rechtsquellen in der englischen und anglo-amerikanischen Literatur' (1913) XXXIX Archiv für Bürgerliches Recht 287 ff., in particular 294. But see Ross, *Theorie der Rechtsquellen: ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen* 106-108, and 126, criticizing that the concept of statute law would be deprived from every value by the incorporation of such vague principles.

72 John William Salmond, *Jurisprudence* (4th edn, Stevens 1913) 146-147, 152. Salmond considered this the central difference to German authors such as Savigny and Windscheid. Cf. Savigny, *System des heutigen Römischen Rechts* 83: "Sehen wir endlich auf die Wirksamkeit [des Gewohnheitsrechts] im Verhältnis zu den Gesetzen, so müssen wir diesen Rechtsquellen völlige Gleichheit zuschreiben. Gesetze also können durch neues Gewohnheitsrecht nicht nur ergänzt und modificirt, sondern auch außer Kraft gesetzt werden [...]". See also Windscheid, *Lehrbuch des Pandektenrechts* 49.

73 William Jethro Brown, *The Austinian theory of law: being an edition of lectures I, V, and VI of Austin's "Jurisprudence," and of Austin's "Essay on the uses of the study of jurisprudence"* (Murray 1906) 328-329. Brown attributes the idea that an act of parliament could be void to natural law thinking of the past.

customary law.[74] Hart also attacked Austin's argument according to which all law must be derived from the will of the sovereign and suggested a secondary rule of recognition according to which so-called primary rules of obligations can be identified.[75] This secondary rule could, in principle, accommodate common law:

> "In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions."[76]

Whereas Hart, only in a cursory and sketchy fashion[77], attempted to reconcile custom and common law with his idea of law as set of primary and secondary rules, Brian Simpson suggested to understand common law as sort of customary law. Rather than understanding common law as a system of clearly defined rules, Simpson suggested "an alternative idea - the idea that the common law is best understood as a system of customary law, that is, as a body of traditional ideas received within a caste of experts"[78]. According to Simpson, certain propositions of common law were so abstract that they could not be reasonably explained by reference to a regularly observable custom in the sense of a behavioural practice, which is why the view of common law as custom "has today fallen almost wholly out of favour."[79] Yet, he suggested to "conceive of the common law as *a system of customary law*, and to recognize that such system may embrace complex theoretical notions which both serve to explain and justify past practice in the settlement of disputes and the punishment of offences, and provide a guide for future conduct in these matters."[80] This system was said to consist "of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them [...]".[81] The existence of such

74 Hart, *The concept of law: With a postscript* 44-48; Duxbury, 'Custom as Law in English Law' 339.
75 Hart, *The concept of law: With a postscript* 97, 100.
76 ibid 95.
77 Hart did not consider custom to be "in the modern world a very important 'source'", ibid 45; see Duxbury, 'Custom as Law in English Law' 339.
78 Simpson, 'Common Law and Legal Theory' 362.
79 ibid 374, 375-376.
80 ibid 375-376 (italics added).
81 ibid 376.

ideas and practices was said to depend on the condition "that they are accepted and acted upon within the legal profession"; in this sense, common law was not authoritatively fixed by language the same way that statutory rules are, rather formulations of the common law only describe and systematize those practices, remain as a description subject to correction and should not be equated with the practices described.[82]

II. The historic discussion of the relationship between unwritten law and the written law in the United States of America

In comparison, the discussion in the US turned much earlier and to a greater extent on the interaction between common law and legislation than the debate in the UK did.[83]

82 ibid 376. It has been argued that this insight may be helpful for understanding also customary international law in the international legal order, see Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' 261 ("rules of custom are best conceptualized as 'statements of legal science'"); see also Hakimi, 'Making Sense of Customary International Law' 1517-1519.

83 See Atiyah, 'Common Law and Statute Law' 1, arguing that the question of interaction has received little attention in English scholarship; cf. James McCauley Landis, 'Statutes and the Sources of Law' (1965) 2 Harvard Journal of Legislation 8 ("Historically statutes have never played such a confined role in the development of English law.").

The *Erie* judgment[84], in which the US Supreme Court rejected the existence of a federal common law in multi-state jurisdictional disputes and thusly reduced the scope of application of common law, the rise of legal realism, the proliferation of legislation in the New Deal era[85] as well as a growing interest in the interpretation of the constitution arguably shifted the discussion away from the relationship between common law and legislation.[86] However, the early discussion's focus on the *law in action* and the idea to apply statutes "beyond their terms"[87] provided inspiration for modern doctrines on general

84 *Erie Railroad Company v Tompkins* SCOTUS 304 U.S. 64, courts could apply state common law; in the follow-up, the judgment's implications for the status of international law in the US legal system was subject to intense debate, as international law had been thought of as federal common law. The first argument was made by Jessup, arguing that Erie did not pronounce on the question of international law. If "applied broadly, it would follow that hereafter a state court's determination of a rule of international law would be a finding regarding the law of the state and would not be reviewed by the Supreme Court of the United States." In his view, "any attempt to extend the doctrine of the Tompkins case to international law should be repudiated by the Supreme Court", Philip C Jessup, 'The Doctrine of Erie Railroad V. Tompkins Applied to International Law' (1939) 33(4) AJIL 742, 743; decades later, Curtis Bradley and Jack Goldsmith argued that customary international law should not be understood as federal common law as it was by what they called the "modern" position, Curtis A Bradley and Jack L Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110(4) Harvard Law Review 817, 852 ff.; Curtis A Bradley and Jack L Goldsmith, 'The Current Illegitimacy of International Human Rights Litigation' (1997) 66(2) Fordham Law Review 319 ff.; for a defense of this modern position see Ryan Goodman and Derek P Jinks, 'Filartiga's Firm Footing: International Human Rights And Federal Common Law' (1997) 66(2) Fordham Law Review 463 ff.

85 Ellen Ash Peters, 'Common Law Judging in a Statutory World: An Address' (1982) 43 University of Pittsburgh Law Review 996.

86 Common law remains relevant though at the state level and arguably also at the Federal level, cf. for an overview Caleb Nelson, 'The Legitimacy of (Some) Federal Common Law' (2015) 101(5) Virginia Law Review 1 ff.; Pojanowski, 'Reading Statutes in the Common Law Tradition' 1357 ff.

87 Robert F Williams, 'Statutes as Sources of Law Beyond their Terms in Common-Law Cases' (1982) 50(4) The George Washington Law Review 558 ff., see also 571-573 and 592-593 for examples of interplay between statutes and common law; see also Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford University Press 2012) 286.

principles in other domestic legal orders, for instance in the United Kingdom and in Germany, as well as in international legal scholarship.[88]

1. Roscoe Pound

Roscoe Pound suggested four ways in which legislative innovation could relate to the common law and be approached by courts. Firstly, "[courts] might receive [legislative innovation] fully into the body of the law as affording not only a rule to be applied but a principle from which to reason" and regard it as "a more direct expression of the general will" and as superior to judge-made rules on the same subject. They might also, secondly, use legislation as source of inspiration for analogies, "regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject". According to the third option, courts might refuse "to receive [legislative innovation] fully into the body of the law" and to reason from it by analogy but at least give the scope of the legislation a liberal interpretation; in contrast, courts might in the fourth scenario interpret the legislation as strictly and narrowly as possible, "holding it down rigidly to those cases which it

88 For a reception of Pound's and Cardozo's scholarship see MacCormick, *Legal Reasoning and Legal Theory* 194; Cross, *Precedent in English Law* 167-169; Fikentscher, *Methoden des Rechts in vergleichender Darstellung. Anglo-amerikanischer Rechtskreis* 211-212, 251-253. US scholarship itself was influenced by European thinkers such as François Gény and Rudolf von Jhering, Benjamin Cardozo, *The Nature of the Judicial Process* (13th edn, Yale University Press 1946) 16 (reference to Gény), 102 (reference to Jhering); on this reception see Jerome Frank, 'Civil Law Influences on the Common Law - Some Reflections on 'Comparative' and 'Contrastive' Law' (1956) 104(7) University of Pennsylvania Law Review 890-893; on differences of principles in common law and civil law jurisdictions see Stone, 'The Common Law in the United States' 6 ("With the common law, unlike the civil law and its Roman law precursor, the formulation of general principles has not preceded decision. In its origin it is the law of the practitioner rather than the philosopher."); but see Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* 219 (acknowledging those differences but also noting tendencies of convergence); see also Kolb, 'Les maximes juridiques en droit international public: questions historiques et théoriques' 429. Hersch Lauterpacht referred Roscoe Pound and Benjamin Cardozo who are discussed in this chapter, cf. the index in Hersch Lauterpacht, *The Function of Law in the International Community* (Reprinted with corr., first publ. 1933, Oxford University Press 2012) 461 f.

covers expressly."[89] In Pound's view, the last mentioned scenario represented "the orthodox common law attitude towards legislative innovation", whereas he regarded the state of his discipline tending towards the third attitude and he suggested that the legal development would eventually lead to the adoption of the second and the first method in spite of the doubts those methods might face to a common law lawyer.[90]

Since common law became "a custom of judicial decision, not a custom of popular action"[91], it was no longer superior to legislation which became "the more truly democratic form of lawmaking [...] the more direct and accurate expression of the general will."[92] In his view, principles could be extrapolated from legislation.[93] Pound did not reduce law to rules. Rather, he distinguished "laws" from "the law", meaning "the whole body of legal precepts" which "gives them [the laws] life."[94] At the same time, he recognized a difference between rules and principles. Rules, on the one hand, were "precepts attaching a definite detailed legal consequence to a definite, detailed state of facts"[95] and "the bone and sinew of the legal order."[96] Principles, on the other hand,were said to be "the work of lawyers. They organize experience of interpreting and applying rules".[97] They were described as "authoritative starting points for legal reasoning, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules in the narrower

89 Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) Harvard Law Review 385.

90 ibid 385-386, and 400 on a systemic understanding of the relationship between statutory law and common law ("Statute and common law should be construed together, just as statute and statute must be."); see also Landis, 'Statutes and the Sources of Law' 8, 11 ff., originally published 1934 (noting that historically English common law was often preceded by statutes and on necessary modifications to accommodate English common law to US-American realities).

91 Pound, 'Common Law and Legislation' 406.

92 ibid 406. As Cardozo put it, "a legislative policy [...] is itself a source of law, a new generative impulse transmitted to the legal system", *Van Beeck v Sabine Towing Co* SCOTUS 300 U.S. 342 351. Contra: Holland, *The elements of jurisprudence* 76 footnote 2.

93 Pound, 'Common Law and Legislation' 407.

94 Roscoe Pound, *Jurisprudence Part 3. The Nature of Law* (vol 2, West 1959) 104 ff., 106.

95 Roscoe Pound, 'Hierarchy of Sources and Forms in Different Systems of Law' (1933) 7 Tulane Law Review 482.

96 ibid 483.

97 Pound, *Jurisprudence Part 3. The Nature of Law* 126.

sense."[98] Unlike rules, principles "do not attach any definite detailed legal results to any definite, detailed states of facts".[99] The interpreter would have to make a choice between competing principles, "and this choice is seldom authoritatively fixed."[100]

2. Benjamin Cardozo

General principles played a prominent role in Cardozo's work on the judicial process. According to Cardozo, the judge "must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is move and develop [...]"[101]. The direction could be determined from different perspectives or "methods"[102]: these methods represented considerations which Cardozo considered to be relevant for the ascertainment and the interpretation of general principles. The method of philosophy included reasoning by logical progression or by analogy[103] and emphasized logical consistency of the law. The method of evolution considered the historical development of a principle.[104] The method of tradition referred to custom which may assist in fixing the direction of a principle.[105] The purpose of custom then was "not so much in the creation of new rules, but for the tests and standards that are to determine how established rules shall be applied".[106] Cardozo's method of sociology referred to considerations of social justice and the welfare of the society.[107] All methods were said to be applicable, with the sociological method being "the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pre-

98 Pound, 'Hierarchy of Sources and Forms in Different Systems of Law' 483.
99 ibid 483.
100 ibid 484.
101 Cardozo, *The Nature of the Judicial Process* 28.
102 ibid 30-31.
103 ibid 49.
104 ibid 51-57.
105 ibid 58.
106 ibid 60, see also 62 ("It is, however, not so much in the making of new rules as in the application of old ones that the creative energy of custom most often manifests itself today").
107 ibid 66-67.

tensions, balancing and moderating and harmonizing them all."[108] Cardozo emphasized the value of uniformity and impartiality as well as consistency of the law and its symmetrical development, all of which, however, had to be balanced against other social interests such as equity or fairness.[109] The judicial task was described as a creative one, as "[t]he law [...] is not found, but made."[110] Unlike the legislator, however, who "is not hampered by any limitations in the appreciation of a general situation"[111], the judge must "base his judicial decision on elements of an objective nature."[112] For this purpose, the judge "is to draw inspiration from consecrated principles" and "exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the 'primordial necessity of order in the social life'."[113]

3. Lon Fuller

Another important perspective on the relationship between written law and unwritten law in US legal theory was developed by Lon L. Fuller. Fuller is well known for his eight criteria of legality: governance by general norms, public ascertainability or public promulgation, in general no retroactivity, clarity of law, non-contradictoriness, the possibility of compliance, constancy of the law over time, congruence between official action and declared rule.[114] Adherence to these eight criteria of legality would produce the internal morality of law as a morality of aspiration, as opposed to a morality of duty.[115]

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108 Cardozo, *The Nature of the Judicial Process* 98.
109 ibid 112-113.
110 ibid 115.
111 ibid 120.
112 ibid 121.
113 ibid 140-141(quote) with approving reference to François Gény and to the first article of the Swiss Civil Code of 1907, which was said to set "the tone and temper in which the modern judge should set about his task" (140).
114 Lon L Fuller, *The Morality of Law: Revised Edition* (Yale University Press 1969) 46-91; the terminology is in part borrowed from Thomas Schultz, 'The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences' (2011) 2(1) JIDS 72.
115 Fuller, *The Morality of Law: Revised Edition* 104, 121, and 202-203, for the internal morality as professional commitment of lawyers and object to thrieve to, more than just "good legal craftsmanship" (Herbert LA Hart, 'Book Review of The Morality

It is, however, Fuller's work on customary law, also termed "implicit law"[116], which Gerald Postema has considered to constitute the "hallmark of Fuller's jurisprudence".[117] Customary law was formed "when a stabilization of interactional expectancies has occurred so that the parties have come to guide their conduct toward one another by these expectancies".[118] Fuller's account stressed the interplay between written law, or law enacted by the lawgiver, and customary law as law emerging between subjects to the law.[119] In Fuller's model, enacted law and customary law are not in a relationship of competition but supplement each other.[120]

Whereas Pound and Cardozo highlighted in their work the role of the judge, Fuller's work pointed to the contributions of the law-subjects. Both in Cardozo's[121] and in Fuller's account[122], the purpose of customary law did not lie in creating new rules but in explaining the meaning of existing rules. The accounts thus envisioned a role of custom which was not in competition to the written law. The horizontal relationship between the written law enacted by the lawmaker and the law's addressees makes Fuller's ideas particularly interesting to the contemporary discussions about the *lex mercatoria*, or

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of Law by Lon L. Fuller' (1965) 78(6) Harvard Law Review 1285-1286); see also Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71(4) Harvard Law Review 632.

116 Lon L Fuller, 'Human Interaction and the Law' (1969) 14 The American Journal of Jurisprudence1 ff.

117 Gerald J Postema, 'Implicit Law' (1994) 13(3) Law and Philosophy 364.

118 Fuller, 'Human Interaction and the Law' 9-10.

119 ibid 24 ("the existence of enacted law as an effectively functioning system depends upon the establishment of stable interactional expectancies between lawgiver and subject").

120 ibid 35-36 ("enacted law and the organizational principles implicit in customary law are not simply to be viewed as alternative ways of ordering men's interactions, but rather as often serving to supplement each other by a kind of natural division of labor"); on the congruence between enacted law and social practices in Fuller's work see see Postema, 'Implicit Law' 368, 373-377; cf. Andreas Hadjigeorgiou, 'Beyond Formalism Reviving the Legacy of Sir Henry Maine for Customary International Law' in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge University Press 2022) 186-202 (on the relationship between customary law and written law in the work of Maine).

121 Cardozo, *The Nature of the Judicial Process* 58.

122 Fuller, 'Human Interaction and the Law' 24.

nonstate law[123] and his emphasis on the importance of interpretative practices has been referred to in the public international law discourse as well.[124]

III. A new interest in the interplay between common law and statutory law in the recent UK jurisprudence

The portrayal of the English debate has turned so far more on the hierarchy between written and unwritten law and less on the interaction.[125] With the clarification of the primacy of the statutory law, the question of the precise interaction between unwritten law and written law, between common law and statutory law, was seldomly addressed, but it attracted more attention in recent judicial practice. Lord Hoffman commented on the relationship between statutory law and common law in the *Johnson* case, where the question was raised whether the plaintiff had a cause of action under common law, unaffected by the damage cap limitation that applied to the claim under statutory law. He stressed that the "development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernise the common law. But such developments must be consistent with legislative policy as expressed in statutes. The courts may proceed in harmony

123 Ralf Michaels, 'A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution: A Reply to Thomas Schultz' (2011) 2(2) JIDS 421 ff., with further references; Bruce L Benson, 'Customary Law as a Social Contract: International Commercial Law' (1992) 3(1) Constitutional Political Economy 1 ff.; Gregory Shaffer, 'How Business Shapes Law: A Socio-Legal Framework' (2009) 42(1) Connecticut Law Review 150.

124 Brunnée and Toope, *Legitimacy and legality in international law: an interactional account*; Brunnée and Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' 19 ff. For Fuller, international law invites one to qustion the dominant domestic paradigm of vertically imposed law, Fuller, *The Morality of Law: Revised Edition* 237; on this topic, see also Michael Markun, *Law without Sanctions Order in Primitive Societies and the World Community* (Yale University Press 1968) 11, see also 66, 90, 161.

125 Bogg, 'Common Law and Statute in the Law of Employment' 67, according to whom "the interaction between common law and statute has been underexplored"; see already Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* 131, 264-265.

with Parliament but there should be no discord."[126] It would not be "a proper exercise of the judicial function"[127] to develop a common law that would circumvent the statutory damage limitation and be "contrary to the evident intention of Parliament".[128]

One cannot say, however, that common law has always a subsidiary role in relation to written law. In particular the relationship between common law and the Human Rights Act was subject to discussions in scholarship. The recent judicial practice in the United Kingdom indicates that the interpretation of common law was informed by statutes and international obligations, while at the same time maintaining common law as a distinct legal concept.

1. Common law as human rights law

Prior to the adoption of the Human Rights Act, the European Convention on Human Rights was not implemented domestically. Courts therefore resorted to common law as legal basis and interpreted this branch of law in light of the ECHR, which was described as "incorporation without incorporation".[129] With the adoption of the Human Rights Act, "the common law did not come to an end"[130], in particular the UK Supreme Court stressed the continuing importance of common law.[131] In *Osborn*, Lord Reed, with whom the other judges agreed, wrote that the constitution of the United Kingdom and the European Convention on Human Rights share common values. Human rights

126 *Johnson v Unisys Limited* House of Lords [2001] UKHL 13, Lord Hoffmann para 37.

127 ibid, Lord Hoffmann para 57.

128 ibid, Lord Hoffmann para 58; but see Lord Steyn's dissent, para 23, emphasizing that Parliament did not intend to preclude the principled development of common law. On Lord Hoffmann's approach see Bogg, 'Common Law and Statute in the Law of Employment' 68, identifying three modes of interplay in Hoffmann's opinion: statutes might preempt the development of common law, it might operate as analogical stimulus for common law and common law as fundamental rights.

129 *Watkins v Home Office* House of Lords [2006] UKHL 17, Lord Rodger of Earlsferry, para 64, also arguing: "Now that the Human Rights Act is in place, such heroic efforts are unnecessary".

130 *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* England and Wales Court of Appeal, QB [2013] QB 618 Toulson LJ para 88.

131 Brice Dickson, *Human rights and the United Kingdom Supreme Court* (Oxford University Press 2013) 28 ff.

should be primarily protected through domestic law, through legislation and the common law. Lord Reed acknowledged the importance of the Human Rights Act, while stressing at the same time that the Act "does not however supersede the protection of human rights under the common law or statute [...] Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate."[132]

In *Kennedy*, Lord Mance, writing for the majority and against a tendency to frame legal questions concerning human rights solely in terms of ECHR rights, explained that "the natural starting point" would be domestic law and in particular common law, "it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene."[133] Common law would remain independent, "[i]n some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence [...] And in time, of course, a synthesis may emerge."[134] He then argued that article 10 ECHR would not contain a positive right of access to information and that such protection was to be looked for instead in the common law.[135] Common law

132 *Osborn v The Parole Board, Booth v The Parole Board In the matter of an application of James Clyde Reilly for Judicial Review (Northern Ireland)* UKSC [2013] UKSC 61 Lord Reed in particular para 57. See also para 104 for examples in which the jurisprudence of the EctHR was taken into account for the interpretation of the common law. See also *R (Daly) v Secretary of State for the Home Department* House of Lords [2001] UKHL 26, where the House of Lords decided that common law protects a prisoner's right to confidential privileged legal correspondence. Lord Bingham noted that this common law interpretation corresponds to article 8 ECHR (para 23). Lord Cooke of Thorndorn stressed that "that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication" (para 30). See also *Regina v Parole Board ex parte Smith, Regina v Parole Board ex parte West* House of Lords [2005] UKHL 1 para 30 ff., where ECtHR jurisprudence was included in the consideration of what common law would require for a hearing to be regarded as fair. See also on the prohibition of torture as common law *A and others v Secretary of State for the Home Department* House of Lords [2005] UKHL 71 Lord Bingham para 51 ("the English common law has regarded torture and its fruits with abhorrence for over 500 years").

133 *Kennedy v Charity Commission* UKSC [2014] UKSC 20 Lord Mance, para 46.

134 ibid Lord Mance para 46.

135 ibid Lord Mance para 46. See also paras 51-54 on the Wednesbury test and portionality, and para 94 on the ECHR. But see the dissent by Lord Wilson, paras 188-189, coming to a contrary conclusion on article 10 ECHR by adopting a less narrow interpretation.

as primarily applicable law continued to be interpreted in light of the HRA and the ECHR.[136]

2. Common law in light of human rights

The ECHR and the HRA have also an impact beyond the interpretation of common law rights. For instance, human rights as enshrined in the ECHR informed the interpretation of established common law concepts such as the doctrine on *ultra vires* and statutory interpretation, according to which an executive practice that infringes human rights will arguably not have been within the scope of the statutory authorization unless the statute is explicit on this point,[137] and the *Wednesbury* doctrine of reasonableness[138].

136 The principle to take account of obligations under international law was also stressed in *R (on the application of Faulkner) v Secretary of State for Justice and others* UKSC [2013] UKSC 23 Lord Reed para 29, common law needs to be interpreted and developed "so as to arrive at a result which is in compliance with the UK's international obligations; the starting point being our own legal principles rather than the judgments of an international court."

137 Secondary acts of the executive must remain within the scope of the statutory authorizations. The statute itself has to be interpreted in line with international human rights obligations. An executive practice that infringes human rights will arguably not have been within the scope of the statutory authorization, unless the statute is explicit on this point, see *Regina v The Secretary of State for the Home Department ex Parte Mark Francis Leech)* England and Wales Court of Appeal [1993] EWCA Civ 12; David Feldman, 'Convention Rights and Substantive Ultra Vires' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000) 253 ff. See also the first judgment delivered by the UK Supreme Court, *Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants) Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant) R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant)* UKSC [2010] UKSC 2, the court decided that an order of Her Majesty's treasury by which the financial assets of the listed individual had been frozen on the grounds of suspected involvement into terrorism, and by which the individual was rendered effectively a prisoner of the state, was an ultra vires act as it was not covered by the very general language of the United Nations Act 1946. See also Elliott, 'Beyond the European Convention: Human Rights and the Common Law' 98: "The HRA thus does not break new conceptual ground when it comes to the protection of rights: it merely utilizes and extends the vires- based technique that was already established at common law."

138 See already Jeffrey Jowell and Anthony Lester, 'Beyond Wednesbury: Substantive Principles of Administrative Law' [1987] Public Law 371-374, 377, 379, the authors

Moreover, common law has also continued to constitute a legal basis for infringements of individual rights, as the UK Supreme Court recently maintained with respect to the so-called act of state doctrine. According to this doctrine, certain acts of the Crown were not justiciable and certain tort claims against the Crown by (foreign) citizens were precluded from judicial review.[139] The UK Supreme Court did not follow the Court of Appeals which had argued that it would be for parliament to introduce a procedural bar to claims.[140] Instead, it was argued that in narrow circumstances, a tort claim under foreign law against the Crown might not be enforced by Her Majesty's court based on the Crown act of state doctrine.[141]

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argued that the reasonableness test should not confine itself to procedural fairness but be committed to human rights and the European Convention. The authors demonstrated that past judgments had already protected for instance the right to property, disguised by the Wednesbury language (at 372).

139 The leading case is *Attorney General v Nissan* House of Lords [1969] UKHL 3, see in particular Lord Wilberforce according to whom the Crown act of state doctrine rests on the "two different conceptions or rules" mentioned in the text. For present discussions see*Rahmatullah v Ministry of Defence and another, Mohammed and others v Ministry of Defence and another* UKSC [2017] UKSC 1 Lady Hale (with whom Lord Wilson and Lord Hughes agree) para 19 ff., Lord Sumption paras 79-81, contra: Lord Mance para 69 (only one principle); on the act of state doctrine, see also Amanda Perreau-Saussine, 'British Acts of State in English Courts' (2008) 78 BYIL 176 ff.

140 *Mohammed (Serdar) v Ministry of Defence, Qasim v Secretary of State for Defence, Rahmatullah v Ministry of Defence, Iraqi Civilians v Ministry of Defence* UK Court of Appeal [2015] EWCA Civ 843 para 364.

141 *Rahmatullah v Ministry of Defence and another, Mohammed and others v Ministry of Defence and another* [2017] UKSC 1 (Lady Hale with whom Lord Wilson and Lord Hughes agree) paras 36-37 on the conditions: "[...] We are left with a very narrow class of acts: in their nature sovereign acts - the sorts of thing that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are themselves lawful in international law"; see also Lord Sumption para 81, raising the question of a further condition, namely whether the Crown act of state doctrine would be applicable only against claims of aliens.

3. Concluding Observations

The recent judicial practice on the "resurgence"[142] of common law demonstrates that common law is interpreted in light of statutes and international obligations.[143] The success of common law is also the result of efforts by the UK Supreme Court. When parties began to plead almost exclusively on the basis of the HRA without further regard to the common law,[144] the judges of the Supreme Court countered this development by signalizing that they continued to understand common law to be the law to be applied in the first place and, if possible, in concordance with the obligations under the ECHR. The judges did not simply regard common law as synonymous and equated with the Human Rights Act, they applied common law "within its own paradigm"[145]. There were reasons related to the UK legal order which may explain the continuing attractiveness of common law: the "proud tradition"[146] of UK constitutionalism and the potential of common law to operate

142 See Roger Masterman and Se-shauna Wheatle, 'A common law resurgence in protection?' [2015] (1) European Human Rights Law Review 61 ff.; Bowen, 'Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?' 361; see also Brenda Hale, 'UK Constitutionalism on the March? keynote address to the Constitutional and Administrative Law Bar Association Conference 2014' [2015] Judicial Review 201 ff.

143 *Montgomery v Lanarkshire Health Board* UKSC [2015] UKSC 11 Lord Kerr and Lord Reed (with whom Lord Neuberger, Lord Clarke, Lord Wilson and Lord Hodge agree) para 80: "Under the stimulus of the Human Rights Act 1998, the courts have become increasingly conscious of the extent to which the common law reflects fundamental values."

144 For this observation see *Kennedy v Charity Commission* [2014] UKSC 20, Lord Mance para 46: "Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights."; Elliott, 'Beyond the European Convention: Human Rights and the Common Law' 91; Bowen, 'Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?' 361-362.

145 See Max Du Plessis and Jolyon Ford, 'Developing the common law progressively - horizontality, the Human Rights Act and the South African experience' [2004] (3) European Human Rights Law Review 312-314 on the need to apply a legal concept such as common law "within its own paradigm".

146 Hale, 'UK Constitutionalism on the March? keynote address to the Constitutional and Administrative Law Bar Association Conference 2014' 201 ff.

as domestic counterweight,[147] whilst the opinions differ on whether the idea of judicial review of an act of parliament would be easier to accept, if at all, under the Human Rights Act made by parliament than under the common law.[148] What is important for the purposes of this study is, however, that the treatment of common law in the UK demonstrates that a legal concept, in spite of all the uncertainties from the perspective of legal theory[149], can work if it continued to receive the support of scholars and practitioners.[150] Common law then seems to appear as Simpson described it, "a body of practices observed and ideas received by a caste of lawyers."[151]

C. Example: German law and the interrelationship of sources

The German legal history illustrates how a legal concept such as customary law can lose its support of a legal community in light of functionally equivalent doctrines, such as the role of a standing jurisprudence, the interplay

147 Bjørge, 'Common Law Rights: Balancing Domestic and International Exigencies' 234 ff. (pointing to Security Council resolutions which might prevail over the ECHR which would render a domestic counterweight such as common law important).

148 Elliott, 'Beyond the European Convention: Human Rights and the Common Law' 114-115, wondering whether the prospects of "judicial disobedience to statute" are more favourable under the Human Rights Act than under common law; for Bowen, 'Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?' 362-365 however, common law would for reasons of parliamentary sovereignty not as strong as the Human Rights Act; expressing also "a note of caution": Clayton, 'The empire strikes back: common law rights and the Human Rights Acts' 4; see also Sales, 'Rights and Fundamental Rights in English Law' 91-92 and 95-96.

149 For an overview of the legal-theoretical difficulties of common law see Simpson, 'Common Law and Legal Theory' 359 ff.; Oliver Lepsius, *Verwaltungsrecht unter dem Common Law: amerikanische Entwicklungen bis zum New Deal* (Mohr Siebeck 1997) 33-36.

150 Cf. Clarence Wilfred Jenks, *The common law of mankind* (Stevens 1958) 104-105, arguing against an unduly rigid and overdogmatic approach to customary international law, since the "future status and effectiveness of established custom depends primarily on certain basic intellectual attitudes."

151 Simpson, 'Common Law and Legal Theory' 376; cf. Sales, 'Rights and Fundamental Rights in English Law' 99, arguing that common law interpretation should not be mere judge-made law but be supported by evidence of a will of a legislature in statutory provisions.

between a written norm and the application of a norm and the doctrine of legal principles all of which made customary law less attractive.[152]

I. The historical school

Both Friedrich Carl von Savigny and Georg Friedrich Puchta are associated with the so-called historical school according to which customary law was the expression of a national spirit (*Volksgeist*), which was the ultimate source of three sources: customary law, enacted law and legal science (*Gewohnheitsrecht, Gesetzesrecht, Juristenrecht*).[153]

Prior to the historical school, there was a tendency to strengthen the written law in form of statutes in relation to custom. As described by Jan Schröder, whilst it was still thought in the 16th century that the consent of the lawmaker was not necessary for a custom to emerge as long as the custom was reasonable and did not contradict natural law or divine law, and had derogatory force in relation to written law,[154] the understanding of law changed in the outset of the 16th century, as law became detached from values

152 See in particular Christian Tomuschat, *Verfassungsgewohnheitsrecht? Eine Untersuchung zum Staatsrecht der Bundesrepublik Deutschland* (Heidelberg, 1972) 9; Josef Esser, 'Richterrecht, Gerichtsgebrauch und Gewohnheitsrecht' in Josef Esser (ed), *Festschrift für Fritz von Hippel: zum 70. Geburtstag* (Mohr Siebeck 1967) 118, 122-123, 126; but see on the potential usefulness of the concept of customary law for a judicial jurisprudence Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) 356-357, 433; Christian Starck, 'Die Bindung des Richters an Gesetz und Verfassung' (1976) 34 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 71.; Bodo Pieroth, *Rückwirkung und Übergangsrecht Verfassungsrechtliche Maßstäbe für intertemporale Gesetzgebung* (Duncker & Humblot 1981) 272-273.

153 Wolfgang Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Mitteleuropäischer Rechtskreis* (vol 3, Mohr Siebeck 1976) 90; see also Paul Guggenheim, 'Contribution à l'histoire des sources du droit des gens' (1958) 94 RdC 52, according to whom Savigny's and Puchta's focus on *opinio juris* was the essential contribution *vis-à-vis* preceding theories.

154 Jan Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methode vom Humanismus bis zur historischen Schule (1500-1850)* (Beck 2001) 14; cf. also Siegfried Brie, *Die Lehre vom Gewohnheitsrecht: eine historisch-dogmatische Untersuchung. Theil 1: Geschichtliche Grundlegung: bis zum Ausgang des Mittelalters* (Marcus 1899) 151-158 on the recognition of the derogatory force of custom in medieval times.

or justice and was regarded as the expression of the will of the lawmaker.[155] As a consequence, customary law was brought within this statutory paradigm by being based on a tacit command of the lawmaker.[156] Throughout the 18th century, the derogatory force of custom was questioned or made dependent on the tacit consent of the lawmaker.[157] In contrast to a strong voluntarist understanding of law which depended solely on the will of the lawmaker, the historical school stressed the organic growth of the law through itself, for instance through analogical reasoning which takes account of the "inner consequence" of the legal system.[158] In this context, customary law and the legal craft was given more significance.[159]

1. Friedrich Carl von Savigny

Savigny argued that the seat of all law was the common conscience of the people.[160] It was not custom that *created* this positive law. Rather, custom was "the indicator of positive law and not the basis of its creation".[161] Article 38(2) PCIJ Statute, now article 38(1)(b) ICJ Statute, reflected this understanding[162],

155 Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methode vom Humanismus bis zur historischen Schule (1500-1850)* 97-98; Hobbes, *Hobbes's Leviathan: reprinted from the edition of 1651* 203, chapter XXVI.

156 Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methode vom Humanismus bis zur historischen Schule (1500-1850)* 105-107.

157 ibid 112.

158 Savigny, *System des heutigen Römischen Rechts* 290, 292.

159 Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methode vom Humanismus bis zur historischen Schule (1500-1850)* 194.

160 Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer 1814) 12; Savigny, *System des heutigen Römischen Rechts* 14.

161 ibid 35: "So ist die Gewohnheit das Kennzeichen des positiven Rechts, nicht dessen Entstehungsgrund."; for the English translation see Christoph Kletzer, 'Custom and Positivity: an Examination of the Philosophic Ground of the Hegel-Savigny Controversy' in Amanda Perreau-Saussine and James Bernard Murphy (eds), *The nature of customary law* (Cambridge University Press 2007) 134, where Kletzner also convincingly argued that the term customary *law* "is not an ontological determination of the law but only an epistemic or heuristic determination"; see also Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Mitteleuropäischer Rechtskreis* 90; similar: Georg Friedrich Puchta, *Das Gewohnheitsrecht. Zweiter Theil* (Palm 1837) 10.

162 Tomuschat, 'Obligations Arising For States Without Or Against Their Will' 290.

when it referred to "custom, as evidence of a general practice accepted as law" as opposed to "a general practice accepted as law, as evidence of international custom"[163]. According to this understanding, the continuation of a certain practice can create law only insofar as it influences the consciousness of the people.[164] Close to customary law in Savigny's conception was the so-called scientific law made by jurists.[165] Legislation, a further source, did not have an only limited or subsidiary role in relation to custom but was equally ranked which implied the mutual derogability between both sources.[166] Even though Savigny had reservations about the codification project, he did not reject codification *per se*, his concern was that legislation should fit within the organic structure of the law.[167]

2. Georg Friedrich Puchta

Whereas Savigny emphasized the organic whole,[168] Puchta focused on a logical structure of law and on a distinction between sources and modes of law.[169]

Puchta's system distinguishes between sources (*Rechtsquellen*) and modes or forms of law (*Gattung*).[170] According to Puchta, the national spirit of a people gave rise to three sources of law each of which is associated with specific modes of law: the direct conscience of a people gave rise to custom, the legislature enacted statutes, and the legal science gave rise to lawyers' law

163 See Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 49; Sienho Yee, 'Arguments for Cleaning Up Article 38 (1) b) and (1) c) of the ICJ Statute' (2007) 4 Romanian Journal of International Law 34.

164 Savigny, *System des heutigen Römischen Rechts* 35-37 (on contingent rules which were not better or worse than alternative rules in order to regulate a certain matter).

165 Friedrich Carl von Savigny, *Pandektenvorlesung 1824/25* (Klostermann 1993) 12, who described the *Juristenrecht* as a new peculiar organ of customary law ("*ein neues eigenthümliches Organ des Gewohnheitsrechts*").

166 ibid 43.

167 ibid 44; cf. Stephan Meder, *Ius non scriptum - Traditionen privater Rechtssetzung* (2nd edn, Mohr Siebeck 2009) 134.

168 Savigny, *Pandektenvorlesung 1824/25* 50-51.

169 Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Mitteleuropäischer Rechtskreis* 92, 703.

170 Cf. recently on a similar distinction Yasuaki, *International Law in a Transcivilizational World* 105, 112.

(*Juristenrecht*).[171] Puchta distinguished custom from the so-called scientific law to a greater extent, he conceded that customary law and lawyers' law were often merged as they share similar features: they do not belong to the written enacted law and they are identified by way of reference to the same evidence, namely the practice of courts.[172] Nevertheless, they were said to derive from different sources, namely the direct conscience of a people and the legal science.[173]

Similar to Savigny, Puchta argued that custom was nothing else than the continuing application of a legal rule, custom's authority derived from the fact that custom was a testimony to the existence of said rule.[174] Custom was the product of a legal community rather than of unconnected, isolated instances of practices. In order to contribute to customary law these acts would have to express a common conscience.[175] In Puchta's view, the mistaken view which regarded custom to be first and foremost practice confused the evidence of custom with the essence of this legal concept.[176] In other words, the *consuetudo*, or practice, is not custom, but the application of custom.[177] Being a product of a legal community and deriving like all law from the national spirit, custom was said to be embedded in a normative environment. Thus, three conditions needed to be met for a rule of custom to exist:[178] there needed to be a practice regarding the rule, this practice must point to a common conscience, or *opinio juris*, in relation to the rule in question. Last but not least, the rule must not be opposed by higher law or certain principles of the existing law which do not permit any derogation or which ensure the maintenance of order in the respective society.[179] Thus, normative considerations, such as divine law, *bona mores* and higher principles of law, were important when one set out to ascertain a rule of customary law.

171 Georg Friedrich Puchta, *Das Gewohnheitsrecht. Erster Theil* (Palm 1828) 139-146.
172 ibid 163-164; in relation to custom see 172.
173 ibid 161.
174 Puchta, *Das Gewohnheitsrecht. Zweiter Theil* 10.
175 Puchta, *Das Gewohnheitsrecht. Erster Theil* 167-172.
176 ibid 189.
177 Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Mitteleuropäischer Rechtskreis* 694.
178 Puchta, *Das Gewohnheitsrecht. Zweiter Theil* 32; cf. Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Mitteleuropäischer Rechtskreis* 695, according to whom practice and *opinio juris* must be safeguarded by basic legal rules ("*grundlegende Rechtssätze*").
179 Puchta, *Das Gewohnheitsrecht. Zweiter Theil* 56-59.

Whereas the lawmaker was free to derogate from a rule of custom which he deemed to be unreasonable, the judge remained bound by this rule.[180] As far as lawyers' law was concerned, it had to fit to the structures of the legal system.[181]

Both Savigny and Puchta recognized that the relative significance of the sources may differ according to the spirit of the time: Savigny recognized the possibility of a shift of preferences, from custom to legislation, but he emphasized the significance of the organic whole.[182] Puchta acknowledged that the relative importance of custom may decrease once a legal community has matured[183], while also accepting the possibility that statutes can give rise to custom.[184]

II. The declining relevance of custom

1. Rudolf von Jhering's critique and the codification of civil law

Rudolf von Jhering was more skeptical towards custom than the just mentioned scholars.[185] In contradistinction to a national spirit, Jhering emphasized that the legal science transcended national boundaries.[186] In his view, any legal order was built on and expressed universal legal ideas. Jhering's major work on the spirit of the Roman law did therefore not focus only on the Roman law, but also on *the law* as such, studied in the context of the Roman law:[187] *"Durch das römische Recht, aber über dasselbe hinaus"*, through the Roman law, but beyond it.[188] Rather than confining his perspective to single rules, Jhering wanted to ascertain by way of abstraction the underlying

180 ibid 61.
181 Puchta, *Das Gewohnheitsrecht. Erster Theil* 166.
182 Savigny, *System des heutigen Römischen Rechts* 50-51.
183 Puchta, *Das Gewohnheitsrecht. Erster Theil* 216.
184 ibid 219.
185 Meder, *Ius non scriptum - Traditionen privater Rechtssetzung* 139.
186 Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung Erster Theil* (2nd ed., Breitkopf und Härtel 1866) 10, 15.
187 ibid IX; see also on this aspect Walter Wilhelm, 'Das Recht im römischen Recht' in Franz Wieacker and Christian Wollschläger (eds), *Jherings Erbe* (Vandenhoeck & Ruprecht 1970) 229 ff.
188 Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung Erster Theil* 14; William Seagle, 'Rudolf von Jhering: Or Law as a Means to an End' (1945) 13(1) The University of Chicago Law Review 77.

principle.[189] In that, his scholarship was regarded to be a precursor to the doctrine of general principles of law.[190]

According to Jhering, the idea of custom as an expression of a national spirit was an attempt of the historical school, of Savigny and Puchta, to revitalize custom after the rise of statutes in the 18th and 19th century.[191] In his view, however, this glorification of customary law ignored the tremendous progress which law achieved through formal written statutes.[192] As Jhering saw it, customary law was premised on the idea of harmony and unity between the law and the subjective feelings of the people, the life and spirit of the time.[193] No general theory, however, could help distinguishing between customary law and non-binding standards in the community when one had to ascertain a rule in a concrete case.[194] For Jhering, the greater certainty and stability of the written law outweighed a potential loss of flexibility and responsiveness offered by customary law. By separating law from a national feeling or spirit and replacing such inner subjectivity with an external written form, a distinction between law and non-law became possible and law gained a greater autonomy and independence.[195] At the same time, Jhering did not want to endorse a doctrine of black letter law that was divorced from social reality, on the contrary.[196] The doctrine of interpretation plays a crucial rule in mediating between the written law and social realities on the ground, and he acknowledged that the interpretation of written law can change over time.[197]

The codification of civil law which was pursued at the end of the 19th century in Germany steered a road in the middle: according to Section 2 of the first draft of the German Civil Code, rules of customary law were applicable

189 Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung Erster Theil* 23.

190 Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Mitteleuropäischer Rechtskreis* 227-230.

191 Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung Zweiter Theil* (3rd ed., Breitkopf und Härtel 1866) 28-29.

192 ibid 31.

193 ibid 31.

194 ibid 34.

195 ibid 36-38.

196 Rudolf von Jhering, *Der Zweck im Recht* (Breitkopf und Härtel 1877); Fikentscher, *Methoden des Rechts in Vergleichender Darstellung Mitteleuropäischer Rechtskreis* 244.

197 Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung Zweiter Theil* 65, see 66 on evolutive interpretation.

only to the extent that the statute would refer to them.[198] The final draft left this question open and neither excluded nor endorsed custom: its relation to the written law could not be determined by the legislator and would be left to legal theory under consideration of the prevailing consciousness in public life.[199] The drafters of the civil code thought that customary law would remain more important in public law than in civil law governing the relationship between private individuals,[200] and the doctrinal climate might have appeared favourably with the theories of the historical school. Yet, the story of the concept of customary law in the context of German constitutional law is quite different and demonstrates how a concept was very early pushed to the side by other legal techniques which were regarded to better accommodate the *Zeitgeist* and the desire for a particular formalist reasoning.[201]

2. Approaches prior to the Basic Law

The scholarly attention was early on drawn to the written instrument. Paul Laband introduced the idea of the transformation/change of the written document (*Wandlung der deutschen Reichsverfassung*): just as the foundations

198 *Entwurf eines bürgerlichen Gesetzbuches für das deutsche Reich: Erste Lesung: ausgearb. durch die von dem Bundesrathe berufene Kommission* (Guttentag 1888) 1 (section 2); Meder, *Ius non scriptum - Traditionen privater Rechtssetzung* 140-146.

199 "Rechtssätze, die sich in der Judikatur unter dem Namen der Analogie, der einschränkenden und ausdehnenden Auslegung, der feststeheneden Praxis under dergleichen herausbildeten, seien in Wahrheit nicht als Gewohnheitsrecht, und dieses mit Fug und Recht ein Produkt der fortbildenden Thätigkeit des Richters [...] Wie [sich dieses Recht] zum geschriebenen Gesetzesrechte verhalte, sei eine Frage, die der Macht des Gesetzgebers entrückt sei und nur von der Theorie nach Maßgabe der jeweilig im öffentlichen Leben herrschenden Anschauungen beantwortet werde.", Benno Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich. Einführungsgesetz und Allgemeiner Theil* (vol 1, Decker's Verlag 1899) 570, see also 359-370 on the discussion of custom; Meder, *Ius non scriptum - Traditionen privater Rechtssetzung* 146.

200 Mugdan, *Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich. Einführungsgesetz und Allgemeiner Theil* 361.

201 Heinrich Amadeus Wolff, *Ungeschriebenes Verfassungsrecht unter dem Grundgesetz* (Mohr Siebeck 2000) 215; Stefan Korioth, *Integration und Bundesstaat Ein Beitrag zur Staats- und Verfassungslehre Rudolf Smends* (Duncker & Humblot 1990) 50-51, explaining the little interest in customary constitutional law by 19th century scholars in Germany by reference to the codification movement, the praise of a written constitution and an ideal of positivism.

of a house could remain the same after in its inside extensive redecorations and modifications had taken place, the constitutional structure of the *Reich* would look the same from the outside, whereas a glance in the inside would reveal that the substance is not the same as it used to be.[202] This idea of *Wandlung* which Laband considered to be a political phenomenon introduced the possibility of flexibility to the written constitution, thereby dispensing any need for a concept of customary law.[203]

Similarly, Georg Jellinek considered the phenomenon of "*Verfassungswandlung*" (constitutional transformation/change) at the crossroads between law and politics. He contrasted formal change and further development of law (*Rechtssätze*), be it by statutes, customary law or, some might argue, *Juristenrecht* ("*Gesetz, Gewohnheitsrecht, und, wie die einen behaupten, die anderen bestreiten, durch Juristenrecht*") and informal change which he coined "*Verfassungswandlung*".[204] Customary law was then treated only in a cursory fashion in comparison to his focus on change by interpretation.[205] Jellinek stated that the abolishment of statutes would not necessarily entail the termination of the law expressed therein because of customary law, unless customary law and the given statute were intrinsically connected.[206] Like Laband, he rejected the possibility of customary law derogating from the constitution.[207]

Heinrich Triepel's concept of law included not only the written law but also the unwritten law to which the written law was connected.[208] Triepel addressed the role of unwritten law in his essay on the relationship between the competences of the federal state and the written constitution. He accepted the existence of unwritten competences and the implied powers doctrine of US constitutional law.[209] Unlike the US constitution, the German constitution

202 Paul Laband, *Die Wandlungen der deutschen Reichsverfassung* (Zahn & Jaensch 1895) 3.

203 See also Georg Meyer and Gerhard Anschütz, *Lehrbuch des Deutschen Staatsrechtes* (6th edn, Duncker & Humblot 1905) 210.

204 Georg Jellinek, *Verfassungsänderung und Verfassungswandlung Eine staatsrechtlich-politische Abhandlung* (Verlag von O Häring 1906) 2-3, 9.

205 ibid 15.

206 ibid 5.

207 ibid 22.

208 Heinrich Triepel, 'Die Kompetenzen des Bundesstaats und die geschriebene Verfassung' in Wilhelm van Calker and others (eds), *Staatsrechtliche Abhandlungen Festgabe für Paul Laband zum fünfzigsten Jahrestage der Doktor-Promotion* (Mohr Siebeck 1908) vol 2 287, 316 and 335.

209 ibid 252, 256 ff., 278.

would be far easier to amend by way of formal amendment or through re-interpretation and reasoning based on analogy which he found difficult to sharply distinguish from each other.[210] While he accepted that unwritten competences could be based on customary law,[211] he did not elaborate on this legal concept and instead based his reasoning on the interpretation of the written document, analogical reasoning and the written text's "spirit" (*Geiste der Verfassung*).[212]

The three preceding approaches rested primarily on the written instrument, the application of which could involve analogical reasoning, progressive interpretation or constitutional transformation. It was Smend who directed the attention of the field to unwritten constitutional law as legal concept in the context of the relationship between the constitutive states and the Federal *Reich*.[213] Just as contracts had to be performed in good faith, the *Reichverfassung* had to be interpreted according to the principles of "*pacta sunt servanda*" and federal friendliness (*bundesfreundliche Gesinnung*). Compliance with these principles (*Grundsätze*) was not just based on political feasibility or determined by federal courtesy and tradition ("*bundesstaatliche Sitte und Herkommen*"), these principles were said to constitute the continuing legal basis and form of the federal relationship ("*dauernde Rechtsgrundlage und Rechtsform des bundesstaatlichen Gesamtverhältnisses*"). As to the relationship between written and unwritten law, he argued that the unwritten law would stand behind the text[214] and that it was not necessarily customary law.[215] Smend argued that a constitutional transformation (*Verfassungswandlung*) which changes the material content of the constitution would not be bound by the requirements regarding the formation of customary law.[216] Smend's approach distinguished itself from Jellinek by stressing the norma-

210 ibid 310, 313.

211 ibid 286.

212 ibid 334.

213 Rudolf Smend, 'Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat' in *Festgabe für Otto Mayer zum siebzigsten Geburtstag* (Mohr Siebeck 1916) 261. Cf. on Smend Gerhard Anschütz, 'Der deutsche Föderalismus in Vergangenheit, Gegenwart und Zukunft' (1924) 1 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 13; Peter Häberle, 'Zum Tode von Rudolf Smend' [1975] (41) Neue Juristische Wochenzeitschrift 1875.

214 Smend, 'Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat' 262.

215 Cf. ibid 255.

216 Rudolf Smend, 'Verfassung und Verfassungsrecht (1928)' in Rudolf Smend (ed), *Staatsrechtliche Abhandlungen und andere Aufsätze* (2nd edn, Duncker & Humblot 1968) 242.

tive connection between the concept of *Verfassungswandlung* and the written constitution.[217]

With the fall of the Weimar Republic and the rise of the national socialist dictatorship in 1933, the law was subjected to the so-called "*Führer* command".[218] As expounded by Bernd Rüthers in his study on the "indefinite interpretation" of civil law in National Socialism, statutes' interpretation and application were governed by *völkisch* legal thinking and "concrete order thinking"[219] by which the law should be derived from the concrete order of the *völkisch* community.[220] Rüthers concluded that "[t]he national socialist theory of sources of law did not set forth a clear concept of source of law, nor did it rank the many sources of law-creation", besides the primacy of the proclaimed dictator will.[221]

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217 Smend, 'Verfassung und Verfassungsrecht (1928)' 188; see also Korioth, *Integration und Bundesstaat Ein Beitrag zur Staats- und Verfassungslehre Rudolf Smends* 57 and 61.

218 Michael Stolleis, *A History of Public Law in Germany 1914-1945* (Oxford University Press 2004) 395; see also on the international law scholarship in Germany at 416: "Two aspects are characteristic for the state of the discipline of international law up to 1939: first, its ineluctable and growing politicization, which threatened its scholarly character at its very core; second, the uncertainty about the methodological foundations, since all previous sources of law—natural law, the universally accepted international customary law, external state law, and the 'basic norm' of the Vienna School—were cast aside. The '*völkisch* idea' proclaimed in its place was a legally useless propaganda slogan, and it was not accepted internationally." On this topic see also Detlev F Vagts, 'International Law in the Third Reich' (1990) 84 American Journal of International Law 661 ff.

219 This translation for "konkretes Ordnungsdenken" was borrowed from Stolleis, *A History of Public Law in Germany 1914-1945* 396.

220 Bernd Rüthers, *Die unbegrenzte Auslegung* (8th edn, Mohr Siebeck 2017) 124.

221 Translation by the present author of ibid 134: "Die nationalsozialistische Rechtsquellentheorie hat weder einen klaren Begriff der Rechtsquelle noch eine Rangfolge der vielen Quellgebiete der Rechtsschöpfung, die in ihr beschrieben wurden, hervorgebracht."; on the subsequent discussions of so-called Radbruch thesis and the debate on the validity of statutory law, natural law and positivism, cf. Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) 1(5) Süddeutsche Juristenzeitung 105-108; Herbert LA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) Harvard Law Review 616-621; Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' 651 ff; Stanley L Paulson, 'Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses' (1994) 13(3) Law and Philosophy 313 ff.

3. Approaches under the Basic law

Since the establishment of the Federal Constitutional Court under the Basic Law, the focus on the interpretation of the constitution was accompanied by the studies on judicial law (*Richterrecht*) and the act of concretization of general rules of the constitution (*Verfassungskonkretisierung*).[222] Christian Tomuschat considered in his *Habilitation* customary constitutional law to be a concept of a bygone age which would no longer fit to the conditions of modern life in the constitutional context.[223] The so-called "*Richterrecht*", the concretization of general rules by judicial application, the subtle normative differentiation between a norm and the practice interpreting the norm, the mutual conditionality between norm and norm-application ("*wechselseitige Bedingtheit von Rechtsnorm und Rechtsanwendung*") would be better suited to introduce flexibility, if needed.[224] Customary law was associated with the risk of petrification, rather than with an element that keeps the law in flux.[225] For Tomuschat, customary law and the constitution would constitute different and distinct sources which would not be capable of forming a symbiotic relationship. Rather, the relationship would be one of competition rivalry and of displacement.[226]

There were proposals for a continuing usefulness of the concept of customary law: scholars pointed out that customary law could operate as limit to judicial law[227], that it could be positioned in a symbiotic relationship with the

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222 Wolff, *Ungeschriebenes Verfassungsrecht unter dem Grundgesetz* 176-177; Peter Badura, 'Verfassungsänderung, Verfassungswandel, Verfassungsgewohnheitsrecht' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (CF Müller 1992) vol VII 62 para 10.

223 Tomuschat, *Verfassungsgewohnheitsrecht? Eine Untersuchung zum Staatsrecht der Bundesrepublik Deutschland* 9: "Die Lehre vom Gewohnheitsrecht, einst Prunkstück der deutschen Rechtswissenschaft, scheint nicht recht in das heutige Verfassungsleben zu passen."

224 ibid 152-153. In this light, Häberle opined that customary law would be only useful if one adopted a narrow understanding of the doctrine of interpretation applied to the written constitution, Peter Häberle, 'Verfassungstheorie ohne Naturrecht' (1974) 99 Archiv des öffentlichen Rechts 443-444 footnote 37.

225 Tomuschat, *Verfassungsgewohnheitsrecht? Eine Untersuchung zum Staatsrecht der Bundesrepublik Deutschland* 151.

226 ibid 51.

227 Pieroth, *Rückwirkung und Übergangsrecht Verfassungsrechtliche Maßstäbe für intertemporale Gesetzgebung* 272-273.

written constitution and be interpreted in relation to the latter.[228] In the end, customary law did not prevail and alternative doctrines that were attached to the interpretation of the written law and the judicial interpretation, application and development of the law asserted themselves successfully.[229] There may be unwritten rules in isolated instances, for instance in German state liability law, provided that those are not derived from or related to written provisions;[230] there is not, as Uwe Kischel has noted, "a general aversion to the concept of customary law, but rather a lack of familiarity (in Germany) — although every lawyer has heard of customary law, almost none would imagine actually using it in practice."[231]

D. Characteristics of general principles of law from a comparative historical perspective

The last part of this chapter is dedicated to the concept of principles of law. No attempt is made to illustrate the role of "principles" in the history of legal thought.[232] Robert Kolb has described how since the antiquity the concept of general principles had served the purpose of systematizing the law and of accumulating legal experiences in the interpretation and application of specific rules in concrete cases; for this purposes, analogies were drawn and

228 Brun-Otto Bryde, *Verfassungsentwicklung: Stabilität und Dynamik im Verfassungsrecht der Bundesrepublik Deutschland* (Nomos 1982) 446; Wolff, *Ungeschriebenes Verfassungsrecht unter dem Grundgesetz* 344.

229 The concept of custom has lost support also in administrative law, as scholars turned to role of judges in the development of the law, on this development see Jeong Hoon Park, *Rechtsfindung im Verwaltungsrecht: Grundlegung einer Prinzipientheorie des Verwaltungsrechts als Methode der Verwaltungsrechtsdogmatik* (Duncker & Humblot 1999) 147-184.

230 See Uwe Kischel, *Comparative Law* (Oxford University Press 2019) 368 for the example of the so-called claim for remedy of legal consequences (*Folgenbeseitigungsanspruch*) concerning the rectification of the effects of unlawful state conduct which legal commentators base on analogies to provisions of the civil code, on a general principle of law or customary law.

231 ibid 368.

232 For such overviews see Sigrid Jacoby, *Allgemeine Rechtsgrundsätze Begriffsentwicklung und Funktion in der Europäischen Rechtsgeschichte* (Duncker & Humblot 1996) 23 ff.; Franz Reimer, *Verfassungsprinzipien Ein Normtyp im Grundgesetz* (Duncker & Humblot 2001) 146 ff.; Kolb, 'Les maximes juridiques en droit international public: questions historiques et théoriques' 407 ff.

common principles were extrapolated from a mass of single cases. This doctrinal effort met a pressing need over the centuries and in particular in light of the structural transformations in the medieval society, the increased mobility of social actors and the increase of transborder commercial relations.[233] By representing the essence of law and legal experience, general principles of law were linked by some to natural law or the *jus gentium*.[234] General principles commended themselves in international disputes, they asserted themselves in national codifications as well as in international arbitration even during the rise of positivism and dualism in the 19th century.[235]

Rather than revisiting this legal history of general principles, this section concentrates on trends relating to the concept of principles in modern legal thinking against the background of experiences described previously in this chapter: the emphasis on the systematic character of the law by Friedrich Carl von Savigny and Friedrich Puchta; Rudolf Jhering's focus on concepts common to different legal systems; the observation by François Gény and Raymond Saleilles that law may undergo a development not necessarily intended by the legislator of statutes; the insights articulated by Roscoe Pound and Benjamin Cardozo that principles perform an important part in the interpretation of the written law; the recent common law history in the UK as a testimony for the interpretation of unwritten law in light of the normative environment; and the recognition of the importance of the judge in concretizing general and abstract rules which would play an important part in later doctrinal works that originated at the beginning of the 20th century.[236]

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233 Kolb, *La bonne foi en droit international public Contribution à l'étude des principes généraux de droit* 16-17.

234 See for an overview Degan, 'General Principles of Law (A Source of General International Law)' 6 ff.; see also Kolb, 'Les maximes juridiques en droit international public: questions historiques et théoriques' 413 ff., describing that maxims of law were only non-normative proposals resulting from experience whereas general principles of law is a normative concept which fits to the idea of law as a source-based system.

235 Kolb, *La bonne foi en droit international public Contribution à l'étude des principes généraux de droit* 23-24.

236 See Gény, *Méthode D'Interprétation et Sources en Droit Privé Positif: Essai Critique* 78, 147. The above-mentioned authors partially referred to each other, see for instance Cardozo, *The Nature of the Judicial Process* 16 (reference to Gény), 102 (reference to Jhering).

The current section will first present an overview of general principles before delving into specific aspects.[237]

I. General principles in legal theory: an overview

General principles can be classified according to different categories and functions, which cannot always be clearly separated from each other[238]: there are general principles of law which are an expression of the integrity of law as force different from mere power, politics or arbitrariness, and an expression of the judicial process, embodying concepts that are necessary for law to perform its function in a society,[239] for instance *pacta sunt servanda*, good faith, abuse of rights, reasonableness and proportionality. Then there are rather technical principles relating to legal logic, such as *lex specialis* or *lex posterior*; additionally, there are general principles expressing the basic evaluations and values which underline specific rules as ascertained

237 This section focuses on scholarship about general principles of law and legal principles of a group of authors which includes, without being limited to, international law scholars. The reason for not strictly separating international law scholars and domestic law scholars is that both groups referred to each other and that the concept of general principles can be found both on the domestic and on the international level. The next subsection draws on Matthias Lippold, 'The Interpretation of UN Security Council Resolutions between Regional and General International Law: What Role for General Principles?' in Mads Andenæs and others (eds), *General Principles and the Coherence of International Law* (Brill Nijhoff 2019) 151-153.

238 For similar taxonomies see Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* 36–38ff, 73-75, 90-92; Martti Koskenniemi, 'General principles: reflexions on constructivist thinking in international law' (1985) 18 Oikeustiedejurisprudentia 124 f., republished in Martti Koskenniemi, 'General Principles: Reflexions on Constructivist Thinking in International Law' in Martti Koskenniemi (ed), *Sources of International Law* (Routledge 2000) 359-402; Schachter, 'International Law in Theory and Practice: general course in public international law' 75 ff.; Robert Kolb, *Theory of international law* (Hart Publishing 2016) 136-144.

239 Cf. Franz Bydlinski, *Fundamentale Rechtsgrundsätze Zur rechtsethischen Verfassung der Sozietät* (Springer 1988) 128 and 131, according to whom one of the key characteristics of principles is to ensure a minimum content of the positive law.

by induction or extrapolation,[240] and general principles based on analogies from other branches of law or legal orders.

The focus on the distinction between 'rule' and 'principle',[241] *Rechtssatz* and *Rechtsgrundsatz*,[242] *Regel* und *Prinzip*,[243] *regles juridiques* and *principes*,[244] should not obscure the significance of the interrelationship between rules and principles, which to a certain extent arguably relativizes the importance of the debate on whether the difference between rules and principles is one of kind[245] or one of degree.[246] Principles can emerge from and through the interpretation of the law and unfold themselves in respect of their meaning in

240 Sometimes, this kind of principle is classified as a descriptive, as opposed to a normative, principle. Since even these descriptive principles can have "normative consequences" in the interpretation of law, the classification should not be overemphasized, see Koskenniemi, 'General principles: reflexions on constructivist thinking in international law' 128.

241 Ronald Dworkin, 'The Model of Rules' (1967) 35(1) University of Chicago Law Review 25: "The difference between legal principles and legal rules is a logical distinction"; Ronald Dworkin, *Taking Rights Seriously* (Harvard Univ Press 1977) 24; cf. for a similar Scandinavian distinction Koskenniemi, 'General principles: reflexions on constructivist thinking in international law' 134-135 with reference to the work of Torsten Eckhoff and Nils Sundby according to whom rules either would or would not apply, whereas 'guidelines' would operate as arguments that have to be weighed; cf. Torstein Eckhoff, 'Guiding Standards in Legal Reasoning' (1976) 29(1) Current Legal Problems 205 ff.

242 Hermann Heller, *Die Souveränität: ein Beitrag zur Theorie des Staats- und Völkerrechts* (de Gruyter 1927) 127.

243 Robert Alexy, *Theorie der Grundrechte* (Nomos-Verl-Ges 1985) 71 ff. Alexy argued that principles are optimisation requirements in the sense that principles require to be realised to the greatest extent possible in a given situation.

244 Jean Boulanger, 'Principes Généraux du Droit et Droit Positif' in *Le Droit Privé Français au Milieu Du XXe Siècle études Offertes à Georges Ripert* (Libr générale de droit et de jurisprudence 1950) vol 1 55.

245 Dworkin, 'The Model of Rules' 25; Alexy, *Theorie der Grundrechte* 75-76; balanced view: Joseph Raz, 'Legal Principles and the Limits of Law' (1971) 81 Yale Law Journal 834-838, who makes a logical distinction which however would not play out in practice.

246 Hart, *The concept of law: With a postscript* 261-262, 265 (contra a sharp distinction between legal principles and legal rules as suggested by Dworkin); MacCormick, *Legal Reasoning and Legal Theory* 155, 232, where he pointed out that rules can be applied by analogy and therefore would not apply in such a rigid fashion as stipulated by Dworkin; Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard Univ Press 1988) 77 (no logical distinction); Matthias Goldmann, 'Dogmatik als Rationale Rekonstruktion: Versuch einer Metatheorie am Beispiel völkerrechtlicher

relation to and in interaction with other principles, rules and the normative environment.[247] They can emerge from the continuous judicial application of functionally similar legal standards,[248] reflect the *rationes legis*, the basic evaluations and structure of the legal system, even the understandings of justice and ethics of the respective community as expressed in the law.[249]

Given their degree of generality and abstraction as well as their ascertainment by way of extrapolation, principles cannot, in general, be "conclusive in the way which [...] mandatory rules may be"[250] or, to borrow from Lord McNair, generally be applied "lock, stock and barrel".[251] They need to be balanced against other principles, thereby admitting countervailing considerations, and be adapted to the specific context.[252] This process can entail a

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Prinzipien' (2014) 53(3) Der Staat 376; András Jakab, *European Constitutional Language* (Cambridge University Press 2016) 370 ff.

247 Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz: entwickelt am Beispiel des deutschen Privatrechts* (2nd edn, Duncker & Humblot 1983) 52, 57; cf. also Giorgio Del Vecchio, *Die Grundprinzipien des Rechts* (Rothschild 1923) 18, 22, stressing that rules and principles need to be construed together in harmony by the jurist.

248 Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* 100.

249 ibid 134; MacCormick, *Legal Reasoning and Legal Theory* 235-236; Meinhard Hilf and Goetz J Goettsche, 'The Relation of Economic and Non-economic Principles in International Law' in Stefan Griller (ed), *International economic governance and non-economic concerns: new challenges for the international legal order* (Springer 2003) 9-10: principles express "fundamental legal concepts and essential values of any legal system".

250 MacCormick, *Legal Reasoning and Legal Theory* 180; Metzger, *Extra legem, intra ius: allgemeine Rechtsgrundsätze im Europäischen Privatrecht* 52 on induction and the risk of the naturalistic fallacy to derive an ought from an is; on the generality, see also Eisenberg, *The Nature of the Common Law* 77; cf. Robert Alexy, 'Zum Begriff des Rechtsprinzip' (1979) Beiheft 1 Rechtstheorie 79, 81-82, explaining the generality of principles by their character as 'ideal ought' which has not been conditioned yet by factual and normative limitations.

251 *International Status of South West Africa* 128, Sep Op McNair 148; see also Weil, 'Le droit international en quête de son identité: cours général de droit international public' 148, pointing out that even within one municipal legal order the same principles may appear differently in different branches of law.

252 Canaris, *Systemdenken und Systembegriff in der Jurisprudenz: entwickelt am Beispiel des deutschen Privatrechts* 52, 57; in the right institutional setting, for instance in an adversarial adjudicatory context, principles can function like rules in the sense that on their bases cases can be decided, Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' 11-12, referring to *Temple of Preah*

mutual elucidation: the content of a principle becomes concretized through subprinciples, rules and judgments, and the content of a rule can be determined by reference to principles.[253] By taking recourse to general principles, the interpreter can relate the rule to be applied to its broader normative environment and make a choice between different interpretations of the rule; in this sense, principles constitute reasons[254], they can define argumentative starting points or shift burdens of argumentation.[255] They are not mere gap-fillers[256], they can help in identifying teleological gaps in the first place.[257]

Vihear (*Cambodia v. Thailand*) (Judgment) [1962] ICJ Rep 23, 26, 32 where the case was decided on the basis of general principles such as acquiescence and estoppel.

253 MacCormick, *Legal Reasoning and Legal Theory* 235-246; cf. Peter Liver, 'Der Begriff der Rechtsquelle' in Schweizerischer Juristenverein (ed), *Rechtsquellenprobleme im schweizerischen Recht* (Stämpfli 1955) 27; Karl Larenz, *Methodenlehre der Rechtswissenschaft* (3rd edn, Springer 1975) 458-463.

254 Gerald Fitzmaurice, 'The General Principles of International Law considered from the standpoint of the rule of law' (1957) 92 RdC 7: "A rule answers the question 'what': a principle in effect answers the question 'why'."

255 Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* 52, 82; Ronald Dworkin, *Law's Empire* (Harvard Univ Press 1986) 243 ff., 263: the interpreter should be guided by a a commitment to law's integrity, assuming that law was structured by a 'coherent set of principles' about justice, fairness and due process; Armin von Bogdandy, 'Grundprinzipien' in Armin von Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht: theoretische und dogmatische Grundzüge* (2nd edn, Springer 2009) 21 (on principles imposing burdens of argumentation).

256 On the gap-filling function see already Cardozo, *The Nature of the Judicial Process* 71.

257 Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz: eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem* (2nd edn, Duncker und Humblot 1983) 16-17, 32-33, 37-39, 55-56, 93-94; Lauterpacht, *The Function of Law in the International Community* 64-86 (distinguishing between a formal completeness and a material completeness of a legal system); on the potential of general principles to enable critique of the law see Helmut Coing, *Die obersten Grundsätze des Rechts Ein Versuch zur Neugründung des Naturrechts* (Lambert Schneider 1947) 150ff.; Emmanuel Voyiakis, 'Do General Principles Fill 'Gaps' in International Law?' (2009) 14 Austrian Review of International and European Law 246 ff. (critical of principles as mere gap-fillers). But cf. Jörg Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice' (2010) 80 BYIL 355, arguing that "[t]he distinction of the reference point from within *Recht*, yet outside *Gesetz* (positive law) means transcending positive law for an extra-positive value-judgment. The 'demand' is in effect created by legal scholars, who put their

II. Conceptualizations of legal validity and different degrees of normativity of general principles

The answer to the question of whether general principles constitute valid law ultimately also depends on one's concept of law.[258] For the purposes of illustration, the different perspectives are exemplified by way of reference to the work of Josef Esser and Hans Kelsen. Subsequently, this section will focus on different ways of conceptualizing the legal validity of principles and on the different degrees of normativity of principles.

1. Reflections on the scholarship of Josef Esser and Hans Kelsen's response

Josef Esser focused on the positivization of principles. Under the intellectual influence of authors such as François Gény, Roscoe Pound and Benjamin Cardozo who had stressed the "law in action", Josef Esser developed a

personal views of what the law should be in place of what the law is (with all its 'imperfections')."

258 Cf. Roberto Ago, 'Positive Law and International Law' (1957) 51 AJIL 698-699, 724 ff., 728-733, arguing that certain prevonceived ideas of positivism equating the latter with voluntarism, and the label of positivism as such, prevent legal science from studying legal norms which were not "laid down" by a source; Metzger, *Extra legem, intra ius: allgemeine Rechtsgrundsätze im Europäischen Privatrecht* 83 ff. (distinguishing between *Setzungspositivismus* und *Anerkennungspositivismus*).

sophisticated account of legal principles.[259] For Esser, as translated by the present author,

> "positive law includes not only rules ready to apply but also the general legal ideas, the *rationes legis*, the basic evaluations and structural principles of one system, but also the principles of legal-ethical character relating to justice of a legal order, insofar as they have asserted themselves within specific legal institutes. Beyond that, they are guides or *principi informatori* for the law-applying authorities just like all maxims or rules of the past as expression of judicial experience."[260]

Esser highlighted that principles which derive from the overall system would not only in hard cases but constantly inform the interpretation and application of rules[261]: the law would not derive from rules, the rules would derive from the *corpus iuris*.[262] This interplay between principles and norms and the

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259 Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre*. Esser's account was not translated into English which might have impacted its reception over time. At the time of publication, it received critical acclaim internationally, see Wolfgang Friedmann, 'Review of Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts by Josef Esser' (1957) 57(3) Columbia Law Review 449 ("one of the most significant, enlightened, and scholarly contributions to the comparative study of the judicial process ever made."); Max Rheinstein, 'Book Review Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: Rechtsvergleichende Beitraege zur Rechtsquellen- und Interpretationslehre (Principle and Norm in the Judicial Development of Private Law: A Comparative Inquiry into the Problems of the Sources of Law and Their Interpretation) by Joseph Esser' (1957) 24(3) The University of Chicago Law Review 606; on the reception of Esser in Spanish and Italian literature see José Antonio Ramos Pascua, 'Die Grundlage rechtlicher Geltung von Prinzipien- eine Gegenüberstellung von Dworkin und Esser' in Giuseppe Orsi and others (eds), *Prinzipien des Rechts* (Lang 1996) 8 ff.; see also Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* 48.

260 Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* 134: "[...] positives Recht, wenn auch nicht selbständig fertige Rechtssätze (rules), sind die sog. allgemeinen Rechtsgedanken, die rationes legis, die Wertungsgrundsaätze und Aufbauprinzipien eines Systems, aber auch die rechtsethischen und Gerechtigkeitsprinzipien eines Rechtskreises, außerhalb seines Schulsystems - alle, soweit sie sich in konkreten Ordnungsformen Geltung verschafft haben. Darüber hinaus sind sie guides oder principi informatori für die rechtsbildenden Organe, wie es alle Maximen und Regeln überlieferter Problemlösungen sind, welche richterliche Erfahrung verkörpern."

261 ibid 149, 219, 253, 264, 287.

262 ibid 309, see also on the stabilizing force of legal principles at 300.

contextuality of principles in need of a structure to operate in have the consequence that principles' precise effects depend on the normative and institutional context, and, last but not least, on the legal operator. For, as translated by the present author, "it is not the principles acting but the legal operator. The question of the correct relation cannot be answered on the basis of the legal system alone without investigating the conflicts [which the legal system seeks to address, M.L.]."[263]

Hans Kelsen critically engaged with the writing of Josef Esser in his *post mortem* published treatise on a general theory of norms.[264] There was agreement on some level, namely that the continuous application of law by courts may create norms and that what Esser described as principles may inform the judges' decisionmaking. In Kelsen's view, however, these principles were no legal norms, nor would these principles become law through continuous application by courts. At best, they may resemble the norms created by courts. Kelsen argued that courts can create general, as opposed to individual, norms through through custom based on a constant jurisprudence (*"im Wege einer durch ständige Judikatur der Gerichte konstituierten Gewohnheit"*):[265] By virtue of the principle of *res judicata* (*Rechtskraft*), courts would possess an almost unfettered (*"beinahe unbeschränkte"*) power which, however, they would rarely make use of. This strong position of courts is characteristic of Kelsen's model which will be explained in more detail in the next chapter[266]: a court makes a decision between possible interpretations of a higher norm and then creates a norm, and this decision is determined by the court alone and not by any natural law or binding principles.[267]

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263 Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgarantien der richterlichen Entscheidungspraxis* (Altenhäum Verlag 1970) 100: "Nicht die Prinzipien agieren, sondern der Rechtsfinder. Die richtige Relation ist nicht ohne Befragung der Konfliktprobleme aus dem System zu entnehmen."

264 Hans Kelsen, *Allgemeine Theorie der Normen* (Manz 1979) 92-99; Hans Kelsen, *General Theory of Norms* (Clarendon Press 1991) 115-122.

265 Kelsen, *Allgemeine Theorie der Normen* 92-93.

266 See below, p. 195.

267 See also Jochen von Bernstorff, 'Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt' in Andreas Føllesdal and Geir Ulfstein (eds), *The judicialization of international law: a mixed blessing?* (Oxford University Press 2018) 15 ("The intrusion of the judge's subjective value judgements into decisions of the court should not be glossed over by the seeming objectivity of the theories of interpretation. Instead, Kelsen construed the scientifically uncontrollable factor as an act of law-making of the judge that was authorized by the legal system.") and 16 (on the potential use

2. Conceptualizations of legal validity and different degrees of normativity of general principles

Scholars suggest different bases for the legal validity of general principles. Canaris, for instance, submitted three different grounds of the validity of legal principles[268]: firstly, specific provisions of statutory law from which general principles have been ascertained by way of induction and in which principles have found some, yet incomplete, degree of realization (*unvollkommene Verwirklichung*)[269]; secondly, the very idea of law (*Rechtsidee*), including equality before the law of the prohibition of arbitrariness or the consistency of the legal order. Reasoning on the basis of the idea of law would often start with the "discovery" of the solution to legal problem, proceeds to the formulation of a legal idea (*Rechtsgedanke*) which by reference to examples would be shaped and hardened to a principle.[270] Thirdly, he suggested rational

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of principles in the lawcreation by courts); as argued by Ewald Wiederin, 'Regel-Prinzip-Norm. Zu einer Kontroverse zwischen Hans Kelsen und Josef Esser' in Stanley L Paulson and Robert Walter (eds), *Untersuchungen zur Reinen Rechtslehre Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985/1986* (Manzsche Verlags- und Universitätsbuchhandlung 1986) 155-156, whilst Esser and Kelsen accepted judicial lawmaking, they differed on the limits and the normative framework of this exercise; see also Iain GM Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 2 EJIL 269; cf. Frederick Schauer, 'Fuller and Kelsen - Fuller on Kelsen' in Matthias Jestaedt, Ralf Poscher, and Jörg Kammerhofer (eds), *Die Reine Rechtslehre auf dem Prüfstand. Hans Kelsen's Pure Theory of Law: Conceptions and Misconceptions* (Franz Steiner Verlag 2020) 309-318, arguing that Fuller's (and later Dworkin's) focus on lawyers and judges can explain different perspectives on the law between Fuller and Kelsen who, in contrast, refrained from explaining of how judges should interpret and apply a rule, see also below, p. 196 (on Kelsen) and p. 210 (on Lauterpacht and Kelsen); cf. also Alexandre Travessoni Gomes Trivisonno, 'Legal Principles, Discretion and Legal Positivism: Does Dworkin's Criticism on Hart also Apply to Kelsen?' (2016) 102 Archiv für Rechts- und Sozialphilosophie 118, 121-125; cf. also Jörg Kammerhofer, 'Positivist Approaches and International Adjudication' [2019] Max Planck EiPro para 2 ("One could almost say that the more a theory is about adjudication, the less likely it is to be positivist").

268 Canaris, *Die Feststellung von Lücken im Gesetz: eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem* 96-100.

269 ibid 96-106.

270 ibid 106-107.

considerations (*Natur der Sache*) which could not explain normative validity but which could operate as an interpretative guide, since the legal order could be presumed to adopt a solution which would accommodate practical realities.[271] Canaris stressed that a principle might derive its force from the idea of law (positive justification) but must not be opposed by the positive legal order (negative delimitation).[272] The farther away a principle would be from the positive rules and the closer it would be to the idea of law as such, the higher would be the principle's abstractness and the lesser might be the likelihood of the principle's concrete legal relevance and applicability.[273]

Other scholars focus on the recognition of legal principles in a given legal system for the validity of these principles.[274] In the view of Neil MacCormick, for instance, "if (one) seek(s) to ascertain the principles of a given system, (one) ought to search for those general norms which the functionaries of the system regard as having, on the ground of their generality and positive value, the relevant justificatory and explanatory function in relation to the valid rules of the system."[275]

Two scholars who are often discussed in relation to principles, Ronald Dworkin and Robert Alexy,[276] have focused on the distinction between rules and principles.

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271 Canaris, *Die Feststellung von Lücken im Gesetz: eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem* 118-121; similarly already Liver, 'Der Begriff der Rechtsquelle' 43.

272 Canaris, *Die Feststellung von Lücken im Gesetz: eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem* 108, 113.

273 ibid 114.

274 See also Metzger, *Extra legem, intra ius: allgemeine Rechtsgrundsätze im Europäischen Privatrecht* 85 ff.; cf. also Ago, 'Positive Law and International Law' 698-699, 724 ff., 728-733.

275 MacCormick, *Legal Reasoning and Legal Theory* 152-153; Hart, *The concept of law: With a postscript* 265-267 (principles could be identified by pedigree in that they have been consistently invoked by courts).

276 See for instance for an approach based on Alexy's doctrine of principles Petersen, 'Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation' 286 ff.; for an approach relying on Dworkin see John Tasioulas, 'In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16(1) Oxford Journal of Legal Studies 85 ff.; for an approach informed by Dworkin and a Rawlsian reflective equilibrium see Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 774 ff.

Dworkin's doctrine originated in a debate with H.L.A. Hart's positivism.[277] Dworkin stressed in his early work a "logical distinction" between rules and principles. The former apply in an all-or-nothing fashion, whereas a principle "states a reason that argues in one direction, but does not necessitate a particular decision".[278] In contrast to rules, principles were said to have "a dimension of weight or importance".[279] A conflict between principles would be resolved by taking into account the relative weight of each principle; in a conflict between rules, however, only one rule could be a valid rule.[280] Dworkin's later work on interpretivism focuses on the integrity of law.[281] This integrity of law would be both the product of and the inspiration for "comprehensive interpretation of legal practice" which consists of statutes, judgments and principles flowing thereform.[282] The judge would have to base her judgment not on policy for this is the competence of the legislator, but on principles, guided by a "spirit of integrity" and a commitment to law's integrity from which the judge derives her authority, assuming that law was structured "by a coherent set of principles" about justice, fairness and due

277 See on the debate on whether the judge has "discretion" in "positivism" Dworkin, 'The Model of Rules' 17 ff.; cf erview of the debate Johannes Saurer, 'Die Hart-Dworkin-Debatte als Grundlagenkontroverse der angloamerikanischen Rechtsphilosophie: Versuch einer Rekonstruktion nach fürnf Jahrzehnten' (2012) 98 Archiv für Rechts- und Sozialphilosophie 214 ff.; cf. for a comparison of Dworkin and Esser András Jakab, 'Prinzipien' (2006) 37 Rechtstheorie 49-50 and, following Jakab, Kleinlein, *Konstitutionalisierung im Völkerrecht Konstruktion und Elemente einer idealistischen Völkerrechtslehre* 665, both arguing that Dworkin's account is different from Esser's account because principles led to a greater liberty of the judge in Esser's account while principles restricted judicial discretion in Dworkin's account. However, as described above, principles inform in Esser's account the judges' application of law and have insofar a guiding function. The fact that the principles may appear more dynamic in Esser's account than in Dworkin may perhaps be attributed to the difference between civil law, where new institutes and principles arose more frequently than in constitutional law where the principles as such are often derived from the written constitution, cf. Metzger, *Extra legem, intra ius: allgemeine Rechtsgrundsätze im Europäischen Privatrecht* 27 footnote 55.

278 Dworkin, 'The Model of Rules' 25-26.

279 ibid 27.

280 ibid 27.

281 Dworkin, *Law's Empire*.

282 ibid 226 and 245; cf critically Robert Alexy, *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie* (Suhrkamp 1995) 88 (the institutionalized juristic system is necessarily incomplete).

process.[283] In particular, this interpretative approach would apply generally, not only in "hard" cases, since the very question of whether a case is a hard case is the result, not the starting point, of interpretation.[284]

Robert Alexy defined principles in his dissertation as "normative propositions of high generality".[285] Analyzing the structure of (constitutional) norms in his *Habilitation*, Alexy argued that the theoretical distinction between rules and principles could explain constitutional legal phenomena such as the balancing of constitutional rights or their impact in the interpretation of statutory law.[286] Alexy postulated a so-called strong separation thesis with respect to rules and principles. Whereas rules would be either fulfilled or not fulfilled, principles would be optimization requirements, that is "norms requiring that something be realized to the greatest extent possible, given the legal and factual possibilities".[287] They would represent an "ideal ought".[288] The extent to which this ideal ought could be realized would depend on opposing principles and rules.[289] If a conflict between rules could not be resolved by reading an exception into one rule, conflicts would be resolved

283 Dworkin, *Law's Empire* 243, 245, 263.

284 Dworkin's early work suggested the applicability in hard cases, Ronald Dworkin, 'Hard Cases' (1975) 88(6) Harvard Law Review 1057 ff. He clarified his view later, see Dworkin, *Law's Empire* 255-256, 266, 351: distinction would be "just an expository device", 354; see also Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford University Press 1978) 231.

285 Robert Alexy, *Theorie der juristischen Argumentation Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung* (Suhrkamp 1978) 299 footnote 81, 319 (own translation).

286 Alexy, *Theorie der Grundrechte* 71; Robert Alexy, 'Grundrechte als Subjektive Rechte und als Objektive Normen' (1990) 29 Der Staat 54 ff.

287 Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16(2) Ratio Juris 135; cf. for criticism Peter Lerche, 'Die Verfassung als Quelle von Optimierungsgeboten?' in Joachim Burmeister (ed), *Verfassungsstaatlichkeit Festschrift für Klaus Stern zum 65. Geburtstag* (Beck 1997) 202-206; Ralf Poscher, 'Theorie eines Phantoms - Die erfolglose der Prinzipientheorie nach ihrem Gegenstand' (2010) 4 Rechtswissenschaft 356, 367-368, 370-371, against the distinction between rules and principles as matter of legal theory; For an overview of the critique and his proposal to distinguish between rules, relative principles and absolute principles see Karsten Nowrot, *Das Republikprinzip in der Rechtsordnungengemeinschaft* (Mohr Siebeck 2014) 506 ff.

288 Alexy, 'Zum Begriff des Rechtsprinzip' 79-82; Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 82; Alexy, *Theorie der Grundrechte* 75-76.

289 Alexy, *A Theory of Constitutional Rights* 48.

at the level of validity; in contrast, "the solution of the competition between principles consists in establishing a conditional relation of precedence between the principles in light of the circumstances in the case."[290] While a principle could be trumped in a specific case, a rule would not be necessarily trumped if the rule's underlying principle was trumped, as other, so-called formal principles according to which lawfully enacted rules or established practice must be followed might support the rule.[291]

III. Assessment: recognizing the multifaceted character of general principles

The approaches described in this section illustrate the multifaceted character of general principles and their interplay with other principles, rules and the legal system. The concept of general principles of law often is based on the insight that law evolves and that the law in action might be different from the law in the books as originally envisaged. In this sense, theories on general principles may be seen as implying a certain relativisation of the original lawmaker's subjective intent.[292] At the same time, judges were not supposed to enjoy an unbound discretion in further developing the law through its interpretation and application. Nor should the volitive act entailed in judgments be solely determined by the practicalities of the dispute or the interests of the parties. Instead, account should be taken of the basic principles of the legal system.[293] In this light, the approaches centered on principles

290 ibid 52.

291 ibid 58.

292 Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* 285 (the lawmaker is not the ultimate authority on the scope given to statutes); see also Martin Kriele, *Theorie der Rechtsgewinnung entwickelt am Problem der Verfassungsinterpretation* (Duncker & Humblot 1967) 311-312 (speaking of legislator's prerogative, rather than monopoly, with respect to lawmaking); Friedrich August von der Heydte, 'Glossen zu einer Theorie der allgemeinen Rechtsgrundsätze' (1933) 33(11/12) Die Friedens-Warte 295.

293 Cf. Coing, *Die obersten Grundsätze des Rechts Ein Versuch zur Neugründung des Naturrechts* 131 recognizing that judges are no simple executors of the will of the lawmaker and that their judgment call should be informed by the statutory's idea of justice; Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* 300 ff.; cf. Canaris, *Die Feststellung von Lücken im Gesetz: eine methodologische Studie über*

adopted a middle road, on the one hand recognizing the development of the law, on the other hand focusing on the values expressed in the legal order that would inform the acts of the legal operator. Based on this understanding principles are not exclusively either restraining or liberating. They represent both legal experience and the law in action.

The overview illustrated that principles can vary as to their degrees of normativity and as to their embeddedness in legal practice. There are fundamental principles such as the principle of good faith, *pacta sunt servanda*, the protection of legitimate expectations, the prohibition of arbitrariness and of abuse of rights, *audiatur et altera pars* and equality of arms, which are regarded to be deeply connected to the idea of law and thus part of any legal system. As reflection of the law in action and because of the interrelationship between principles and also new rules, principles of law and their respective concretizations can change over time.[294] New ideas may arise and start as mere guides for the legal operator where the law to be applied leaves room for interpretation and discretion and over time become embedded into legal practice and harden into a legal principle.[295]

Thus, principles can be of varying degrees of normativity. They can lack any normativity if they have not been positivized and if they have not asserted

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Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem 33, 37-38, 57, 93 ff.; in this light see also Dworkin's emphasis that the judges do not enjoy discretion as lawmakers do and shall subject their judgment to the evaluations of the legal system from which they derive their authority, Dworkin, *Law's Empire* 243 ff.; Eisenberg, *The Nature of the Common Law* 151; cf. also Cardozo, *The Nature of the Judicial Process* 141.

294 Canaris, *Systemdenken und Systembegriff in der Jurisprudenz: entwickelt am Beispiel des deutschen Privatrechts* 60 ff.; Larenz, *Methodenlehre der Rechtswissenschaft* 471.

295 Cf. on different categories of principles Kleinlein, *Konstitutionalisierung im Völkerrecht Konstruktion und Elemente einer idealistischen Völkerrechtslehre* 671 (distinguishing in legal discourse between *Ordnungsprinzipien* as legal science's abstractions of positive law, *Leitprinzipien* as goals or guides set forth in treaties and *Rechtsprinzipien* as general legal norms); Goldmann, 'Dogmatik als Rationale Rekonstruktion: Versuch einer Metatheorie am Beispiel völkerrechtlicher Prinzipien' 394 ff., distinguishing between general principles of law, principles as doctrinal constructions of the legal discourse, non-binding guiding principles, emerging principles and structural principles; for an example of a principle which was originally regarded to be only a political principle but hardened into a legal one, see the development of the right to self-determination below, p. 285.

themselves in legal practice.[296] These varying degrees and the vagueness of principles as well as the wide range of opinions on principles' validity might be worrying from the perspective of legal certainty. An overemphasis and an idealization of unwritten principles can, as put by Matthias Jestaedt, operate as Trojan horse for extra-legal considerations in the guise of a legal concept and go at the detriment of working closely with the more specific, enacted written rule.[297]

It is therefore important neither to overemphasize general principles of law at the expense of the specifically, and ideally democratically legitimized, enacted law, nor to neglect the role they play in the law, including in the

296 See also Crawford, 'Change, Order, Change: The Course of International Law General Course on Public International Law' 143, commenting on the discussions of the *lex mercatoria* and referring to the UNIDROIT principles, arguing that the scholarly distillation of principles common in different domestic legal orders "is a pure confection, unrelated to any real source of authority or any existing praxis. It is a law of and for professors, a *Buchrecht* reduced to a single book, based on the assumption that comparative law techniques can distil a true or real underlying common law — a sort of natural law without the benefit of divinity. The assumption is demonstrably untrue."; cf. Rudolf B Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51(4) AJIL 734 ff.; Rudolf B Schlesinger and Pierre Bonassies, *Formation of contracts: a study of the common core of legal systems; conductes under the auspices of the general principles of law project of the Cornell Law School* (vol 1, Oceana-Publ 1968) 41 (concluding that "the areas of agreement are larger than those of disagreement" and that the areas of agreement and disagreement "are intertwined in subtler and more complex ways than had been surmised."); on a critical discussion of the lack of legal validity of such principles see Ralf Michaels, 'Privatautonomie und Privatkodifikation Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien' (1998) 62 Rabels Zeitschrift für Ausländisches und Internationales Privatrecht 580 ff.

297 Matthias Jestaedt, 'Bundesstaat als Verfassungsprinzip' in *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (CF Müller 2004) vol 2 801, 810-811; for a critique of the understanding of constitutional fundamental rights as principles see Matthias Jestaedt, *Grundrechtsentfaltung im Gesetz* (Mohr Siebeck 1999) 222 (pointing to the multifaceted interplay between constitutional law and ordinary law); his critique is directed against the principles theory as developed by Robert Alexy. Cf. for further critique Lerche, 'Die Verfassung als Quelle von Optimierungsgeboten?' 202-206 (principles doctrine may favour a constitutionalization of the legal order and does not do justice to different categories of principles); Poscher, 'Theorie eines Phantoms - Die erfolglose der Prinzipientheorie nach ihrem Gegenstand' 356, 367-368, 370-371 (contra a distinction between rules and principles as matter of legal theory); for an overview of the discussion of Robert Alexy's scholarship see Nowrot, *Das Republikprinzip in der Rechtsordnungengemeinschaft* 506 ff.

international legal order. A focus on legal practice, which the present study adopts, can shed light on the operation of principles, their interrelationship with and their elucidation by treaties and customary international law in the international legal order and it can also provide a safeguard against the risks of principles being overemphasized.

By operating within the confines of legal argumentation, interpretation and application of other legal rules and principles, principles are, while being shaped by generality and flexibility, still anchored, as Kolb puts it, "in the realm of legal phenomena, with a definable core-meaning and an overlookable system of extensions, which gives to the principles a genetic code able to grant that minimum of certainty without which the law opens up to the arbitrary [...] it appears that 'principles' are neither simple 'rules' nor simple 'vague ideas'."[298]

The persuasiveness of the legal operator's recourse to, and balancing of, principles must be assessed in each individual case and does not depend in an abstract fashion on a principle's legal validity alone. A principle's legal validity does not relieve the legal operator from her responsibility to relate this particular principle to other rules and principles in the specific case. A legal reasoning certainly can derive a certain persuasiveness from recourse to a general principle of law, but the specific use of a general principle as opposed to a competing principle needs to derive its persuasiveness from the legal reasoning. At the same time, it remains possible that new principles emerge and harden into positive law through case law. While courts have an important function in that regard, they should approach the judicial task not with a view to positivizing new principles but with a view to serving the law. In doing the latter, they may accomplish the former.

E. Concluding Observations

This chapter approached the interrelationship of sources, and of written and unwritten law, in comparative legal thought. In particular, it examined the discourse in the UK common law system[299] and contrasted the latter with the discussion in the US at a certain point of history.[300] Whilst the

298 Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' 9.

299 See above, p. 105.

300 See above, p. 113.

common law in the UK still enjoys considerable support of scholars and, in particular, the UK Supreme Court and therefore did not vanish with the adoption of the Human Rights Act[301], customary law in Germany lost support to doctrines relating to the interpretation and application of the written law.[302] Subsequently, this chapter addressed general principles of law from legal-theoretical perspectives.[303]

This chapter demonstrated by way of reference to municipal legal orders different ideas of the relationship between written law and unwritten law, from an "oil and water" relationship[304] or a relationship of competition[305] to relationships of convergence and of a dynamic interplay[306], depending on the spirit of the time and the respective preferences of scholars and courts.

Also, this chapter depicted that the function of the unwritten law differed in relation to the written law, it could be the basis for independent rules[307] or indicate the way in which the written law should be applied[308], it could be seen as the practice of the law-subjects or as the product of a caste of lawyers and courts.[309] It is on the basis of these insights that one can evaluate and consider the role of customary international law in the international legal order.

Furthermore, this chapter demonstrated that the idea of the law in action and the interplay between written law and unwritten law informed the doctrine of general principles of law.[310] Whereas certain explanations of principles focus on the distinction between principles and rules, this chapter

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301 See above, p. 120.
302 See above, p. 126.
303 See above, p. 138.
304 See above, p. 103.
305 See above, p. 137.
306 See above, p. 119.
307 See above, p. 120.
308 See above, p. 119. Recently, Mark D Walters, 'The Unwritten Constitution as a Legal Concept' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) 35 argued in favour of more attention to unwritten constitutional law as "a discourse of reason in which existing rules, even those articulated in writing, are understood to be specific manifestations of a comprehensive body of abstract principles from which other rules may be identified through an interpretive back-and-forth that endeavours to show coherence between law's specific and abstract dimensions and equality between law's various applications".
309 See above, p. 112.
310 See above, p. 138.

submitted that general principles of law are connected to legal reasoning and the systematization of the law and should be understood in their interrelationship with other principles, rules and the normative context, taking also into account the role of the legal operator. It will be demonstrated that this can contribute to the understanding of general principles in the international legal order.[311]

311 See also below, p. 216, comparing the second report of the ILC Special Rapporteur with this chapter's perspectives on general principles. Cf. also the index in Lauterpacht, *The Function of Law in the International Community* 461 f., referring to Roscoe Pound and Benjamin Cardozo who were discussed in this chapter; cf. Thirlway, *The sources of international law* 107 who refers only to Dworkin as author who demonstrated the existence of legal principles.