Chapter 7
The Survival and Resurgence of Roman Law in Western Europe

7.1 The Historical Background

With the collapse of the Roman Empire in the West, Europe moved slowly but surely into an era that is generally known as the Middle Ages. This period of transition featured a disintegration of the civilisation and forms of social and cultural life that had been characteristic of the Greco-Roman world. The urban life that had been the ideal of the Greeks and introduced by the Romans throughout the Mediterranean basin declined. Many towns disappeared as new forms of habitation were constructed around fortified manors and small village communities. Although some great urban centres in Italy and Gaul continued to exhibit signs of commercial activity, trade and industry decayed and economic life reverted to an agricultural and pastoral type geared to maintaining local self-sufficiency. As all centralised authority dissolved, political conditions shifted towards the decentralised localism associated with the feudal system and the economically self-sufficient manor became the principal economic and administrative unit. Moreover, general culture in the West declined sharply and illiteracy became widespread. These events derived from the confusion caused by the Germanic invasions and the decay of the cities that had existed for centuries as centres for learning and the propagation of ideas. Nevertheless, vestiges of the classical civilisation remained alive throughout this period and gradually their fusion with the crude culture of the Germanic peoples and the learning of Christianity produced a new cultural synthesis.

By the end of the sixth century, the great Germanic migrations into Western Europe had ceased. Of all the Germanic kingdoms established in the lands of the former Roman Empire, only the Frankish was destined to endure as most of the others disappeared after a brief existence. The first great Frankish dynasty was the Merovingians established by Clovis (481–511). Under the reign of Clovis, the Merovingian rule was transformed from the leadership of a loosely organized tribe to a strong kingship extending over the whole of Gaul. After Clovis' death,

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this development of the Frankish kingdom was hindered by the political division of the land and the disunity of his successors who continuously intrigued and fought against each other for power. Under these circumstances, the royal authority weakened and the kings increasingly relied upon an independent group of nobles for sustenance, advice and support in war that was rewarded with grants of land, offices and privileges. Despite the feebleness of Clovis' successors, the Frankish kingdom with support from the Catholic Church not only survived as a single realm but also expanded its territory. The most powerful noble in the court was an official designated *maior domus*, or mayor of the palace. From the middle of the seventh century, the gradual decline of royal authority meant the mayors of the palace in the respective courts became the real rulers of the kingdom. In 681, Pippin II of Heristal elevated his position as mayor of the palace of Austrasia (one of the three provinces into which the Frankish domain had been divided) by assuming the mayoralty of the united Frankish kingdom. After Pippin's death, his illegitimate son Charles Martel (714–741) succeeded him in the office of mayor of the palace. Martel gained control of the realm and became the founder of a new line of rulers known as the Carolingians (he did not adopt the royal title himself). Charles' grip on power was secured further after the Battle of Poitiers (732), where he defeated the Arabs who had already besieged Spain, and thus he stemmed their further advance into Western Europe. His son Pippin the Short, who became mayor of the palace after his father's death, deposed the Merovingian for whom he ruled and garnered Church support to reign as the king of the Franks in 751. Church support was requisite to legitimise his role, so Pippin enticed this aid by offering the Pope his protection against the Lombards who threatened Rome. He also ceded to the Pope the Exarchate of Ravenna (in Northern Italy) that he had acquired by conquest from the Lombards after the latter had expelled the last remnants of the Byzantine garrisons. By the time of his death in 768, the borders of the Frankish kingdom had been extended into the Lowlands, Lombardy and the Pyrenees.

The greatest monarch in the Carolingian line was Pippin's son Charles, known to history as Charlemagne (768–814), who became sole ruler of the Franks on the death of his brother Carloman in 771. After a long series of wars, Charlemagne extinguished the Lombard kingdom in Northern Italy and assumed its rulership (774). He quelled the Saxons and thereby added a large tract of territory in Germany to the Frankish realm, strengthened his suzerainty over Bavaria and the area that later became Austria, and repulsed the Arabs beyond the Pyrenees to gain control of Barcelona. Like his predecessors, he followed a policy of close cooperation with the Church. He confirmed the grant of territory in Italy that had been previously presented to the Pope by his father and made it part of his policy to spread the Christian faith in the newly conquered lands. The partnership between the Carolingians and the Papacy culminated in Charlemagne's coronation by Pope Leo III as Emperor in Rome on 25 December 800. In internal affairs, Charlemagne exerted great efforts to promote centralised rule. He exercised general supervision over the Church using the Church organization as a vehicle for extending his authority, held the nobles in check (although he often sought their advice in matters of state policy), and ensured closer supervision of the administration by appointing counts

and margraves to govern the various parts of his realm. Moreover, he ordered a record of the unwritten laws of the various tribes and the authoritative editing of earlier codes such as the Salic Code of the Franks. Although the legal traditions of each locality were fully respected, Charlemagne engaged his position as head of the empire to issue edicts (capitularies) that were applicable to all his subjects. These statutes were not merely statements of popular customs promulgated by a ruling chief; they were the decrees of a sovereign ruler whose will was the source of law, according to the well-known doctrine of Roman law. Charlemagne's reign also witnessed a revival of learning, and inspired artistic and literary activity. In monasteries and palace schools, the classical texts were once again studied, theological problems pondered, books collected and ancient manuscripts copied. In contrast with these achievements, little progress occurred in the economic sphere as the feudal and manorializing tendencies of the landlord class increasingly escaped from the control of the central government.

The establishment of a Western Empire by Charlemagne was one of the most important events in the rise of a new society in Western Europe. Just as the reign of Justinian had precipitated the emergence of Byzantine civilisation, the achievements of Charlemagne helped to mould the civilisation of Western Europe that began to form in his time. In the years following Charlemagne's death, the unity of the Frankish Empire shattered and political authority everywhere tended to disintegrate. During the ninth and tenth centuries, new invaders—Norse Vikings, Saracens, Magyars and Slavs—threatened Europe from all sides. Charlemagne's successors, weakened by perpetual dynastic struggles, were unable to thwart the advance of these invaders. In the wake of the devastation caused by war and plundering, economic conditions worsened, living standards remained at a low level and learning was stifled. The permanent threat of invasion and the inability of the kings to protect and assert their authority over the local communities of their realms strengthened the centrifugal tendencies in the West. This entailed the proliferation of feudalism with its politically divisive and economically retarding influences.

The feudal system had its roots in later Roman times, but some of its defining characteristics were derived from Germanic traditions. Of particular importance was the custom of Germanic kings and nobles to grant privileges, land or office to persons close to them who were then obligated to serve loyally in the government and in time of war. A hierarchical system gradually emerged: at the top position resided the king and below him, as vassals and subvassals, were the nobles (dukes, counts, barons and knights) while the base consisted of the peasants who provided a livelihood for all by tilling the land. Each vassal had full control over his own territory in return for definite and well-recognized obligations of a personal and military character due to his overlord. This arrangement accorded the vassal his requisite protection, while it provided his overlord with the power and prestige he desired. As medieval kings were not powerful enough to assert their authority over the local communities of their realms, feudal lords acquired a considerable degree of independence. Thus, the fiefs were regarded in economic and political terms as

nearly autonomous units. Decentralisation was supreme and remained so until feudalism yielded to the rising tide of nationalism and royal power.

The weakness of central authority enhanced the power of the Church, which adapted itself to the feudal system by accumulating vast landholdings and by extending its influence through its own vassals and serfs. As Church officials became feudal lords themselves, the division of power between Church and state (the former was supposedly supreme in matters of faith and morals, the latter in temporal affairs) became difficult to maintain in practice. Thus, the foundations were laid for the contest between secular and ecclesiastical authorities that transpired during the later Middle Ages.

In the eleventh century, Europe entered a period of political, economic and cultural transformation. The decentralising tendencies that engendered political fragmentation and the expansion of feudalism gradually receded, as political authority grew progressively stronger with the rise of powerful new monarchies. The Holy Roman Empire of the German Nation that was established in the middle of the tenth century by Otto the Great (936–973) asserted its authority throughout the domains of the Carolingian Empire (with the exception of France) and expanded its territories to the East. The kingdom of France consolidated itself under a new line of rulers initiated by Hugh Capet (987–996). Well-organized Norman kingdoms were formed in Southern Italy and in England. In Spain, Arab power declined and Christian rule had extended beyond the centre of the Iberian peninsula by the close of the eleventh century. At the same time, the government of the Church was centralised at Rome and had acquired strength from a series of reforms initiated by Pope Gregory VII (1073–1085) that enabled it to enter into a contest for supremacy with the Empire itself. Improved political conditions and the gradual return of order facilitated economic growth and created a more favourable environment for the development of medieval thought and culture.

One of the most important developments that stimulated the economic and cultural revival of the eleventh and twelfth centuries was the rise of towns and the emergence of a new urban civilisation. Potent factors in urban growth were the rapid expansion of trade and the increase in popularity of fairs, i.e. organized occasions for commercial exchange. During the crusades, the Mediterranean had been reopened as a major West European trading route and new trading possibilities were recognized and exploited. The first to profit from these trade events were the Italian coastal cities (such as Venice, Genoa and Pisa) that gained in strength, independence and prosperity. The increasing number, size and power of commercial cities naturally cultivated the urban middle class and the expansion of its political influence. This new urban class was a powerful force that generated new currents in medieval Europe, as opposed to the inertia of the old agrarian feudal order. The latter was characterised by localism, uniformity and repetition that rendered it inherently stagnant and custom-bound. In contrast, the urban movement was based on diversity and novelty accompanied by a dynamic and more tolerant outlook on life. This promoted the introduction of novel social, economic, political and legal elements into medieval life and stimulated cultural endeavours. As the

townspeople struggled for greater economic and political freedom, they redirected the political evolution of Europe and accelerated the decline of feudalism.

The new upward trend of culture manifested itself in a significant increase in literary and artistic output and educational activity, and a revival of classical studies. Alongside the traditional forms of education centred around monasteries and churches, secular education emerged as a vital force in the intellectual development of the European society. Unlike the ecclesiastical schools where teaching concentrated mainly on dialectics and theology, secular schools also focused on practical subjects such as medicine and law. In connection with the study of law, one of the most significant cultural developments occurred: the establishment of the first medieval universities. The organization and administration of the medieval universities varied considerably, but a common element existed as they were structured like guilds under a corporate form of control. In the early medieval schools, such as the famous law school of Bologna, teachers and mature students organized themselves into closely-knit communities to facilitate their pursuit of scholarly interests without any outside interference. From the thirteenth century onwards, an increasing number of universities were established throughout Europe and more than seventy were in existence at the close of the Middle Ages.

The eleventh and twelfth centuries are marked also by the long struggle for supremacy between the Empire and the Papacy. This struggle became known as the 'investiture contest' as it revolved around the right of secular authorities to participate in the choice of bishops and other churchmen and to invest them not only with their secular but also their spiritual authority. Pope Gregory VII (1073–1085) rejected the concept of the Papacy as a bishopric of the emperor, demanding supreme authority in all Church affairs and asserting the supremacy of the Church over the state. Drawing upon the writings of early Church fathers, such as St Augustine, he contended that a ruler (whether a king or an emperor) was subject to the universal power of the Church and could only hold office as long as he performed his duties in accordance with Christian principles. The supporters of monarchical authority countered with the theory of the divine right of kings, arguing that while a king should rule justly and for the benefit of his subjects he was answerable to God alone and not to priests for any failures. Gregory's theories and policies led to conflict with Emperor Henry IV (1056–1106) and war between the papal and the imperial parties raged sporadically throughout Europe until 1122. In that year, a compromise was reached by means of a Concordat signed in the German city of Worms. The Concordat of Worms stipulated that the emperor should abandon the right of investing his bishops with the symbols of their spiritual authority. It recognized the Church as a separate, autonomous body vested with jurisdiction over a defined constituency and governed by a distinct body of law, the canon law. At the same time, non-ecclesiastical political entities and secular legal orders were recognized. The Concordat of Worms was a compromise that reflected a gain for the Papacy. Only when the monarchs had acquired sufficient power during the late medieval period could they effectively challenge the supremacy of the Church.

The period between the thirteenth and the fifteenth centuries witnessed the gradual transition of European civilisation from medievalism to the modern age. The most important factors in the institutional background of the decline of the medieval order was the emergence of strong nationalistic monarchies, the growth of towns and the urban middle class, and the decline of the Roman Catholic Church. After the death of Emperor Frederick II (1250), the medieval concept of emperorship was undermined. Germany transformed into a collection of essentially independent principalities, duchies and bishoprics. A power that could ultimately unify the German states only emerged after the rise of Prussia in the seventeenth century. In France, feudal institutions were gradually abandoned and the country moved towards a centralised state under the authority of the king. During the reigns of Louis IX (1226–1270) and his grandson Philip IV the Fair (1285–1314), the power of the feudal lords was curbed, the administration was centralised and the jurisdiction of the king's courts extended over the entire country. Philip became the first European monarch who could defy the Roman Catholic Church, and his victory over Pope Boniface VIII (1294–1303) meant that the Papacy could never again safely contest the power of the French monarchy. In England, as in France, centralised political authority grew stronger. After the decline of the German imperial influence in Italy, city-states such as Venice, Genoa, Florence and Milan cultivated independence and established themselves as leading financial, commercial and cultural centres. Finally, the closing phase of the Middle Ages featured a sharp decline in the power of the Papacy that had raised its pretensions to the highest level under Pope Innocent III (1198–1216). This derived from the triumph of nationalism and nationalistic political theory over medieval theocratic unity. The end of the fifteenth century exhibited disintegration in the institutional basis of medievalism: the dominant agricultural economy, feudal politics and a universal and omnipotent Church. With the emergence of the Renaissance, the dawn of the modern age was imminent.

The sixteenth century is commonly described as the period of the Renaissance and the Reformation. This period features the revival of the spirit of classical antiquity in the spheres of literature and art, as well as a challenge to existing authority and entrenched tradition. The Middle Ages were over. Gone too was the internationalism that for centuries had been the foundation of political philosophy and ecclesiastical practice. By the close of this period the Holy Roman Empire was an empty shell. The rulers of the territorial states that now existed in the Continent scarcely admitted even a titular allegiance to the emperor. Similarly, the Papacy no longer received the obedience of Western Christendom. Its dominance was called into question by the new churches established in the lands where the teachings of Luther held sway. A new political theory emerged from the ruins of imperial and Church internationalism. In the eyes of Renaissance thinkers, such as Machiavelli and Bodin, the state was not directly concerned with the promotion of religion or morality, but demanded for itself the obedience and loyalty of its subjects. One of the most important developments of this period was that the world burst its bounds. Columbus reached America in 1492, and Vasco de Gama discovered the sea route round the Cape to the Indies in 1497. These discoveries, together with the fall of

Constantinople to the Ottoman Turks in 1453, meant that the Mediterranean was no longer the principal trade route for all Western Europe. As the economic supremacy of the Italian maritime city-states declined, Spain, Portugal, England and Holland, which had been remote from the main flow of commerce, now were in a position to become powerful commercial nations.

In many matters, the seventeenth century saw the continuation of the trends that emerged in the sixteenth: nation states were consolidating their frontiers and establishing their spheres of influence; within states, political power was mainly in the hands of monarchs, who claimed absolute authority over their subjects; religion remained a source of conflict both within and between states; and journeys of exploration continued side by side with the colonization of newly discovered lands. Furthermore, although agriculture continued to dominate economic life, commerce was expanding and industrial production was becoming increasingly significant. On a political level, this century saw the decline of Spain, which yielded to France the position of the most powerful state in Europe, and the rise of the Netherlands into a major commercial and military power. In Germany the century was one of calamity originating in religious conflict: the attempt by Protestant nobles in Bohemia to place a Protestant on the throne triggered the Thirty Years War (1618–1648), which laid the country in ruins. The Treaty of Westphalia (1648), which ended the conflict, accelerated the decline of the Holy Roman Empire as a political organization, although the Empire lingered on as a Hapsburg title until the beginning on the nineteenth century. With the rise of the concept of the nation state, the focus of scholarly and intellectual inquiry shifted from theology to political philosophy. The demand of the age was clear: give us real knowledge of the human condition and of the nature of the relationship between the state and the individual, so that we can create a device to secure social order. Now that the medieval order, centered around the Church and the feudal system of social relationships, has collapsed what form of government could secure order? What mechanism of social control could be devised and on what basis? What is the just foundation of political obedience? Whence comes the authority of the law? These questions no longer admitted of the ready answers that could be given when all princes were assumed to derive their powers from the emperor, who was recognized as the supreme earthly authority in matters temporal. New circumstances now gave rise to new theories, and of those theories important political events were to be born in the period that followed.

The eighteenth century was the period in which the ancient European structures of authority and legitimacy were irreparably fractured. This century saw the American Revolution and the loss of Britain's North American colonies; the French Revolution and the commencement of the Napoleonic wars; and the beginnings of the Industrial Revolution. The century also saw the culmination of the intellectual movement that prepared the ground for revolution, known as the 'Enlightenment'. The Enlightenment brought with it a new sense of optimism, as opposed to medieval pessimism, and a new understanding of human nature based on the notions of rationality and freedom. With the rise of the modern concept of the nation state, intellectual inquiry focused on the nature of the relationship between

the citizen and the state, and the question of what rights an individual had, or should have, against the state, especially against a state that acted tyrannically towards its citizens. Two major sets of ideas furnished the intellectual foundations of this period of social and political change: social contract theories and utilitarianism. The essence of the social contract theories is the idea that legitimate government is the result of the voluntary agreement among free and rational individuals. An important point about the social contract theories is that they express the idea that the state rests for its legitimacy upon the consent of its subjects. Laws can legitimately be used to ensure compliance if they have been properly approved by citizens who are party to the social contract. Utilitarianism is primarily a normative, ethical theory that lays down an objective standard for the evaluation and guidance of human conduct. That standard is derived from the assumption that the overriding aim of morality and justice is the maximization of human welfare or happiness. In the field of law, the spirit of the Enlightenment is reflected in the movement towards legal reform, a movement that had its roots in the seventeenth century rationalist natural law thinking. The advocates of reform were convinced that legislation provided an instrument that could be used to remedy social problems, and thus to maximize general happiness according to a rational scheme. This belief that laws and institutions could be reformed to accord with the dictates of reason swept through Europe and led to the codifications of the late eighteenth and nineteenth centuries.

7.2 Roman Law the Early Middle Ages

After the collapse of the Roman Empire in the West, the once universal system of Roman law was replaced by what may be described as a plurality of legal systems. The Germanic tribes that settled in Italy and the former western provinces lived according to their own laws and customs, whilst the Roman part of the population and the clergy were still governed by Roman law. This in effect signified a return to the principle of personality of the laws that prevailed in early antiquity (before the third century AD). Accordingly, the law applicable to a person was not determined by the territory in which he lived but by the national group to which he belonged. This arrangement was necessitated by the fact that in the regions under Germanic rule the vast majority of the population remained Roman and the law of the conquerors was too rudimentary to replace the more refined Roman system. The Germanic kings (except those of the Vandals) compounded the situation as they were in reality independent but considered themselves governing under the authority of the Eastern Roman emperors. In this way, a fiction of legal unity between East and West was maintained and Roman law was regarded as perpetual, although, the effective control exercised by the Eastern emperors became evermore shadowy over time. However, the general deterioration of the Roman culture in the West and the confusion ensuing from the application of the principle of personality rendered the administration of Roman law a task beyond the powers of the courts and lawyers

of this period. In response to this problem, some Germanic kings ordered the compilation of codes containing the personal Roman law that governed many of their subjects and a written form of the laws that regulated the Germanic part of the population. As previously noted, in the Visigothic kingdom of Gaul, the law that applied to the Romans was elaborated in the *Lex Romana Visigothorum* issued by King Alaric II in 506—hence, this work is also known as the Breviary of Alaric (*Breviarium Alarici*). Other important compilations of this period were the *Edictum Theoderici*, enacted by the King of the Visigoths Theodoric II in the second half of the fifth century that applied to both Romans and Visigoths; and the *Lex Romana Burgundionum*, composed during the reign of King Gundobad of the Burgundians and promulgated by his son Sigismund in 517 for use by the Roman inhabitants of his kingdom.

After the conquest of Italy by the forces of the Byzantium, Justinian's legislation was introduced in that country by a special enactment (*sanctio pragmatica pro petitione Vigilii*) issued by Justinian at the request of Pope Vigilius on 14 August 554.[1] However, shortly after Justinian's death the Lombards invaded Italy and occupied most of the peninsula. Byzantine rule remained over Rome, the area around Ravenna, the southern part of Italy and Sicily. In the territories under their control, the Lombards adopted the custom of reducing their own customs to law and permitting their Roman subjects to live according to their own system. The majority of the Romans were governed by the Roman law of Justinian, whilst a smaller part of the Roman population followed pre-Justinianic (Theodosian) Roman law. The prevalent view among modern scholars is that the only materials of Justinian's legislation that gained practical significance were the Code, the Institutes and the Novels of the *Epitome Iuliani*.[2] The Digest appears to have played no part as a source of law and remained virtually unknown for many centuries.[3] In the areas under Byzantine control, the Roman law of Justinian continued to apply until the middle of the eleventh century when the last of the Byzantine possessions in Southern Italy were lost to the Normans.[4] These areas were also introduced to the

[1] Nov. App. VII, 1 in R. Schoell and G. Kroll, *Novellae*, *Corpus Iuris Civilis* III (Berlin 1972), 799.

[2] In the late seventh or early eighth century the Code was edited into a compendium, which contained only about one-quarter of the first nine books. The last three books (referred to as *Tres Libri*), concerned with the public offices of the Roman Empire, were omitted as being of little relevance to contemporary needs, and were not rediscovered until the middle of the twelfth century. The *Epitome Iuliani* was used until the twelfth century, when it was replaced by a larger collection known as the *Authenticum* (because Irnerius and other Glossators regarded it as an official compilation). Only Justinian's Institutes was known in its entirety, as several manuscripts from this period attest. Like the other parts of Justinian's legislation, these were frequently accompanied by crude and ill-arranged glosses, reflecting the legal ignorance of their authors and the general cultural decadence of the era.

[3] The last known citation to the Digest is found in a letter of Pope Gregory I in 603. After that time and until the eleventh century no reference to this work can be found in literary sources, court records or compilations of law.

[4] The Byzantine rule in central Italy came to an end in the middle of the eighth century with the capture of Ravenna by the Lombards. Sicily was lost to the Arabs in the ninth century, but parts of it were temporarily re-taken by the Byzantines early in the eleventh century.

Ecloga Legum of the Isaurians, and the *Prochiron* and the *Eisagoge* of the Macedonian emperors. These furnished the basis for a number of compilations that appeared in Italy during this period, such as the *Prochiron Legum* (also known as *Prochiron Calabriae*) composed in Southern Italy around the end of the tenth century.[5] However, it is uncertain whether the *Basilica* was ever used as a source of law in Italy.

As in Italy, Roman law was preserved in Gaul and Spain in a vulgarised form through the application of the principle of personality and the medium of the Church whose law was imbued with the principles and detailed rules of Roman law. During the Middle Ages, the ecclesiastical courts had rights of jurisdiction over matrimonial cases, matters of succession to personal property and certain aspects of the criminal law. These courts consistently upheld the authority of the Justinianic legislation in cases that fell within their sphere of competence. Moreover, Roman law exercised an influence directly or through canon law on the various codes of Germanic law that appeared in the West during the early Middle Ages but this influence varied greatly between regions and stages of time. The most important Germanic codes embrace the *Codex Euricinianus*, enacted about 480 by Euric the Visigothic king and drafted with the help of Roman jurists; the Salic Code (*Pactus legis Salicae* or *Lex Salica*) of the Franks, composed in the early sixth century; the *Lex Ribuaria*, promulgated in the late sixth century for the Franks of the lower and middle Rhine region; and the *Lex Burgundionum*, issued in the early sixth century for the inhabitants of the Burgundian kingdom. Of the above codes, the Visigothic and Burgundian Codes reflect a stronger Roman influence than the Salic and Ripuarian Codes. Other law codes that exhibited a Roman influence include the Lombard Edict (643), the Alammanic Code (*c*. 720), the Bavarian Code (*c*. 750), the Frisian Code (*c*. 750) and the Saxon Code (*c*. 800).

Over time, the fusion of the Roman and Germanic elements of the population progressed and prompted a dissolution of the division of people according to their national origin. The system of personality of the laws was gradually superseded by the conception of law as entwined with a certain territory or locality. As a result, Roman law as a distinct system of law applicable within a certain section of the population fell into abeyance in most parts of Western Europe. A considerable degree of integration of the Roman and Germanic elements first occurred in the Visigothic territory in Spain. In this region, the *Lex Romana Visigothorum* of Alaric ceased to possess any force and a new code was introduced in 654 under King Recceswinth: the *Lex Visigothorum* (also known as *Forum Iudicum* or *Liber Iudiciorum*: Book of Judicial Actions). This code applied to all the inhabitants of the Visigothic kingdom.[6] In the course of the ninth century, the shift from the

[5] This compilation contained materials from the *Prochiron* and the *Ecloga Legum*, as well as several constitutions of Emperor Leo VI the Wise.

[6] The *Lex Visigothorum* follows the structure of the Theodosian Code. It is based on early legislation (especially on a revised edition of Euric's Code issued by King Leovigild) and laws issued by the current monarch (King Recceswinth). Alaric's code continued to be used in southern France, especially in the territory of the Burgundians, and in some countries north of the Alps.

principle of personality to that of territoriality was further precipitated by the development of the feudal system. As noted before, the predominant feature of feudalism was an estate or territory dominated by a great lord (duke, count, baron or marquis) who was often the vassal of an emperor or king. Since the domain of a great lord constituted a quasi-independent unit in economic and political terms, the area that was controlled by a particular lord was decisive as to the form of law that should prevail. However, the intermixture of races meant that the laws recognized in a territorial unit could no longer be those of a particular race. Instead, all persons living within a given territory were governed by a common body of customary norms that varied in regions and periods. In this way, the diversity of laws no longer persisted as an intermixture of personal laws but as a variety of local customs. In all the territories, however, the customary law that applied was a combination of elements of Roman law and Germanic customary law.

By the end of the tenth century, vulgarised versions of Roman law were so intermingled with Germanic customary law that historians tend to describe the laws of this period as either 'Romanised customary laws' or as 'Germanised Roman laws'. Moreover, Roman law exercised a strong influence on the legislation (capitularies) of the Frankish emperors, as well as on the development of the law of the Roman Catholic Church. Thus, Roman law throughout Western Europe sustained its existence and served both as a strand of continuity and as a latent universalising factor. Yet, in comparison with classical Roman law the overall picture of early medieval law is one of progressive deterioration. The study of law, as part of a rudimentary education controlled largely by the clergy, was based simply on abstracts and ill-arranged extracts from older works. As the surviving literature from this period exhibits, legal thinking was characterised by a complete lack of originality.

7.3 The Revival of Roman Law

From the eleventh century, the improved political and economic conditions created a more favourable environment for cultural development in medieval Europe. At the same time, a renewed interest in law was prompted by the growth of trade, commerce and industry, and the increasing secularism and worldliness of urban business life.

The legal revival began in Northern Italy. Among the earliest centres of legal learning was the law school of Pavia established in the ninth or early tenth century. Roman law and the customary and feudal law of the Lombard kingdom were taught and developed at this school. As the capital of the Italian Kingdom and the seat of a supreme court with a corps of judges and lawyers, Pavia was the centre of vigorous legal activity. Although legal growth was fostered largely by practical needs, it encouraged the systematic study and interpretation of legal sources and improved standards of legal culture. Indeed, studies were not based solely on practical interests, but were carried out according to the processes of formal logic that

were then being developed by the first scholastics. The study of Lombard law was based primarily upon the *Liber Papiensis*, a work composed in the early years of the eleventh century.[7] Other important works of the same period were the *Lombarda* or *Lex Langobarda* and the *Expositio ad Librum Papiensem*, an extensive collection of legal commentaries that embodied materials drawn from both Lombard and Roman sources.[8] The chief source for the study of Roman law was the *Lex Romana Visigothorum*.

By the end of the eleventh century the *antiqui*, the jurists dedicated to the study of ancient Germanic sources, had been superseded by the moderni, who were interested primarily in the synthesis of Roman law and Lombard customary law. While the *antiqui* regarded Roman law as a system subordinate and supplementary to Lombard law, the *moderni* sought to rely on Roman law as a basis for the improvement and development of native law. But the Lombard capital of Pavia was not the only Italian city where law was studied and legal works were produced. At Ravenna, the former centre of the Byzantine Exarchate in Italy, there existed in the eleventh century a school of law where Justinian's texts were known and studied. Moreover, Southern Italy remained for a considerable period of time under Byzantine rule and thus Roman legal learning was preserved in this area through the influence of the Byzantine law. After the Norman conquest of Southern Italy in the late eleventh century, Byzantine Roman law continued to apply in that region under the principle of territoriality of the law.

Towards the end of the eleventh century, Roman law studies experienced a remarkable resurgence. It is difficult to assign a single reason for this development, although some writers place central importance on the discovery of a manuscript in Pisa during the late eleventh century. The material contained the full text of Justinian's Digest that had remained largely unknown throughout the early Middle Ages (when the Florentines captured Pisa in 1406 the manuscript was transferred to Florence and hence it is designated *Littera Florentina* or *Codex Florentinus*).

[7] The Lombards, like other Germanic peoples, had originally no written law. The first compilation of Lombard law was the *Edictum* of King Rothari, published in 643. This work is considered to be the most complete statement of the customary law of any of the Germanic peoples in the West. The entire body of Lombard law, consisting of the Edict of Rothari and the additions introduced by his successors, is known as *Edictum regum Langobardorum.* Even after the annexation of the Lombard kingdom by the Frankish Empire during the reign of Charlemagne, Lombard law continued to be applied in Northern Italy, where it coexisted with Roman law and the customary laws of other Germanic peoples. To deal with the inevitable inconvenience that the presence of diverse legal systems entailed, the Frankish kings of Italy promulgated a large number of laws referred to as *capitula* or *capitularia*. A private collection of these laws, known as *Capitulare Italicum*, was permanently joined to the Lombard Edict in the early eleventh century. This *corpus* of Lombard-Frankish law, referred to in early sources as *Liber Legis Langobardorum*, is commonly known today as *Liber Papiensis*.

[8] The author of the *Expositio ad Librum Papiensem* distinguishes the various legal interpreters into three groups: *antiquissimi*, *antiqui* and *moderni*. Whilst the *antiqui* very rarely drew on Roman law, the *moderni* strove to discover the spirit of law by relying of Roman legal sources, especially when they encountered gaps in the Germanic (Lombard-Frankish) law.

A second manuscript seems to have been unearthed around the same time but has since been lost. This is referred to as *Codex Secundus* and is believed to have furnished the basis for the copies of the Digest produced at Bologna. The rediscovery of the Digest occurred at a time when there was a great need for a legal system that could meet the requirements of the rapidly changing social and commercial life. The Roman law of Justinian had essential attributes that offered hope for a unified law that could in time replace the multitude of local customs: it possessed an authority as a legacy of the ancient *imperium Romanum* and existed in a book form written in Latin, the *lingua franca* of Western Europe. As compared with the prevailing customary law, the works of Justinian comprised a developed and highly sophisticated legal system whose rational character and conceptually powerful structure made it adaptable to almost any situation or problem irrespective of time or place.

The revival of interest in Roman law had been also fostered by the conflict between the Empire and the Papacy, which was from the outset a conflict of political theories for which the rival parties sought justification and support in the precepts of the law. Roman law attracted the attention of secular scholars seeking intellectual grounds for refuting the papal doctrine of the final supremacy of the Church in temporal affairs. At the same time, the emperors were receptive to this law because its doctrine of a universal law (founded on a grand imperial despotism) provided the best ideological means to support the theory that the emperor, as heir of the Roman emperors, stood at the pinnacle of the feudal system.[9] The supporters of the Papacy argued that as spiritual power was superior to secular power, the Pope was supreme ruler of all Christendom and temporal affairs were subject to the final control of the Church. Scholars supporting the papal party were encouraged to search the ancient texts for legal authority that could support this claim and to develop a science of law on this basis. Opponents of the papal views adopted the same rigorous exploration for supporting materials. Relying upon the despotic principle of Roman law, they argued that the power of the state was absolute and could override the opposition of any group within the state. Roman law was thus construed to uphold secular absolutism—a view utterly at variance with the papal claims to primacy. Through the interpretation of Roman political and legal principles, a new political theory was developed in the course of time that hinged upon the idea of a secular and independent sovereignty founded on law.

[9] Charlemagne had been the first to assert that he was in fact heir to the throne of the Western Roman emperors and this claim was again made by Otto when he became German emperor in 962. In the twelfth century, Emperor Frederick Barbarossa employed several Bolognese jurists as his legal advisers in his conflicts with the Italian city-states.

7.3.1 The Glossators

The principal centre of Roman law studies in Italy was the newly founded (*c*. 1084) University of Bologna, the first modern European university where law was a major subject.[10] By the close of the thirteenth century, a number of similar schools had been established at Mantua, Piacenza, Modena, Parma and other cities of Northern and Central Italy, as well as in Southern France. The law school of Bologna owed its fame to the grammarian Irnerius (*c*. 1055–1130), who around 1088 began lecturing on the Digest and other parts of Justinian's codification. This jurist came to be regarded as the founder of the school, although he does not appear to have been the first teacher at this institution (the first public course of law at Bologna was delivered in 1075 by the Pavian jurist Pepo (Joseph), who was probably a teacher of Irnerius). Irnerius's fame attracted students from all parts of Europe to study at the Bologna school that had around 10,000 students by the middle of the twelfth century.[11] The jurists of Bologna set themselves the task of presenting a clear and complete statement of Roman law through a painstaking study of Justinian's texts (instead of the vulgarised versions of Roman law contained in the various Germanic compilations usually relied upon in the past). Their object was to re-establish Roman law as a science—a systematic body of principles and not simply a tool for practitioners. However, the ancient texts were unwieldy as they contained an immense body of often ill-arranged materials and dealt with a multitude of institutions and problems that were no longer known. Therefore, the first task to accomplish was the accurate reconstruction and explanation of the texts.[12]

[10] By the middle of the twelfth century about ten thousand law students from all over Europe were studying at Bologna. The students had the right to choose their own teachers and to negotiate with them matters such as the place and manner of instruction and the amount of tuition. The students and teachers organized themselves into guilds (*societates*) for purposes of internal discipline, mutual assistance and defence. The various *societates* formed a larger body termed *universitas scholarium*, within which students were grouped by nations.

[11] Irnerius's success is attributed to three principal factors: first, his excellent edition of the Digest, known as *Litera Bononiensis* or the *Vulgata*; second, the new approach to the study of Roman law, which viewed the *Corpus Iuris Civilis* as living law; third, the separation of the study of Roman law not only from the study of rhetoric, but also from the study of canon law and feudal law.

[12] The most important part of their work was the reconstruction of Justinian's Digest. According to tradition, the materials were divided into three parts: the *Digestum Vetus*, embracing the initial twenty-four books; the *Digestum Novum*, covering the last twelve books from books 39 to 50; and the *Digestum Infortiatum*, encompassing books 25 to 38. These three parts of the work were contained in three volumes. A fourth volume comprised the first nine books of Justinian's Code, and a fifth embodied the Institutes, the last three books of the Code and the Novels as found in the *Authenticum*. The fifth volume also incorporated several medieval texts, the *Libri Feudorum* (containing the basic institutions of feudal law), a number of constitutions of the emperors of the Holy Roman Empire and the peace treaty of Constance (1183). These five volumes became known as *Corpus Iuris Civilis*.

The work of interpretation was closely connected with the Bolognese jurists' methods of teaching and performed by means of short notes (*glossae*) explaining difficult terms or phrases in a text and providing the necessary cross-references and reconciliations without which the text would be unusable. These notes were written either in the space between the lines of the original text (*glossae interlineares*), or in the margin of the text (*glossae marginales*). The extended glosses of a single jurist formed a connected commentary on a particular legal topic and this continuous glossing of the texts entailed the emergence of entire collections or apparatuses of glosses that addressed individual parts or the whole of Justinian's codification. By employing the general pattern of scholastic reasoning, the Bolognese jurists (designated Glossators, *Glossatores*) sought to expose the conceptual and logical background of the various passages under consideration and to ascertain the consistency and validity of the principles underlying the legal material upon which they commented. They initiated the process by comparing different passages from various parts of Justinian's work dealing with the same or similar issues, explaining away the inconsistencies and harmonizing any apparent contradictory statements (this method was by no means new as it had been engaged by earlier medieval scholars and resembled the approach used by the jurists of the Constantinople and Beirut law schools during the later imperial era). These successive processes corresponded to the medieval progression in the curriculum of the *trivium* from grammar and rhetoric to logic or dialectic—the content of Justinian's works first had to be understood, and so explanatory notes were used; then the consistency of the texts had to be established through the application of the dialectical method. Logic was the most important element of medieval education. Based on works such as Aristotle's *Organon*, it became the dominant technique of medieval scholasticism.[13]

Apart from the *glosses*, several other types of juristic literature were developed, partly from the teaching of the *Corpus Iuris Civilis* at the law schools. Some deal with the issues in the order in which they are found in Justinian's legislation (*ordo legum*), such as the *commenta* or *lecturae*, reports written down by assistants or experienced students and sometimes revised by the teacher himself.[14] Another form of literature is the written record of a *quaestio disputata*, an exercise in which a

[13] Scholasticism as a system of philosophy was based on the belief that reality exists in the world of abstract ideas, generally independent of the external sensual world. Its chief assumption was that truth is discoverable if pursued according to the norms of formal logic. From this point of view, the only path to wisdom was the avoidance of logical fallacies rather than observation of commonplace nature. The formal logic that was applied was largely based on the work *Sic et non* ('Yes and No') of the French philosopher Peter Abelard (1079–1142), composed around 1120. In this work Abelard applies the principles of logic, as laid down by Aristotle, to texts of the Church fathers. The relevant texts are grouped by reference to their similarity (*similia*), or contrariety (*contraria*) and reasoning *per analogiam* or *a contrario* is applied, while distinctions (*distinctiones*) are introduced explaining the differences between the texts. This so-called scholastic method, which could be applied to any authoritative text, whether in the field of theology, philosophy, medicine or law, prevailed throughout the Middle Ages and remained influential even after the end of this period.

[14] The *commentum* was rather condensed, whilst the *lectura* was a full report on the lecture that included all that was said and done in the lecture hall.

teacher posed a question, either a theoretical one or one derived from legal practice, and his students offered opposing views. This was meant to teach students to analyse a legal problem and to argue their case in a logical and structured way. A further type of commentary, which did not originate in the classroom, was the *summa*. The *summae* are synopses or summaries of contents of particular parts or the whole of Justinian's work.[15] Unlike the above-mentioned *commenta* or *lecturae*, these are systematic works that do not follow the order of the issues in the original texts but establish their own order with respect to the fragments within the title they treat. Other forms of juristic literature included: works clarifying conceptual distinctions arising from the texts (*distinctiones*)—these comprised a series of divisions of a general concept into subcategories that were carefully defined and explained until all the implications of the concept were elucidated; collections of conflicting juristic interpretations (*dissensiones dominorum*—the term *domini* referred to medieval jurists); anthologies of opinions on various legal questions connected with actual cases (*consilia*); cases constructed to exemplify or illustrate difficult points of law (*casus*); collections of noteworthy points (*notabilia*) and statements of broad legal principles drawn from the texts (*brocarda* or *aphorismata*); and short monographs or treatises (*summulae* or *tractatus*) on specific legal topics, such as the law of actions and legal procedure.[16]

The interpretation and analysis of Justinian's legislative works was the exclusive preoccupation of the Bolognese jurists until the late thirteenth century. Among the successors of Irnerius, the most notable were Bulgarus,[17] Martinus Gosia,[18] Jacobus and Ugo (renowned as the 'four doctors of Bologna'), Azo, Rogerius, Placentinus, Vacarius, John Bassianus, Odofredus and Accursius. Azo became famous for his influential work on Justinian's Code, known as *Summa Codicis* or *Summa Aurea*.[19]

[15] The *summae* were similar to the *indices* composed by the jurists of the law schools in the East during the late imperial era.

[16] Of particular importance were works dealing with the law of procedure (*ordines iudiciarii*). Since the *Corpus Iuris Civilis* does not contain a comprehensive section on the law of procedure, these works sought to record and compile all the relevant material on legal procedure in general and on specific actions, and to provide guidance on how to initiate a claim in law. One of the best-known works of this kind is the *Speculum iudiciale* of Wilhelmus Durantis (*c.* 1270).

[17] Bulgarus advocated the view that Roman law should be interpreted according to the strict, literal meaning of the text. From the beginning of the thirteenth century, this approach seems to have prevailed. Among Bulgarus's followers were Vacarius, who went to teach in England, and Johannes Bassianus, the teacher of Azo.

[18] In contrast to Bulgarus, Gosia held that the Roman law texts should be interpreted liberally, that is, according to the demands of equity and the needs of social and commercial life. Bulgarus also recognized the role of equity, which for him pertained to the 'spirit' of the law or the intent of the legislator; Gosia, on the other hand, understood equity in the Aristotelian sense, that is as a corrective principle of the law in exceptional cases. Gosia's followers included Rogerius and Placentinus, who had been students of Bulgarus.

[19] The importance of Azo's *Summa Codicis* was reflected in the popular saying: '*Chi non ha Azo, non vada a palazzo*', which means that in some places a man could not be admitted as an advocate unless he possessed a copy of Azo's *Summa*.

In the late twelfth century, Rogerius founded a law school at Montpellier in France (probably together with Placentinus) and this institution became an important centre of legal learning. Vacarius, a Lombard, travelled to England around the middle of the twelfth century and commenced teaching civil law at Oxford. In *c*. 1149 he composed his famous *Liber pauperum* that comprised a collection of texts from the Code and the Digest of Justinian accompanied by explanatory notes. The aim of this work was to introduce the Roman law of Justinian to the poorer students in England.

The greatest of the late Glossators was the Florentine Franciscus Accursius, a pupil of Azo's, who dominated the law school of Bologna during the first half of the thirteenth century. Accursius produced the famous *Glossa Ordinaria* or *Magna Glossa*, an extensive collection or *apparatus* of glosses from earlier jurists covering the entire Justinianic codification and supplemented by his own annotations.[20] The *Glossa Ordinaria* both summarised and made obsolete the whole mass of glossatorial writings from the preceding generations of jurists. It represented the culmination of the Glossators' work and gained rapid acceptance in Italy and other parts of Europe as the standard commentary on Justinian's texts, providing guidance for those engaged in the teaching and practice of law.[21] The *Glossa Ordinaria* was regularly published with editions of the *Corpus Iuris Civilis*, so that they were received together throughout the Continent. With the publication of Accursius's Great Gloss, the contribution of the School of the Glossators to the revival of Roman law ceased but their methods were still applied in the teaching of law at Bologna and elsewhere for a long time.

The Glossators' approach to Roman law is characterised by its lack of historical perspective. Neither the fact that Justinian's codification had been compiled more than 500 years before their own time, nor the fact that it comprised extracts of an even earlier date meant much to them. Instead, they perceived the *Corpus Iuris Civilis* as one body of authoritative texts and paid little attention to the fact that the law actually in force was very different from the system contained in Justinian's texts. This attitude was reinforced by the theory that the Holy Roman Empire was a successor to the ancient Roman Empire—a theory that the Glossators tended to support.[22] It was also associated with the fact that the Glossators' interest in law was chiefly academic and their learning was quite remote from practical affairs.[23] Being true medieval men, the Glossators regarded Justinian's texts in much the same way as theologians regarded the Bible or contemporary scholars viewed the

[20] The work comprised about 96,000 glosses.

[21] The importance of Accursius's gloss was manifested in the popular saying: '*Quod non adgnovit glossa, non adgnoscit curia*', which means that a rule unknown to the *Glossa Ordinaria* was also not recognized by a court.

[22] This is evidenced by the fact that the Glossators added to the *Codex* constitutions of the German Emperors Frederick Barbarossa and Frederick II.

[23] The general attitude of the Glossators was not affected by the fact that their teachings exercised an influence on the statutory law of Italian cities and entered the practice of law through their graduates who were appointed to the royal councils or served as judges in local courts.

works of Aristotle. Just as Aristotle was treated as infallible and his statements as applicable to all circumstances, the texts of Justinian were regarded by the Glossators as sacred and as the repository of all wisdom. The Glossators have been subjected to the criticism that they neglected both the developing canon law and the statutory law enacted by local political bodies, especially in the Italian city-states. They were entirely preoccupied with the study of Roman law, which for them represented a system of legislation more fully developed than either the nascent canon law or the contemporary statutory law. Nevertheless, the Glossators did succeed in resurrecting genuine familiarity with the whole of Justinian's codification and their work prepared the ground for the practical application of the legal doctrines it contained. Their new insight into the workings of Roman law led to the development of a true science of law that had a lasting influence on the legal thinking of succeeding centuries.[24]

7.3.2 The Commentators

By the close of the thirteenth century, the attention of the jurists had shifted from the purely dialectical analysis of Justinian's texts to problems arising from the application of the customary and statute law and the conflicts of law that emerged in the course of inter-city commerce. The enthusiasm for the study of the ancient texts that had enticed many students and scholars to Bologna in the twelfth century now waned, and the place of the Glossators was assumed by a new kind of jurists known as Post-glossators (*post-glossatores*) or Commentators (*commentatores*). The new school with chief centres at the universities of Pavia, Perugia, Padua and Pisa, reached its peak in the fourteenth century and remained influential until the sixteenth century.

The rise of the Commentators' school was not unrelated to the new cultural and political conditions that emerged in the later part of the thirteenth century. Of particular importance was the gradual erosion of the traditional dualism of a universal Church and a universal Empire as a result of the crises affecting both institutions[25]; and the growing strength of nation and city-states in Europe, which

[24] On the school of the Glossators see O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), 42 ff. P. Vinogradoff, *Roman Law in Medieval Europe* (Oxford 1929, repr. 2001), 32 ff. J. A. Clarence Smith, *Medieval Law Teachers and Writers* (Ottawa 1975); R. L. Benson and G. Constable (eds), *Renaissance and Renewal in the Twelfth Century* (Cambridge Mass. 1982); D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 203–6; P. Stein, *Roman Law in European History* (Cambridge 1999), 45 ff. E. Cortese, *Il rinascimento giuridico medievale* (Rome 1992); W. Kunkel and M. Schermaier, *Römische Rechtsgeschichte* (Cologne 2001), 230 ff. H. Lange, *Römisches Recht im Mittelalter,1: Die Glossatoren* (Munich 1997); H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen im europäischen Kontext* (Heidelberg 2005), 36–53.

[25] The last emperor of this period who was able to maintain a unitary view of the Empire was Frederick II of Swabia (1194–1250). His successors concentrated their efforts on consolidating

were able to develop their political structures with little interference from higher universal entities. During the same period, scholastic philosophy reached its pinnacle with the work of the catholic theologian Thomas Aquinas (1225–1274), who synthesized Aristotelian philosophy and Christian theology into a grand philosophical and theological system. The new dialectic that this philosophy forged was not restricted to theological-metaphysical speculation but permeated the study of both public and private law.

Unlike the Glossators, the Commentators were not concerned with the literal reading and exegesis of Justinian's texts in isolation but with constructing a complete legal system by adapting the Roman law of Justinian to contemporary needs and conditions. The positive law that applied in Italy at that time was a mixture of Roman law, Germanic customary law, canon law, and the statute law of the empire and the various self-governing Italian cities. The Commentators endeavoured to integrate these bodies of law into a coherent and unitary system. In executing this task, they abandoned the excessive literalism of the early Glossators and sought to illuminate the general principles of law by applying the methods of rational inquiry and speculative dialectics—thereby building an analytic framework or 'dogmatic construction' of law. Furthermore, in their roles as legal consultants and administrators, they contributed significantly to the development of case law, which also provided a fertile ground for the progressive refinement and testing of their concepts and analytical tools. Indeed, many of their theoretical propositions and dogmatic constructions evolved out of the pressures of actual cases. On the other hand, since the Commentators were mainly concerned with the development of contemporary law, they tended to pay scant attention to the primary sources of Roman law. Thus, the synthesis that occurred was between the non-Roman elements and the Roman law of Justinian as expounded by the Glossators. Systematic treatises and commentaries were written based on this body of law, especially in areas of the law where there was a need for the development of new principles for legal practice.[26]

Among the earliest Commentators was Cino of Pistoia (1270–1336), a student of the French masters Jacques de Revigny and Pierre de Belleperche. Cino began his teaching career at Siena, having been for about 10 years active in practice, and moved to Perugia in 1326. There he composed his great commentary, the *Lectura super Codice*, which continued to be read and cited for more than a century.[27]

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their rule in Germany rather than on governing the Empire as a universal political entity. The crisis that affected the Church is evidenced by, among other things, the transfer of the papal seat to Avignon, where the Pope remained subject to the control of the French kings for about seventy years (1309–1377).

[26] The increased attention to the needs of legal practice is evidenced in the development of the *quaestio disputata*: from the middle of the thirteenth century onwards, jurists increasingly based their *quaestiones* on local statute law or even local custom, which were then analysed by means of the methods of the civil law.

[27] Cino's method consisted of several successive stages: (a) the literal rendition of a legislative text (*lectio literae*); (b) the subdivision of the text into its component provisions (*divisio legis*); a summary of the content of the text (*expositio*); examples of practical cases to which the text was

At Perugia Cino was the master of Bartolus of Saxoferrato, the most influential of the Commentators and one of the great jurists of all time.

Bartolus (1314–1357) obtained his doctorate at Bologna and lectured at Perugia and Pisa, where he also served as judge. He produced a monumental commentary on the entire *Corpus Iuris Civilis*, which, like Accursius's Great Gloss, was acknowledged as a work of authority and extensively used by legal practitioners and jurists throughout Western Europe. Bartolus also dictated legal opinions and composed a large number of monographs on diverse subjects. His reputation among his contemporaries was unsurpassed and his writings came to dominate the universities and the courts for centuries. In Italy, where the doctrine of *communis opinio doctorum* operated (whereby the solution supported by most juristic authorities should be upheld by the courts), the opinions of Bartolus were regarded to possess the same weight as the Law of Citations had accorded to the works of Papinian.[28]

Another influential jurist of this period was Baldus de Ubaldis (*c.* 1327–1400), a pupil of Bartolus. Baldus taught at Bologna, Perugia and Pavia and was also much involved in public life. Unlike Bartolus, he was a canonist and a feudalist as well as a civilian.[29] He was best known for his opinions (*consilia*) that proposed solutions for problems arising from actual cases, especially cases involving a conflict between Roman law and local laws and customs.[30]

The Commentators were remarkably flexible in their interpretation and application of the Roman texts regardless of the original context. They did not hesitate to apply a text to address a current issue, no matter how obsolete they might know its real meaning to be, if its use could be fruitful. However, when they derived arguments from materials that had little or no relation to current affairs, they were not recklessly distorting Roman law to fit their own needs but were consciously adopting its principles to develop new ideas. Their use of the Roman texts was partly due to a feeling that it was important to support a conclusion by reference

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relevant (*positio casuum*); significant observations derived from the law (*collectio notabilium*); possible counter arguments (*oppositiones*); and, finally, an exposition of the problems that might arise (*quaestiones*). By applying this method, Cino sought to subject a legislative enactment to a dialectical process and a systematic analysis that would bring to light the rationale of the relevant law, while being aware that the pursuit of logic could lead to arguments irrelevant to the actual application of the law.

[28] In Portugal, his writings were declared to have the force of law in 1446. Moreover, lectures on his work were established at Padua in 1544 and at Ferrara in 1613. The extent of Bartolus's influence is expressed in the saying: '*nemo jurista nisi Bartolista*', which means one cannot be a jurist unless one is a follower of Bartolus.

[29] His work includes commentaries on the Decretals of Gregory IX and the *Libri Feudorum*. In this connection, it should be noted that in the time of Baldus there was a closer connection between civil law and canon law. It was customary for a student to engage in the study of both subjects and thus become doctor of both laws (*doctor utriusque iuris*).

[30] The *consilium*, the advice given by a law professor on a practical problem, evolved as the most important form of legal literature during this period, as judges were often obliged to obtain such advice before delivering their decision. In the *consilia* problems caused by the interplay between diverse sources of law (local statutes, customs, etc) are tackled through the Roman law jurists' techniques of interpretation and argumentation.

to some authority, no matter how reasonable in itself the conclusion might have been.

The reconciliation of the scholarly Roman law and local law that was achieved though the Commentators' work produced what is referred to as 'statute theory', the notion that in the fields of legal practice local statutes were the primary source, while Roman and canon law were supplementary. However, in spite of the priority bestowed on statutory law, the Roman law-based civil law could prevail in various ways. First, a statute might expressly embody elements of Roman law, and to that extent Roman law shared in the statute's primary authority. Second, a statute might contain technical terms or concepts, which would in almost all cases be construed in the civilian sense, especially since it was accepted that statutory enactments had to be interpreted in such a way as to involve the least possible departure from the civil law. Even when a statute required strict interpretation of its text, it could often be argued that it required declaratory interpretation in light of other available legal sources.

The Commentators succeeded both in adapting Roman law to the needs of their own time and in imbuing contemporary law with a scientific basis through the theoretical elaboration of Roman legal concepts and principles.[31] Of particular importance was their contribution to the development of criminal law, commercial law, the rules of legal procedure and the theory of conflict of laws. It was the Commentators who constructed on the basis of the Roman texts on criminal law a legal science and who created a general theory of criminal responsibility. It was they who developed commercial law in such areas as negotiable instruments or partnership; who articulated the concept and principles of international private law; who devised the detailed rules of romano-canonical procedure on the basis of the Roman *cognitio* procedure; who formulated doctrines of legal personality for entities other than human beings; and who gave substance to the notion of the rights of a third party to a transaction and to the law of agency. The work of the Commentators played a major part in the creation of the *ius commune* and enabled the reception of Roman law throughout Western Europe in the fifteenth and sixteenth centuries.[32]

[31] In the words of the German jurist Paul Koschaker, "[the Commentators] drew from the treasures of Roman wisdom and legal technique that could be used at the time and made of it a basic part of the law of their time, thus preparing the unification of Italy in the field of private law; they in addition made of Roman law the substratum of a legal science, which was later to become European legal science." *Europa und das Römische Recht* (Munich and Berlin 1953), 93.

[32] On the school of the Commentators see O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), 59 ff. P. Stein, *Roman Law in European History* (Cambridge 1999), 71–74; D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 206–8; F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), 55 ff. W. Kunkel and M. Schermaier, *Römische Rechtsgeschichte* (Cologne 2001), 232 ff. N. Horn, "Die Legistische Literatur der Kommentatoren und der Ausbreitung des gelehrten Rechts" in H. Coing (ed.) *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. I: Mittelalter (1100–1500), Die gelehrten Rechte und die Gesetzgebung* (Munich 1973), 261–364; G. Wesenberg and G. Wesener, *Neuere deutsche Privatrechtsgeschichte* (Vienna and Cologne

7.4 The Development of Canon Law

During the fifth century, the weakness of imperial authority in the West led to the strengthening of the Church and its acquisition of greater political power. As the Roman system of administration disintegrated everywhere, the Church assumed many of the functions of the civil government. Since there was nobody left in Rome who could wield greater power, the bishop of Rome rose to a position of supreme authority. In the course of time, the Roman Catholic Church evolved into a grand international organization that was united, disciplined and thoroughly centralised, with an elaborate administrative structure and a comprehensive system of law courts and officials. In its early formative period, the institutionalised Church borrowed freely from the structure, general concepts and detailed rules of Roman law. It endeavoured to formulate laws to regulate its constitution and to govern the conduct of its members as precisely and as carefully as did the Roman emperors. Therefore, the Church functioned as a means for preserving and disseminating much of the Roman legal system. The growth of the Church and the sustained use of Roman law were interconnected: the Church organization was shaped by Roman law whilst the development of Roman law in the West was affected by the medium (the Church) through which it was transmitted. Out of the interaction between Roman law and Christian ideas, there emerged the law of the Church or canon law. Until the revival of Roman law in the eleventh and twelfth centuries, the Church law was the most important universalising factor in Western Europe. Elements of Church law were incorporated into the various legal codes promulgated by Germanic kings in the West and into the legislation of the Carolingian and Holy Roman Empires. Moreover, during the early Middle Ages the Church claimed and acquired jurisdiction for its own courts (either exclusive or concurrent with that of secular authorities) over certain categories of persons and areas of the law.[33] Throughout the Middle Ages the limits of the jurisdiction granted to the Church tribunals was a matter of constant dispute between Church and secular authorities. Eventually, the ecclesiastical courts were deprived of their civil jurisdiction but meanwhile many of the rules and procedures they had applied were adopted by the secular civil courts.

The chief sources of Church law were the decretals of the Popes (the acts through which the Popes, as heads of the Church, exercised their legislative, administrative and judicial powers), the canons of the Church councils, and various patristic writings concerned with matters of administrative policy and Church doctrine.[34] From the fourth century, several compilations of Church law appeared

1985), 28–39; H. Lange and M. Kriechbaum, *Römisches Recht im Mittelalter. Band II, Die Kommentatoren* (Munich 2007).

[33] The jurisdiction of ecclesiastical courts embraced, for example, matrimonial causes and disputes relating to hereditary succession.

[34] The Church drew a distinction between two fundamental categories of law: divine and human. Divine law is thought to have its origin in God's will and is further divided into positive law

in the West and the most important were the *Collectio Dionysiana* (composed in Rome by the monk Dionysius Exiguus on the basis of Apostolic and conciliar canons) and the *Hispana* that were compiled in the early sixth and early seventh centuries respectively. Early in the ninth century an extended version of the *Collectio Dionysiana*, known as *Dionysio-Hadriana* (attributed to Pope Hadrian I), was declared by Charlemagne as the chief code of Church law that applied throughout his empire. In the ninth century, there also appeared a collection of both fictitious and genuine canons that became known as the *False Decretals* (this included the so-called 'Donation of Constantine', a forged document that alleged Emperor Constantine had transferred considerable secular power to the Pope). The aim of this work was apparently to strengthen the claim of Papacy and Church authorities to temporal power. Its legal importance lies in the fact that both the spurious and the genuine materials it contained were utilized by later canonists in their development of the canon law system. Another important collection of the same period was the *Lex Romana canonice compta*, which embodied the rules of Roman law adapted and applicable to the ecclesiastical legal system.[35] Reference should also be made to the *Collectio Anselmo dedicata* (*c.* 882), the first compilation to contain the canonical and Roman texts of Justinian's age arranged in a systematic form. The last two works testify to the process of mingling, interaction and mutual influence of Roman and canon law. This interrelationship may be described as a true reception, through which Roman law norms came to be part of the legal system of the Church.

As noted, the eleventh and twelfth centuries witnessed the revival of legal studies in Western Europe. During the same period, canon law also became the object of systematic study. The task of the canonists was to amalgamate and harmonize the mass of canons contained in earlier canonical collections, and this involved eliminating contradictions and updating matters as necessary. Their ultimate aim was to develop, expand and systematise canon law as an independent body of law and not merely as a set of rules for ecclesiastics. The work that succeeded in transforming canon law into a complete system was the *Decretum* or *Concordia discordantium canonum*, composed by Gratian (a monk at the monastery of Santi Felice e Naborre in Bologna) around the middle of the twelfth century. The *Decterum Gratiani*, as this work became known, was both a code of and a treatise on canon law. It presented in a systematic way and without inconsistencies and contradictions the rules governing priesthood, ecclesiastical jurisdiction,

(embodied in the Bible and in tradition) and natural law (the rules derived from nature, discovered by human reason and applicable equally to all human beings). Human law is divided into canon law, consisting of decretals and canons, and civil law. The earlier collections of Church law were mainly composed of Apostolic and conciliar canons; in the later works, the Papal Decretals comprised the bulk of the material.

[35] The principal sources of this work are the Institutes, the Code and, to a greater extent, the Novels of Justinian.

Church property, marriage and the sacraments and services of the Church.[36] Gratian's method of arranging the materials was similar to that followed by the drafters of Justinian's Institutes.[37] Although it was published as an unofficial private work, Gratian's *Decretum* was soon recognized as an authoritative statement of the canon law as it stood in his era. Like the codification of Justinian, it became the object of systematic study in the universities.[38] Students could obtain their degree either in civil law or in canon law, or they could qualify as bachelors of both civil and canon law.

The canon lawyers initially welcomed the revival of the study of civil law, since canon law, it seemed, could learn much from the civil law. In time, however, the two systems became rivals. Civilian and canonist jurists were ranged on opposite sides in the great struggle for supremacy between the empire and the Papacy, which in one form or another lasted throughout the greater part of the Middle Ages. Just like the supporters of the empire endeavoured to buttress the doctrine of the supremacy of the state over the Church by utilizing principles derived from Justinian's texts, the supporters of the Papacy relied on the *Decretum* and earlier patristic writings to defend the hegemony of the Church and to justify the papal claims to temporal power.[39]

In the period following the publication of the *Decretum*, a number of compilations supplementary to Gratian's work were issued by the Popes. These embraced the *Liber Extra*, also known as *Liber Extravagantium*, of Gregory IX, published in 1234[40]; the *Liber Sextus Decretalium*, published by Boniface VIII in 1298[41]; and the *Constitutiones Clementinae* of 1317.[42] In 1501, a private collection of decretals that were not included in earlier compilations was published under the title

[36] The official title of this work (*Concordia discordantium canonum*) expresses very clearly its purpose: to reconcile apparently conflicting texts so as to form one authoritative whole. This was done with the help of the well-established dialectic method: through arguments *per analogiam* and *a contrario* and by devising *distinctiones* capable of explaining the similarities and differences between the relevant texts.

[37] The work is divided into three parts; these, in turn, are subdivided into *distinctiones* or *causae*, with the latter again divided into *canones*.

[38] Canonist jurists added an extensive body of *glosses* and commentaries, which were later synthesized in the *glossa perpetua* of the canonists Giovanni Teutonico and Bartolomeo da Brescia.

[39] In this debate the canonists had one advantage. As F. Tout has observed, "While the civilian's Empire was a theory, the canonist's Papacy was a fact. As living head of a living system, the Pope became a constant fountain of new legislation for the canon law, while the civil law remained as it had been in Justinian's time." *The Empire and the Papacy* (London 1921), 220.

[40] This was an official collection, in five books, of papal constitutions and decretals, composed by the Spanish Dominican monk Raymond of Peñafort along the lines of Justinian's compilation. The work was promulgated by the papal bull *Rex pacificus* on 5 September 1234, and was sent to the Universities of Bologna and Paris to be studied and to be used in the courts.

[41] The *Liber Sextus* was promulgated by the bull *Sacrosanctae Romanae Ecclesiae* on 3 March 1298.

[42] This collection was composed by order of Pope Clement in 1313 and was completed and promulgated (by the bull *Quoniam Nulla*) under Pope John XXII in 1317.

Extravagantes. All the above works were republished in 1580 by Pope Gregory XIII as parts of an official collection comprising the entire body of canon law (*Corpus Iuris Canonici*), which became the ecclesiastical equivalent of Justinian's *Corpus Iuris Civilis*.[43] Like Roman law, canon law played an important part in the development of law in Europe. Its influence is particularly noticeable in the areas of the law of marriage, the law of succession and the law of obligations. Moreover, canon law has had a considerable influence in the fields of criminal law and the law of procedure.[44]

7.5 The Growth of Commercial Law

As observed earlier, from the twelfth century onwards there occurred a large-scale expansion of economic activity. The development of towns into major commercial and industrial centres, first in Italy and later in other parts of Europe, stimulated maritime and overland trade, and engendered the introduction of new forms of business enterprise.[45] Since the existing systems of law were no longer adequate to meet the needs of commercial life, informal tribunals were established in many cities by guilds[46] and merchants' associations. These tribunals heard cases by summary process and in accordance with rules that were practical, fair and based upon the usages actually observed by businessmen in their dealings with one another. These rules were recognized and applied by secular and ecclesiastical authorities as customary law, and they evolved into a body of internationally

[43] Each body of law retained its distinctive character, content and field of application. Intrinsic to both systems was a claim of universality, a factor that helps to explain their wholesale reception as elements of the common law (*ius commune*) of Continental Europe.

[44] On the development of canon law see O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), 72 ff. P. Stein, *Roman Law in European History* (Cambridge 1999), 49–52; J. A. Brundage, *Medieval Canon Law* (London and New York 1995); F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), 47–54; K. W. Nörr, 'Die kanonistische Literatur' in H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. I: Mittelalter (1100–1500), Die gelehrten Rechte und die Gesetzgebung* (Munich 1973), 365–382; E. J. H. Schrage, *Utrumque Ius. Eine Einführung in das Studium der Quellen des mittelalterlichen gelehrten Rechts* (Berlin 1992), 90–109.

[45] Since international trade was for a long period dominated by such Italian cities as Venice, Florence, Genoa and Pisa, it is unsurprising that most of commercial institutions, if they did not originate in Italy, had their modern development there.

[46] The guild was an autonomous corporation with monopolistic powers over a particular trade or craft: only those enrolled (the masters of the crafts, their co-workers and apprentices) could legally practice the trade. Furthermore, it alone had the power to adjudicate commercial disputes among its members. In the course of time guilds became, in many towns, the basic units of the communal government and thus enrolment in a guild was often an important prerequisite to participation in public life.

recognized law, known as the Law Merchant, which succeeded in penetrating areas where even Roman law met with resistance.[47] This common commercial law, like Roman law and canon law, formed another vital strand in the law of Western Europe, not excluding in this case the law of England.[48]

7.6 Feudal Law

Feudal law comprised the body of rules governing the relationship between a feudal lord and his vassal and the tenure by which the vassal held the land he received from the lord. The system originated in Germanic customary law and was developed in France during the Carolingian era. The three greatest monarchs of the late twelfth and early thirteenth centuries—Henry II of England and Normandy (1154–1189), Philip Augustus of France (1180–1223) and Frederick Barbarossa of Germany (1152–1190)—all promulgated important laws dealing with diverse feudal matters. In the thirteenth and fourteenth centuries, treatises on feudal law were composed by Romanist jurists and several works appeared that recorded local customs in various parts of Europe. It is important to note here that in France and England feudal law was woven into the whole legal fabric, whilst in Germany it was treated as a distinct system whose rules were applicable only to certain estates or individuals and were administered by special courts. However, in all three countries feudal law did not operate independently of other bodies of law: all secular systems (feudal, mercantile, urban and royal) influenced and overlapped one another.

One of the most distinctive features of feudal law was its combination of political and economic rights: the right of government, the right of jurisdiction and the right to use and dispose of land.[49] The point of departure was the legal situation that arose when a person, the vassal, received a piece of land from the lord as a *beneficium* and, in return, undertook to provide personal service, usually of a military character. The personal bond that was created entailed duties as well as rights for both sides: the vassal owed the lord whatever good faith required, usually aid and counsel (*auxilium* and *consilium*), and the lord in his turn undertook the duty to protect and maintain the vassal. The term tenure is used to describe the grounds of a continuous possession of land, or of anything that could be equated

[47] For example, in England, where Roman law was unable to displace the common law, the merchant law was adopted as part of the law of the land because it was better suited to the needs of domestic and international commerce.

[48] For a closer look at the development of the Law Merchant see O.F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), 90 ff.; D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 228–30; J. Kirschner (ed.), *Business, Banking and Economic Thought in the Late Medieval and Early Modern Europe* – Selected studies of Raymond de Roover (Chicago 1974).

[49] An important distinction in this area was that between the greater and the lesser right of jurisdiction, depending on whether capital punishment was available as an option or not.

with land.[50] In a purely feudal society land was not owned by anyone; it was held by superiors in a ladder of tenures leading to the king as the supreme lord. Thus, a person could have certain rights in land valid against his lord, and the lord could have certain rights in the same land against his lord, as well as other rights valid against that lord's lord, who might be the king. The rules concerning feudal hierarchy and rights of succession were an important part of feudal law. Moreover, from an early time, it had been recognized as a rule of customary feudal law that if a vassal broke faith with his lord the fief reverted to the lord.[51] Important rights associated with feudalism were the right to exercise governmental and administrative powers, and the right to hold court and declare the law. Besides the immunities in matters of taxation and jurisdiction granted to local lords, the later also possessed powers of policing, judging and inflicting punishment in the territories under their control, especially during the ninth and tenth centuries. In Germany where, as previously noted, feudal law (*Lehnrecht*) remained distinct from the law of the land (*Landrecht*), the feudal courts developed and operated side by side with the other courts. By contrast, in France legal procedure became totally feudalized after the death of Charlemagne in the early ninth century.[52]

The move towards the systematization of feudal law began in the twelfth century, when the Lombard feudal law that applied in Italy became the subject of academic inquiry. The Lombard sources of law, such as the *Lombarda* and the *Liber Papiensis*, were explained and commented on by jurists at Pavia and Bologna and around 1150 a collection of feudal law, the *Libri Feudorum*, appeared in Milan.[53] In the period that followed the study of feudal law became part of the study of Roman law and the *Libri Feudorum* were commented on and systematized by several legal scholars, such as Pillius of Medicina, James de Ardizzone and Accursius. The latter produced an authoritative gloss to the *Libri* in the 1220s, which were eventually included in the final volume of the *Corpus Iuris Civilis*, which contained Justinian's Novels. In this way, the main body of feudal law became part of the *libri legales*, the legal books of the learned law, and continued to be studied by scholars and used by practitioners until the end of the sixteenth century or even later.[54]

[50] 'Tenure' is derived from the Latin work *tenere*: to hold.

[51] The Norman word for such a breach of faith was 'felony'. In England the most serious crimes came to be referred to as felonies, because they were considered to involve breaches of the fealty owed by all people to the king as guardian of the peace of the realm.

[52] In England after the Norman conquest the local courts came under the control of the kings and thus royal justice was able in a fairly short period of time to supplant feudal justice.

[53] The *Libri Feudorum* was based mainly on imperial legislation in the kingdom of Italy but also embodied other materials, including decisions from various feudal courts.

[54] In the later half of the twelfth century, a book attributed to Glanvill appeared in England, which contained the customary feudal law of the realm, with references to the Institutes of Justinian. Nearly half a century after Glanvill, the German Eike von Repgow published an account of feudal law as part of his *Sachsenspiegel* (1235). Moreover, feudal and common law were often combined, as we can see in the famous *Customs of Beauvaisis* (a region north of Paris), published by the French jurist Philippe de Beaumanoir in about 1280.

Once feudal law became systematized, the specificity of its norms increased and the uniformity of its general principles gradually overshadowed local differences. The reification of the relevant rights and obligations superseded the personal aspects of the lord-vassal relationship and also gave the vassal a greater degree of economic autonomy in managing his fief. Special emphasis was now placed on the reciprocity of the rights and obligations between the parties, as well as on the participation of the parties in the proceedings through which disputes over such rights and obligations were adjudicated. In a word, the characteristic features of feudal law were formalized as elements of its autonomous development in time. Nevertheless, in comparison with Roman and canon law, feudal law was less systematic, less integrated and less scientific. It was largely customary law and as such was treated with more skepticism and as more open to correction and even repudiation than the learned law pertaining to Justinian's main *Corpus* and Gratian's *Decretum*.[55]

7.7 The Reception of Roman Law

The thousands of students from all over Europe who had studied at Bologna and other Italian universities conveyed to their own countries the new legal learning based on the revived Roman law. Throughout Western Europe (in France, Spain, the Netherlands, Germany and Poland), universities were established where scholars trained in the methods of the Glossators and the Commentators taught the civil law on the basis of Justinian's texts. Their students formed a new class of professional lawyers whose members came to occupy the most important positions in both the administrative and judicial branches of government. Before the twelfth century, justice was administered by untrained jurors and based on local legal sources. In contrast, justice was now administered by professional judges appointed by a sovereign who could apply Roman law if local sources (either customary or statutory) were deficient. Through the activities of university-trained judges and jurists, the Roman law expounded by the Glossators and the Commentators entered the legal life of Continental Europe. It formed the basis of a common body of law, a common legal language and a common legal science—a development known as the 'Reception' of Roman law.

Like the Latin language and the universal Church, the received Roman law served as an important universalising factor in the West at a time when there were no centralised states and no unified legal systems but a multitude of overlapping and often competing jurisdictions and sources of law (local customs and statutes,

[55] On the development of feudal law see O.F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), 26 ff.; D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 199–201; M. Bloch, *Feudal Society*, 2nd ed. (London 1962); P. Stein, *Roman Law in European History* (Cambridge 1999), 61–62.

feudal, imperial and ecclesiastical law). However, the course of the reception was complex and characterised by a lack of uniformity. This derived from the fact that the way in which Roman law was received in different parts of Europe was affected to a great extent by local conditions, and the actual degree of Roman law infiltration varied from region to region. In areas of Southern Europe that had incorporated Roman law as part of the applicable customary law, the process of the reception may be described as a resurgence, refinement and enlargement of Roman law. This occurred, for example, in Italy where the influence of Roman law had remained strong and in Southern France where the customary law that applied was already heavily Romanised. In Northern Europe, on the other hand, very little of Roman law had survived and the process of the reception was prolonged with a much more sweeping impact in some regions at its closing stages. The common law (*ius commune*) of Europe that gradually emerged towards the close of the Middle Ages was the result of a fusion between the Roman law of Justinian (as elaborated by medieval scholars), the canon law of the Church and Germanic customary law. The dominant element in this mixture was Roman law, although Roman law itself experienced considerable change under the influence of local custom and the statutory and canon law.

The universal *ius commune* was juxtaposed with the *ius proprium*, the local laws of the diverse medieval city-states and other political communities. Local law sometimes assumed the form of statute or, especially in earlier times, grew out of custom.[56] But the universal and local laws were not necessarily antithetical; they were complementary and each interacted with and influenced the other. Statutory enactments born out of the need to address situations not provided for by the *ius commune* were often formulated and interpreted according to the concepts developed by scholars of the *ius commune*. The scholars, in turn, with their concern for concrete problems of social and commercial life and the need to deal with the law as it actually existed, took the local law into consideration. In their roles as judges, lawyers and officials, jurists trained in Roman law at Bologna and other law schools regarded local law as an exception to the *ius commune*, and therefore as something

[56] The first compilations of city customary law appeared in the second half of the twelfth century in Venice and Bari. These collections were subsequently superseded by statutory enactments, i.e. legislation issued by a local legislative body. An enactment of this kind (*statutum*) was distinguished from a law of theoretical universal application (*lex*), which could be promulgated only by the emperor. In principle, a *statutum* was subordinate and could only supplement but not alter or derogate from a *lex*. In fact, however, local statutes that were irreconcilable with imperial laws often prevailed in the legal practice of the area or city in which they had been enacted. An important example of legislation issued by a monarch is the *Liber Constitutionum Regni Siciliae*, also known as *Liber Augustalis*, a legal code for the Kingdom of Sicily promulgated by Emperor Frederick II in 1231. This code remained the principal body of law in the Southern Kingdom until the eighteenth century. Royal legislation was also enacted in the County (later Duchy) of Savoy, the provinces of Sardinia, the Patriarchate of Aquileia and many other areas. In the domains of the Church, the most important legislative enactment was the *Constitutiones Sanctae Matris Ecclesiae*, also informally known as *Constitutiones Aegidianae*, issued in 1357 by Cardinal Gil of Albornoz, the legate to the papal state during Pope's residence in Avignon.

requiring restrictive interpretation. Furthermore, they tended to interpret local law based on concepts and terminology derived from Roman law, thereby bringing it into line or harmonizing it with the *ius commune*.[57]

7.7.1 The Reception of Roman Law in France

In the period between the sixth and the ninth centuries, three bodies of law applied in France: under the system of the personality of the laws, the Germanic sections of the population were governed by their own laws and customs, whilst the Roman inhabitants of the country continued to live according to Roman law; at the same time, everyone in France (irrespective of ethnic origin) was bound by the laws promulgated by the Frankish monarchs. In the course of the ninth century, the personal system of laws began to disintegrate (as the fusion of the different races made its application virtually impossible) and yielded to a territorial system. The shift from the system of personality to that of territoriality coincided in time with the expansion and consolidation of the feudal institutions in France. Whilst the territory of every feudal lord was governed by its own customs, the customary law that applied in an area generally tended to derive from the predominant ethnic group. And since the Roman element was dominant in Southern France and the Germanic element prevailed in the North, the whole country was divided into two broad regions: the country of the written law (*Pays du Droit écrit*) in the South, where Roman law as embodied in various sources, such as the *Lex Romana Visigothorum* and later editions of the *Corpus iuris civilis*, prevailed; and the country of customary law (*Pays des Coutumes, droit coutumier*) in the North that featured the application of a variety of local customs with a Frankish-Germanic character. In both zones, the law in force also included elements derived from royal, feudal, and canonical sources.

In the South of France, the land of written law, the common law of the region was essentially Roman law (notwithstanding local differences). The Roman law of Justinian was rapidly received in Southern France and accepted as the living law of the land. This favourable reception was facilitated by the revival of Roman law in the late eleventh and twelfth centuries, and the spread of its study from Bologna to

[57] Even in parts of Europe where Roman law was not received in a normative sense, the conceptual structure created by the Glossators and the Commentators was sometimes employed to give a Roman form to indigenous customary rules. Thus, although the *ius commune* was not adopted in Norway and Hungary, local legislation exhibited a certain Roman influence. For example, the Norwegian Code of 1274 of King Magnus VI, while intended to be a written statement of ancient Viking custom, reflects an influence of Roman-canonical law in its organization and many of its institutions. Similarly, in Hungary the spirit of Roman law exercised an influence on the structure of Hungarian law and the character and development of legal thought. In areas as far off as the Ukraine and Belarus, where there was no reception, doctrines and practices of Roman law were introduced through the influence of Byzantine law.

Montpellier and other parts of France. In the early twelfth century, a summary of Justinian's Code was produced in Southern France with the designation *Lo Codi* and based on the work of the Glossators. The study of Roman law received a fresh impetus with the establishment of new law schools at Toulouse and Orleans in the thirteenth century. In these schools and the many others that sprang up in the years that followed the civil law was taught on the basis of Justinian's texts.[58]

In the northern regions of France, the country of customary law, a multitude of Germanic customs were in force. Some of these customs applied over a wider area (*coutumes générales*), whilst others were confined to a particular town or locality (*coutumes locales*)—there were 60 general customs and 300 special or local customs. In this part of France, Roman law was regarded as a supplementary system invoked when the customary law was silent or ambiguous. Moreover, in certain areas of the law (such as the law of contracts and the law of obligations) the Roman system had been adopted and perceived as superior to customary law as well as better suited for tackling many new problems that emerged from the expansion of economic activity.

The administration of justice fell in the province of regional judicial and legislative bodies referred to as Parliaments (*Parlements*). In the country of customary law, the case law of the Parliament in Paris acquired special significance. Advocates attached to this body fostered legal development by means of an intensive literary activity that pertained, largely, to the study of case law.[59]

From the beginning of the thirteenth century, the customs of many regions of Northern France began to be recorded. Several collections of customary law appeared, written in the vernacular but modelled on Roman law compilations. Some of these works, such as the *Les Livres de Jostice et de Plet* (The Books of Justice and Pleading), composed around 1260, reflect a strong influence of Roman law. In other works, such as the *Coutumes de Beauvaisis* (the customs of the county of Clermont in Beauvaisis) written in the late thirteenth century, the impact of Roman law is much less noticeable. Moreover, some of these compilations were private whilst others were issued under the authority of various feudal lords (*chartes de coutumes*). In general, the purpose of these works was to compile and present in a clear form the rules of customary law that applied in one or more regions so that these rules could more easily be proved in the courts of law.

[58] The *Ultramontani*, as the jurists at Toulouse, Orleans and Montpellier were referred to, employed essentially the same methods and composed the same types of legal work as their Italian colleagues at Bologna. The first professors of these universities were Frenchmen who had studied at Bologna, but later there were some who had received their training in France (such as Jacques de Revigny and Pierre de Belleperche, both of whom taught at Orleans). These later jurists were more interested in legal theory than the Italian Glossators, and adopted a more historical and more liberal approach to the study of the Roman legal sources. Moreover, they made a significant contribution to non-Roman areas of law, such as penal law and international private law.

[59] In the course of time, the works of the Parisian advocates formed the basis of an extensive body of jurisprudence that was built upon the comparative study of the diverse local customs – a study that also paid attention to the great tradition of Roman law in France.

In order to reduce the confusion caused by the multiplicity of customs, King Charles VII ordered the compilation of the customs of all regions of France in his Ordinance of Montils-les-Tours in 1453. Although the direction proved largely ineffectual, it was repeated by subsequent monarchs and most of the customary law had been committed to writing by the end of the sixteenth century. The consolidation of customary law through its official publication precluded the wholesale reception of Roman law in Northern France, although elements of Roman legal doctrine entered the fixed body of customary law by way of interpretation. Moreover, Roman law continued to apply in areas of private law on which customary law was silent. This interaction of Roman and customary sources infused the law that prevailed in Northern France with a distinctive character.

Although the publication of the customs removed much of the confusion caused by local differences, legal unity was certainly not achieved. In addition to the differences between Northern and Southern France, considerable regional diversity persisted even within each of the main territorial divisions. Legal unity was finally established in France with the introduction of the Napoleonic Code in 1804.

In the course of the 150 years prior to the enactment of the French Civil Code, the academic study of Roman law reached a climax—a development associated with the writings of jurists such as Jean Domat (1625–1695) and Robert Joseph Pothier (1699–1772).

Domat was born in Clermont-Ferrand, where he served as judge until 1681. His best-known work is his *Les loix civiles dans leur ordre naturel*, published in three volumes between the years 1689 and 1694. After an examination of the entire recorded body of legal material (*droit écrit*) of his region (Auvergne), Domat concluded that it was permeated by an internal logic and rationality that pointed to the existence of certain universal or immutable legal principles (*loix immuables*). He noted that these natural principles are reflected best in the norms of private law; public law, on the other hand, is composed to a much larger extent of statutory laws of a changeable or arbitrary character (*loix arbitraries*). Domat asserted that the general principles of Roman law, as embodied in the codification of Justinian, met the criteria of the *loix immuables* and could be ascribed the status of a system. He argued, further, that contemporary French language was capable of expressing this system in a clear and precise way.[60]

Pothier was born and studied in Orleans, where he served as judge and, from 1749, as university professor. His first major work, *La coutume d'Orléans avec des observations nouvelles*, published in 1740,[61] was concerned with the customary law of his hometown. His next important work was a comprehensive treatise on Roman private law, titled *Pandectae justineaneae in novum ordinem digestae cum legibus*

[60] Domat was the first major academic jurist who challenged the connection between Roman law and its original language, Latin. With respect to the order of the various branches of private law, Domat first treated the general rules of law, then persons, property, obligations and, finally inheritance law. For a closer look at Domat's work see C. Sarzotti, *Jean Domat: Fondamento e metodo della scienza giuridica* (Turin 1995).

[61] A revised edition of this work was published in 1760.

codicis et novellae (1748–1752). This was followed by a series of works on a diversity of legal institutions.[62] In his writings, Pothier sought to overcome the problems for legal practice caused by the fragmentation of the law in France by means of a systematic restatement of fundamental Roman law concepts and principles.[63] In this way he contributed a great deal to the process of unification of private law in France.[64]

7.7.2 The Reception of Roman Law in Germany

During the early Middle Ages, the law that applied in Germany was customary law that tended to vary regionally as a result of the shift from the system of personality to that of territoriality of the laws. Some of the customs applied over an entire region, whilst others were confined to a single city, village community or manor. After the establishment of the Holy Roman Empire of the German Nation in the tenth century, imperial law (concerned almost exclusively with constitutional matters) contributed as an additional source of law. Although the German emperors regarded themselves as successors of the Roman emperors and imperial legislation was influenced by the idea of a universal empire, initially there was no attempt to render Roman law applicable to all German regions as a form of common law that could replace local customs. In the twelfth and thirteenth centuries, Germans who had studied at the law schools of Italy and France introduced some knowledge of Roman law into Germany. However, the effect of this activity on the applicable customary laws was limited as Roman law scholars were largely ignorant or contemptuous of the local laws, which they regarded as primitive in both form and substance and as unworthy of the serious attention of the learned.

In the thirteenth and fourteenth centuries, there appeared a number of compilations embodying the customary laws observed in certain regions of Germany. The

[62] These included his *Traité des obligations I et II* (1761–1764); *Traité du contrat de vente* (1762); *Traité des retraits* (1762); *Traité du contrat de constitution de rente* (1763); *Traité du contrat de louage*; (1764); *Traité du contrat de société* (1764); *Traité de cheptels* (1765); *Traité du contrat de prêt de consomption* (1766); *Traité du contrat de dépôt et de mandat* (1766); *Traité du contrat de natissement* (1767); *Traité du contrat de mariage I et II* (1766); *Traité du droit de domaine de propriété* (1772); and *Traité de la possession et de la prescription* (1772). Pothier's works were widely used by jurists and lawyers throughout the eighteenth and nineteenth centuries. An important collection of these works in 11 volumes was published by Dupin in 1824/25.

[63] For example, in his treatise on the institution of ownership Pothier shows how, in a feudal system that encompassed several forms of property and related entitlements, the fundamental Roman law concept of property could be employed to overcome, in theory at least, many of the discrepancies of the current system.

[64] The Code Civil adopted many of the legal solutions proposed by Pothier, especially in the field of the law of obligations. The drafters of the Code also adopted the systematic structure preferred by Pothier, which goes back to the classical Roman jurist Gaius and was followed by Emperor Justinian: persons; things (including obligations and succession); and actions.

most important of these works were the *Sachsenspiegel*, or the Mirror of the Saxons, composed around 1225 by Eike von Repgow and containing the territorial customary law observed in parts of Northern Germany[65]; the *Deutschenspiegel*, or Mirror of the Germans, published about 1260 in Southern Germany; and the *Schwabenspiegel*, or Mirror of the Swabians, a collection of the customs of Swabia published in the late thirteenth century.[66] These works aspired to provide a basis for developing a common customary law for Germany, but the centrifugal tendencies that prevailed were too strong to be overcome by these works. The formulation of a native common law for the entire country based upon Germanic sources was impossible. This derived from the weakness of the imperial power that was exacerbated by the political splintering of the empire in the late thirteenth century, and the multitude and diversity of the local customs. A further obstacle to the attainment of legal unity was the fact that there was no organized professional class of lawyers interested in developing a common body of law. The administration of justice was in the hands of lay judges, the *Schöffen*, who had the task of declaring the applicable law for a particular issue in court by reference to the customary law that applied in each district. However, the pronouncements of the *Schöffen* were only concerned with particular cases and reflected the personal views of laymen who were not necessarily guided by generally established rules or principles—thus, they added to the uncertainty surrounding the application of customary law.

In the fifteenth century, the problems generated by the fragmented nature of the law in Germany became intolerable as commercial transactions proliferated between different territories. Local custom was no longer adequate to meet the needs of a rapidly changing society, and the weakness of the imperial government meant the unification of the customary law by legislative action alone was unthinkable. If a common body of law could not be developed based on Germanic sources, another system offered a readily available alternative, namely Roman law. The acceptance of Roman law in Germany was facilitated by the idea that the Holy Roman Empire of the German Nation was a continuation of the ancient Roman Empire.[67] In this respect, Roman law was viewed not as a foreign system of law but as a system that continued to apply within the empire as its common law. This idea found support in the newly established German universities, where the teaching of law was based exclusively on Roman and canonical sources[68] whilst Germanic customary law was almost completely ignored. Like the jurists of other countries, German jurists regarded Roman law as superior to the native law and existing in

[65] The *Sachsenspiegel*, a work of outstanding quality, achieved great prestige and authority throughout Germany. Modern commentators regard it as the beginning of Germanic legal literature.

[66] Both the Mirror of the Germans and the Mirror of the Swabians reflect some influence of Roman law.

[67] The Emperor of the Holy Roman Empire was at the same time king of Germany and of Italy.

[68] The methods of study and the legal materials used were substantially the same as those employed in Italian universities.

force both as written law (*ius scriptum*) by virtue of the imperial tradition and as written reason (*ratio scripta*) due to its inherent value.

At a practical level, the reception of Roman law in Germany was facilitated by the establishment in 1495 of the Imperial Chamber Court (*Reichskammergericht*) by a legislative act of Emperor Maximilian I (1493–1519). This act focused on the centralisation of the German system of judicial administration and was part of Maximilian's broader political program designed to restore the power of the monarchy and to secure legal and political unity. The new imperial court, which heard appeals from regional and local courts, was directed to decide cases 'according to the imperial and common law and also according to just, equitable and reasonable ordinances and customs'. Since jurists trained in Roman law dominated the composition of the court, the term 'common law' was naturally interpreted as meaning Roman law. The significance of the 1495 legislation was that it formally acknowledged Roman law as positive law in Germany. Pursuant to this law, judges were required to apply Roman law only when a relevant custom or statutory provision could not be proved. In practice, the difficulty in proving an overriding German rule meant that Roman law became the basic law throughout Germany. The model of the Imperial Chamber Court was followed by the territorial courts of appeal established by local princes in Austria, Saxony, Bavaria, Brandenburg and other German states. At the same time, the courts where lay judges still presided increasingly relied on the advice of learned jurists (city advocates, state officials and university professors) for information and guidance concerning local as well as Roman law. In the course of time, the role of the lay judges diminished and the administration of justice was dominated by professional lawyers who had been trained in Roman and canon law at the universities. By the end of the sixteenth century, it had become common practice for judges to seek the advice of university professors on difficult questions of law arising from actual cases. The opinion rendered was regarded as binding on the court that had requested it. This practice (*Aktenversendung*) prevailed until the nineteenth century, entailing the accumulation of an extensive body of legal doctrine that applied throughout Germany.

By the end of the sixteenth century, Roman law had become firmly established as the common law of Germany.[69] Germanic law had largely been rejected in favour of the more advanced Roman system and German jurisprudence had become essentially Roman jurisprudence. The Roman law that was received embodied the Roman law of Justinian as interpreted and modified by the Glossators and the Commentators. This body of law was further modified by German jurists to fit the conditions of the times and thereby a Germanic element was introduced into what remained a basically Roman structure. In some parts of Germany (such as Saxony), Germanic customary law survived and certain institutions of Germanic origin were retained in the legislation of local princes and of cities. Legal practitioners and jurists from the sixteenth to the eighteenth century executed the process of

[69] German scholars use the phrase '*Rezeption in complexu*', that is 'full reception', to describe this development.

moulding into one system the Roman and Germanic law, which led to the development of a new approach to the analysis and interpretation of the Justinianic Roman law—referred to as *Usus modernus Pandectarum* ('modern application of the Pandects/Digest').[70] This approach continued to be followed in Germany, subject to local variations, until the introduction of the German Civil Code in 1900.

7.7.3 *The* Ius Commune *in Italy, the Iberian Peninsula and the Netherlands*

By the close of the fifteenth century, the medieval world of the Italian city-states had evolved into the Kingdom of Naples in the south, the Papal States and Tuscany in central Italy, Piedmont, Lombardy under Milan, the Republic of Venice and a number of lesser states.[71] The Kingdom of Naples was a centralized state with a hierarchy of courts, more akin to France or Spain than the rest of Italy. The continued political fragmentation of Italy did not affect the application of civil law and the working of the courts, which maintained the traditional blending of the Roman law of the Glossators and Commentators, canonical procedure and general and particular custom. The great medieval treatises of Bartolus and Baldus, in particular, continued to enjoy high esteem. The legal literature that emerged in university towns, such as Bologna, Padua, Pavia and Naples, although frequently concerned with local needs, became part of the pan-European *ius commune*—a

[70] Although this approach externally appears to be a continuation of the Bartolist method, under the influence of Legal Humanism (see relevant discussion below) it gave rise to a different doctrine about the sources of law: whereas Roman law continued to be regarded as an important source of law, local law was no longer viewed as an aberration from Roman law but as a further development of Roman law through custom. Thus, the *Usus modernus Pandectarum* elevated the importance of local law, which now became the subject of systematic scientific study. As far as Roman law is concerned, the term *Usus modernus Pandectarum* implies that the jurists' purpose was to apply the Roman legal texts in contemporary legal practice. The representatives of this approach may to some extent have been influenced by the work of the Humanist jurists, but they tended to use the Roman texts ahistorically, as just another source of legal norms. However, there was no general agreement among jurists as to which texts actually applied. It should be noted that the methods of the *Usus modernus* movement were adopted by many French and Dutch jurists. Leading representatives of this movement include Samuel Stryk (1640–1710), a professor at Frankfurt a.d. Oder, Wittenberg and Halle; Georg Adam Struve (1619–1692); Ulric Huber (1636–1694); Cornelis van Bynkershoek (1673–1743); Arnoldus Vinnius (1588–1657); Gerard Noodt (1647–1725); and Johannes Voet (1647–1713). On the *Usus modernus Pandectarum* see F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), 159 ff. D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 225; A. Söllner, "Usus modernus Pandectarum" in H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. II: Neuere Zeit (1500–1800), 1. Teilband, Wissenschaft* (Munich 1977), 501–516; R. Voppel, *Der Einfluß des Naturrechts auf den Usus modernus* (Cologne 1996); H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen im europäischen Kontext* (Heidelberg 2005), 76–83.

[71] These included Siena, Ferrara and Mantua.

process facilitated by the invention of the printing press in the late fifteenth century.[72] Italian scholars of the late fifteenth and early sixteenth centuries, such as Giasone del Maino (1435–1519) and Filippo Decio (1454—*c*. 1535), sought to combine the tradition of the *ius commune* with the ideals of the new humanist learning. After the integration of Italy into the Napoleonic state, the French Civil Code was introduced in the country (1806). Even though the *ius commune* continued to exist even after the restoration of the Italian states following the defeat of Napoleon (1815), a growing number of states began to draw up their own law codes (the so-called *codici preunitari*). The earliest among these, the codes of the Kingdom of Naples (1819) and the Duchy of Parma (1820), were modelled closely on the French Civil Code, while the later ones of Piedmont (1837) and Modena (1851) represent a peculiar blend of French style and traditional local elements. In Lombardy and Venice, which had been returned to the rule of the Austrian emperors, the Austrian Civil Code (ABGB) of 1811 was put into force.[73]

Any consideration of the development of law in Spain must take into account the fluid relationships between the different peoples that settled in the Iberian Peninsula and the changing fortunes of the diverse states that evolved in medieval times. As noted earlier, in the second half of the fifth century the Germanic tribe of the Visigoths was successful in establishing a permanent rule on the Peninsula.[74] In the period that followed, Roman personal law, as embodied in the *Lex Romana Visigothorum*, coexisted with the laws of the Visigoths (who never amounted to more that 5 % of the total population). In the course of time, as the two ethnic groups merged, a territorial law, permeated in both substance and form by Roman law, prevailed. This law was embodied in the *corpus iuris* promulgated for all citizens by the Visigothic king Recceswinth in *c*. 654. The new law code, referred to as *Liber Iudiciorum* or *Lex Visigothorum*, remained the basis of law in Spain until the fifteenth century, governing the Christian population even during the long Muslim rule (from 711). During the period when Christian forces were pushing back those of Islam, a diversity of states of varying sizes and significance emerged in the territory of present-day Spain: Castile (later reunited with León), including Galicia and the Basque region; Aragon; Catalonia; Navarre; and the Balearic Islands.

The legal development of Castile-León deserves special mention because of the important role this state played in the unification of Spain. In this realm the king exercised supreme jurisdiction as the natural lord of all his subjects. The growing influence of the court of *alcades de corte*, or of the royal household, composed of professional judges, diminished the importance of local customs of a largely

[72] As already noted, the local laws were not necessarily in conflict with the universal ones: many laws born out of the need to address situations not provided for by the *ius commune* were formulated and interpreted in accordance with concepts devised by jurists of *the ius commune*.

[73] The ABGB combined natural law ideas, especially in the fields of the law of persons and family law, with Roman law concepts and principles.

[74] The capital of the Visigothic kingdom was Toledo.

Germanic origin, called *fueros* or *usus terrae*. In the course of the thirteenth and fourteenth centuries men trained in Roman law at the universities (*letrados*) became influential and attained high office in the royal service. A large number of students from Spain attended Bologna, and this trend continued even after the first Spanish universities were established (in Palencia, Salamanca, Seville and Lerida) in the thirteenth century.[75] The Spanish jurists spread the knowledge of Roman law and the methods of the Glossators and the Commentators throughout the Iberian Peninsula. The most significant product of this growth of the study of Roman law was the famous *Libro de las leyes*, commonly called the *Las Siete Partidas* (The Seven Parts [of the Law]), compiled by order of King Alfonso X the Learned during the period 1256–1265. This work, drafted largely by jurists of the University of Salamanca, contains a large number of legal rules on marriage, contracts, inheritance and procedure, derived from a variety of Roman and canonical sources.[76] The enforcement of *Las Siete Partidas* as the common law of Spain was delayed due to the opposition of Spanish traditionalists, who remained loyal to their local customs. Only in 1348 was it promulgated as general law (by the *Ordenamiento de Alcalá*, a compilation of laws enacted by the courts of Alfonso XI in Alcalá de Henares), even though it remained subordinate to local custom. However, as local customs needed to be proved to a court as actually being observed, whilst there was always a presumption in favour of *Las Siete Partidas*, the later work gradually came to prevail as the official law of Spain. The accompanying reception of the learned law of the *ius commune* was so massive that the monarchs decreed that the courts, when faced with gaps in the law, should rely on the authority of the major Glossators and Commentators.[77] Although *Las Siete Partidas* was rearranged at various times as political conditions evolved, it remained the foundation of law in Spain until it was superseded by the *Codigo Civil* of 1889.

In neighbouring Portugal the law that applied was at first derived from the *Liber Iudiciorum* of the Visigoths, as extended in 1054 by King Alfonso V of León, and local customs. But, in the course of time, the *ius commune* was received in this country too, with the principal centres of legal learning being the universities of Coimbra and Lisbon. It is thus unsurprising that the first comprehensive collection of Portuguese laws, the *Ordenações Afonsinas*, enacted by King Alfonse V in 1446, in large part consisted of Roman and canon law. This compilation was followed by the *Ordenações Manuelinas*, promulgated by King Manuel in 1521, and finally in 1603, during the reign of King Philip II, by the *Ordenações Filipilinas*, which remained in force until modern times not only in Portugal, but also in its colonies,

[75] So numerous were the students from Spain studying at Bologna that in 1346 a special college was set up for them there by the Spanish Cardinal Gil of Albornoz.

[76] These sources include the *Corpus Iuris* of Justinian, the *Decretum* of Gratian, the *Decretales* of Gregory IX, and the works of some of the most famous of the Glossators, especially Azo and Accursius on civil law, and Goffredo of Trani and Raymond of Peñafort on canon law.

[77] To avoid confusion, in 1427 John II, King of Castile and León, ordained that the courts should not follow, as authorities, the opinions of jurists later that Johannes Andreae (Giovanni d'Andrea) on canon law and Bartolus on Roman law. Later, by a law of 1499, Baldo was also included.

such as Brazil. These enactments embodied the principle that Roman law and the works of the Glossators and the Commentators constituted the common law of the realm that was applicable whenever local legislation or customs were silent or ambiguous.

In the Netherlands, as in most areas of Western Europe, the revival in the study and application of Roman law in the High Middle Ages led to a major reception of Roman legal norms, concepts and principles, so that by the end of the sixteenth century Dutch law bore a heavily Romanised look. This development occurred at a time when the material prosperity of Holland had advanced considerably, owing largely to the growth of trade and commerce, and so a more sophisticated legal system was required to meet the new conditions. Instances of Roman legal influence were particularly evident in the fields of the law of property, contract and delict, as these were the areas where Roman law was considered to be far superior to the indigenous Dutch law. However, in spheres such as the law of persons and intestate succession, local customary laws largely resisted the Roman reception. Moreover, even in the areas of property and contract, Dutch jurists were cautious in their selection of Roman rules, and tended to reject archaic and formalistic concepts. The outcome of this process was thus a hybrid legal system, consisting of Roman and Dutch elements, which came to be known as Roman-Dutch law.[78] The principal centre of Roman legal studies in the Netherlands was the University of Leyden, established in 1575. In the period that followed more universities were founded at Franeker in Friesland (1585), Groningen (1614), Utrecht (1636) and Harderwijk in Gelderland (1648). Legal development in the seventeenth and eighteenth centuries was based largely on the work of the Dutch professors, especially those of Leyden, who, together with the judges of the High Courts of the provinces, created a highly advanced body of law derived from the synthesis of legal science and legal practice.[79] In 1652 Roman-Dutch law was introduced to South Africa, with the result that the Roman and Dutch texts became authoritative sources of South African law.[80]

[78] The term 'Roman-Dutch law' was introduced in the seventeenth century by the jurist Simon van Leeuwen, who used it as a title in his principal work, *Roomsch Hollandsch Recht* (1664).

[79] The greatest product of the Leyden law faculty was Hugo Grotius, author of the famous work *De iure belli ac pacis* (1625). Grotius also published a work entitled an Introduction to the Jurisprudence of Holland (*Inleidinge tot de Hollandsche Rechtsgeleerdheid*, 1631), in which he treats the law of Holland as a unique amalgam of Germanic custom and Roman law. Reference should also be made here to Arnold Vinnius (1588–1657), a law professor at Leyden, who established Dutch legal science as a mixture of Roman, customary and natural law elements; Johannes Voet (1647–1714), another Leyden professor, author of the influential *Commentarius ad Pandectas*, published in two volumes in 1698 and 1704; and Ulrich Huber (1636–1694), a professor at the University of Franeker, whose works *De iure civitatis libri tres* (1672) and *Paelectiones iuris civilis* (1678–1690) are built up largely from Roman materials. The widespread influence of the Dutch masters throughout Europe is attested by the large numbers of foreign editions of their principal works in the seventeenth and eighteenth centuries.

[80] It should be noted here that unlike the Continental European legal systems, but like the English common law, Roman-Dutch law in South Africa has not been codified. It is thus unsurprising that law courts and commentators have to grapple, even today, with the historical sources of the *ius*

7.7.4 *The Influence of Roman Law in Britain*

At the end of the eleventh century there was little to distinguish the law in England from that of Germany or northern France. Although England had been a Roman province for more than 300 years, after the invasion of the Angles and Saxons Roman law was superseded by Anglo-Saxon law—a species of Germanic folk-law. The law codes of Ethelbert of Kent (*c*. 600),[81] Ina (*c*. 700)[82] and Alfred (*c*. 890)[83] were of largely the same character as the Continental *leges barbarorum*, although, unlike the latter, they were written in Anglo-Saxon and not in Latin. In general, the substance of the law in England, like elsewhere in northern Europe, consisted mainly of unwritten customary law that was supplemented or superseded in some particulars by canon law. The immediate effect of the Norman Conquest of England in the second half of the eleventh century was to intensify the trend towards particularism by increasing the number of franchise and manorial courts, and by the reintroduction of the old principle of personality of law in favour of the Norman element of the population. But, at the same time, it gave to England alone in the West a strong central government that was capable of imposing a uniform legal and administrative system upon the whole country. Under King Henry II (r. 1154–1189) the royal courts began to encroach on the jurisdiction of the feudal courts, and by the close of the thirteenth century the process towards the construction of a national system of law had been carried a long way.

Three principal elements can be traced in the law of England, as it had developed in this period. The foremost place must be attributed to the function of the *Curia Regis*, or King's Court, the body that under the Normans transacted all the business of the central government.[84] There is nothing in the contemporary history of Continental law that can be compared with the creative activity of this court in the fashioning of the writ system.[85] Second in importance is the Roman and canon

commune and its Dutch variant. Special attention is given to seventeenth and eighteenth century Dutch authorities, such as Grotius, Voet and Vinnius, although other works from the entire body of learned literature from Bartolus to the German Pandectists, and even the sources of Roman law itself, are regularly consulted in areas like property, contract and succession.

[81] This code, as preserved, contains ninety brief sections dealing with punishments for various wrongs.

[82] This code consisted of seventy-six sections in the form of 'dooms' or penal judgments.

[83] This compilation, known as 'The Laws of King Alfred', contained about 125 sections in all. It draws on earlier Saxon laws as well as on various biblical sources.

[84] King Henry II organized the judicial work of the *Curia Regis*. His judges sat to administer the law on a regular basis, and the practice of sending out itinerant judges, which had been initiated by King Henry I, was re-established and made systematic.

[85] A writ was an order by a court in the king's name directing some act or forbearance. Writs were at first issued only in special cases to meet exceptional circumstances. Something took place that led the king to give a command in writing to a royal official or to some lord who held a franchise court, and this command in writing was a writ. Some of these writs were used to initiate proceedings before a court of law (there were referred to as *original writs*). The use of such writs appears to have become common by the end of the twelfth century. From that time until the

law that came to England in the twelfth century. Thirdly, there is the customary law that survived the Norman Conquest and continued to be applied by the local courts. These latter two sources of law were, as we have seen, those that formed the substance of the private law in much of Continental Europe. The fact that above all others helps to explain why the common law as it evolved in England represents a distinct system from the civil law is the relatively slight influence that these sources had on the content of English law. As commentators have observed, the history of English law has been marked not by the reception of a foreign system of law and its fusion with native customs, but instead by the growth of a body of rules fashioned by the king's justices and developed by their successors in which neither Roman law nor the customary law was a decisive influence. The rigidity of the legal process, the need to conform to the framework that had been developed and the centralized court system, all helped to mould a diversity of local customs and practices into a common law, i.e. a law that was followed by the entire country.

For a century and a half after the Norman Conquest it was by no means obvious that England was destined to develop a distinct legal system. The effects of the revival of Roman law studies in Italy in the eleventh century were early felt in England. Indeed, it is not unlikely that Lanfrancus, a teacher of law at Pavia and subsequently Archbishop of Canterbury, used his knowledge of Roman law in his administrative and legislative reorganization of his realm. The first known teacher of Roman law in England was the Glossator Vacarius, who arrived in the country in the middle of the twelfth century. Vacarius taught at Oxford, where he composed for the instruction of his pupils his famous *Liber pauperum*, a nine-volume compendium of Roman law based on the Code and the Digest of Justinian.[86] Vacarius' success raised the fear that Roman law would be received as the law of the land and provoked a quick reaction from the monarch, who was disturbed by the implication in Roman law of imperial sovereignty. The barons, too, opposed the prospect of Roman law reception since in their eyes Roman law provided a foundation for royal absolutism. Thus, King Stephen prohibited Vacarius from teaching at Oxford and in 1234 Henry III forbade the teaching of Roman law in London. Two years later the barons, gathered in Merton, refused a proposal by bishops to adopt the Roman law principle according to which children born before the marriage of their parents

nineteenth century, writs were technical statements of the plaintiff's complaint. There were different writs for different claims: e.g., the writ of right to recover land; the writ of debt, to recover money owing; and the writ of trespass, to complain of a breach of peace. The clerks of the chancery (the secretarial office of the Crown) kept precedents of the writs they issued, and it was not long before it was recognized that unless a man could bring his complaint within one of the forms of writ recorded in the *Register of Writs*, he could have no remedy. Since an action could not be brought without a writ, it became established that the only kinds of harm for which one could seek compensation in law were those that could be described within the narrow and unyielding language of some recognized writ. In later times, attempts were made by Parliament to introduce some flexibility to the law by permitting the issue of new forms of writ, but these were only partially successful.

[86] See F. de Zulueta (ed), *The Liber Pauperum of Vacarius*, Publications of the Selden Society 44 (London 1927).

should be counted as legitimate, on the grounds that they did not wish to alter the laws of England (*Nolumus leges Angliae mutare*). The position adopted corresponded to the practice of the courts and encouraged the autonomous development of English law. Nevertheless, Roman law concepts continued to exert an influence on English doctrine. This influence is clearly reflected in the two most important legal treatises of the era: Glanvill's *Tractatus de legibus et consuetudinibus regni Angliae* (Treatise on the laws and customs of the Kingdom of England) of 1187, and Bracton's treatise of the same title, written about 70 years later.

Glanvill's work, which records the law of the time of Henry II (1133–1189),[87] is partly based on the preface and introductory chapters of Justinian's Institutes, and various Roman legal institutions are referred to or contrasted with English rules. More importantly, the work "shows that Roman law has supplied a method of reasoning upon matters legal, and a power to create a technical language and technical forms, which will enable precise yet general rules to be evolved from a mass of vague customs and particular cases".[88] Bracton's treatise, written in the reign of Henry III (1216–1272),[89] was also clearly influenced by Roman law, which came to him through the Glossator Azo. The scope of his work was the same as that of the French works on customary law, which were being published at the same period: just as the French writers filled out the customary law with importations from Roman law, so Bracton supplemented the meager and inadequate rules of the common law in fields such as the law of personal property and the law of contract by borrowings from Roman sources. Furthermore, Bracton used Roman concepts and distinctions to describe, classify and explain the writs and actions through which the King's Court administered justice.[90] In this respect, his work shows that the common law had considerably progressed: new writs and forms of action had been introduced, and the common law had gone far towards superseding local customs.

The two centuries following Bracton's death saw a sharp decline in the influence of Roman law in England. Though it continued to be studied at the Universities of Oxford and Cambridge, it had little effect on the common law itself. Undoubtedly, the causes were manifold and, in part, political. But one of the principal factors was the fact that English judges and lawyers received their professional training at the Inns of Court and not at the universities.[91] The common law exhibited two

[87] Glanvill was at various times Sheriff of Lancashire and of Yorkshire, Justice in Eyre and a general in Henry's army. In 1180 he became Justiciar of England, or Chief Minister of the Crown.

[88] W. S. Holdsworth, *Some Makers of English Law* (Cambridge 1938), 15.

[89] Bracton became a Justice in Eyre in 1245 and, three years later, one of the judges of the *Curia Regis*. Like many other royal judges of that time, he was an ecclesiastic and at the time of his death in 1268 he was Chancellor of the Exeter Cathedral.

[90] As S. E. Thorne observes, "[Bracton] was a trained jurist with the principles and distinctions of Roman jurisprudence firmly in mind, using them throughout his work, wherever they could be used, to rationalize and reduce to order the results reached in English courts." See *Bracton on the Laws and Customs of England* (Cambridge Mass. 1968), 33.

[91] The Inns of Court were self-governing legal societies, products of the medieval spirit of corporate organization that had manifested itself in the trade guilds. Much about their origins is

characteristics in this period: in the first place, it tended to become more fixed and rigid in substance; and, secondly, the rules governing legal procedure became more complex and technical. The legal works of this period consist almost exclusively in commentaries upon the writ system, and the legal education imparted in the Inns of Court was concerned primarily with giving to students an accurate knowledge of the procedural law in whose interstices substantive law was still firmly embedded. Such Roman law as was introduced came not through the courts of common law, but through the ecclesiastical and admiralty courts, and through the Court of Chancery, which owed its origin to the growing rigidity displayed by the common law. At the same time, the growth of the forms of action around which the law of tort and contract later crystallized meant that the fields of law that on the Continent succumbed most readily to the influence of Roman law were secured to the common law.

The sixteenth century was probably the most crucial period in the history of the common law. In the early part of that century the common law came under increasing attack. Many influential voices were raised against it, and there were calls for a wholesale reception of Roman law such as was taking place at the same time in Germany and other parts of Continental Europe.[92] But the common law stood its ground. Four key factors contributed to its survival. First was the character of the Tudor monarchs, who preferred to refashion the medieval institutions of the country and adapt them to the altered conditions of the age rather than to root them out altogether.[93] Second was the fact that new courts, especially the Court of Chancery[94]

unclear, but they probably began as hostels in which those who practiced in the common law courts lived. These hostels gradually evolved a corporate life in which benchers, barristers and students lived together as a self-regulating body. The student members were required to take part in moots, attend lectures and study law under the supervision of their seniors.

[92] F. W. Maitland has brilliantly related the story of the sixteenth century pressure of Roman law in England in his *English Law and the Renaissance* (London 1901).

[93] This may be explained by the fact that the principles of the common law constituted at the same time principles of the constitution, and to abolish them entirely would have amounted to a revolution rather than a resettlement.

[94] When, in the fourteenth century, the common law courts were separated from the *Curia Regis*, the judicial power of the monarch and his council was not exhausted. The king continued to receive complaints of wrongdoing and petitions for justice. The king often referred these requests for help to the Chancellor, his chief secretary, who was usually an ecclesiastic. In the course of time, it became customary for petitioners to go directly to the Chancellor, who dealt with cases on a flexible basis: he was more concerned with arriving at a fair result than with the rigid principles of law. As the common law courts became more formalistic and thus more inaccessible, pleas to the Chancellor increased and eventually resulted in the emergence of a special court constituted to deliver 'equitable' or 'fair' decisions in cases that the common law could not address. In a Statute of 1340 (14 Ed III St 1 c 5) a Court of Chancery was mentioned alongside other courts of the age and, by Tudor times, the Chancellor's Court was a firmly established institution whose jurisdiction was expanding and its work was increasing. The term 'equity' came to denote the part of English law administered by the Court of Chancery, as distinct from that administered by the courts of common law. In the seventeenth century conflict arose between the common-law judges and the Chancellor as to who should prevail. King James I, acting on the advice of Bacon and other experts in the law, resolved the dispute in favour of the Chancellor. Whilst the role of equity remained

and the Court of Star Chamber,[95] addressed the deficiencies of the common law.[96] Thirdly, the continuity of the common law was secured by Coke's restatement and modernization of its principles in the early seventeenth century. And, finally, there was the vital role played by the Inns of Court, and by what Maitland has described as "the toughness of a taught tradition".

Since the time of Edward Coke (1552–1634) the common law has never been under serious threat in England. However, the absence of a formal reception did not result in a total absence of impact of Roman law on English law. For instance, Roman law was of some assistance to Lord Mansfield (1705–1793) in the development of English commercial law, and judges have occasionally relied on it, whether in equity or at law, when an analogy was in point. Moreover, to a considerable extent English law had adopted Roman legal terminology. Nevertheless, although Roman legal concepts and doctrines have been woven into the fabric of English law, neither the corpus nor the structure of the latter is Roman.[97]

In contrast to English law, the law of Scotland was affected by the Roman law-based *ius commune* to a significant degree. By the close of the Middle Ages, Scotland had a customary law similar to that of England, although considerably less developed. However, unlike its English counterpart, Scottish law remained open to external influences. The most obvious such influence was that of the Church, and it was through the infusion of canon law that Roman law first influenced Scottish law

unchallenged, its application became increasingly regulated through a system of rules and principles based on precedent and gradually developed by a series of Lord Chancellors, all of whom were lawyers as opposed to the ecclesiastics of the earlier era. The Court of Chancery was abolished under the Judicature Acts of 1873–75, which established the High Court of Justice to administer both common law and equity. The Judicature Acts also provided that in cases in which there was a conflict between law and equity, the rules of equity should prevail.

[95] The Court of Star Chamber evolved from the king's Council. In 1487, during the reign of Henry VII, this court was established as a judicial body separate from the Council. The court, as structured under Henry VII, had a mandate to hear petitions of redress. Although initially the court only heard cases on appeal, Henry VIII's Chancellor Thomas Wolsey and, later, Thomas Cranmer encouraged suitors to appeal to it straight away, and not wait until the case had been heard in the common law courts. In the Court of Star Chamber (as in the Court of Chancery) all questions were decided by the court itself, and the granting or withholding of relief was in the discretion of the court and not regulated by rigid rules of law. The Court of Star Chamber was abolished in 1641, but its better rules were taken over by the King's Bench and became a permanent part of the law of England.

[96] As F. W. Maitland noted, "were we to say that equity saved the common law, and that the Court of Star Chamber saved the constitution, even in this paradox there would be some truth." *The Collected Papers of F.W. Maitland* (Cambridge 1911), 496.

[97] As H. E. Holdsworth has remarked: "We have received Roman law; but we have received it in small homoeopathic doses, at different periods, and as and when required. It has acted as a tonic to our native legal system, and not as a drug or poison. When received it has never been continuously developed on Roman lines. It has been naturalized and assimilated; and with its assistance, our wholly independent system has, like the Roman law itself, been gradually and continuously built up by the development of old and the creation of new rules to meet the needs of a changing civilization and an expanding empire." *A History of English Law*, 7th ed. (London 1956–1966), Vol. IV, p. 293.

and procedure. Furthermore, knowledge of Roman law was brought to Scotland by students attending Continental universities from as early as the thirteenth century.[98] In 1532 a permanent court of professional judges, the Court of Session, was established, which used a version of the Continental Romano-canonical procedure. As far as possible, the court relied on native Scots law, but in cases that could not be addressed on that basis, judges had recourse to the Romanist *ius commune*. By the close of the sixteenth century, Roman law had infiltrated many aspects of Scottish law and had become one of the dominant characteristics of the Scottish legal system. However, from the beginning of the eighteenth century, especially after the Act of Union in 1707, by which Scotland and England were consolidated into one kingdom, English law began to exercise a strong influence on the law of Scotland, while the role of Roman law gradually declined.[99]

7.8 The Humanist Movement

As previously observed, the Renaissance and the Reformation brought about a broader appreciation of intellectual and cultural accomplishments and an emancipation of human reason from the fetters of traditional faith and dogma. This new outlook and new spirit fostered impatience with the narrow pedantry of the old schools of law. The established doctrine of *communis opinio doctorum*, in its extreme form, hampered the logical development of principles and resolved legal problems by marshalling the opinions of legal scholars on the point at issue and then counting heads. Thus, during this period, the law schools of Italy, which until then had been famous throughout Europe, came to be regarded as the homes of an outworn theory (referred to as *mos Italicus*). The influence of the Renaissance produced a new school of jurists, the Humanists, who brought to legal writing the spirit of the revival of letters.

As has been noted, the rise of the School of the Commentators in the fourteenth century prompted a shift in scholarly attention from the dialectical examination of Justinian's texts to the consideration of the adaptability of Roman law to the needs and conditions of medieval life. The Commentators were primarily interested in developing contemporary law and so they tended to disregard the historical framework and the primary sources of Roman law. From the fifteenth century, the increased interest in the cultural inheritance of classical antiquity cultivated the development of a new approach to the study of Roman law. Scholarly attention now turned to the consideration of Roman law as a historical phenomenon and special

[98] The first Scottish university, the University of St Andrews, was founded in 1413, followed by the University of Glasgow in 1451 and the University of Aberdeen in 1495. However, most Scottish students preferred to resort to universities in Continental Europe, especially in France, Germany and, after the Reformation, the Netherlands.

[99] An important factor in this development has been the appellate jurisdiction of the House of Lords.

emphasis was placed on the importance of the techniques of history and philology for its proper understanding and interpretation. The methods used by the Commentators in the study of Justinian's texts had led to the formulation of theories that the Humanists perceived as utterly unwarranted when the texts were studied in their proper historical context; therefore, such theories had to be rejected in favour of interpretations based upon the true historical sense of the texts.[100] The chief aim of the Humanist scholars was thus the rediscovery of Roman law existing in Roman times through the application of the historical method instead of the scholastic method engaged by the medieval Commentators. They thus endeavoured to read the texts of the *Corpus Iuris Civilis* against their historical background, relating them to information provided by non-legal sources from antiquity. A considerable part of the Humanists' work was concerned with the detection of the interpolations in the Justinianic codification as an important step towards uncovering the true character of classical Roman law. An important innovation was that, unlike the medieval jurists, the Humanists were able to read Greek texts, which enabled them to use Byzantine legal sources, such as the *Basilica*, to reconstruct the texts of Justinian.[101] The Humanists also endeavoured to achieve a more systematic treatment of the contents of Justinian's *Corpus*. The medieval *summae* and other works had introduced systematic treatment for one work at a time, but it was now attempted to present the entire *Corpus Iuris Civilis* as one systematic whole.

[100] Lorenzo Valla, a fifteenth-century Italian Humanist, criticized the inelegant Latin of the Commentators, arguing that this was proof of their shortcomings as jurists. See P. Stein, *Roman Law in European History* (Cambridge 1999), 75. Stein relates that the French Humanist Guillaume Budé described the earlier jurists' glosses and commentaries as "a malignant cancer on the texts, which had to be cut away." Ibid., at 76.

[101] The Legal Humanists were responsible for the beginnings of what is known as *palingenesia*: the reconstruction of legal texts that have been altered by editors after they were first issued. With respect to the works of the classical Roman jurists, *palingenesia* profited from the fact that every fragment in the Digest is accompanied by an *inscriptio* containing the name of the original author and the title and part of the work from which the fragment was taken. This made it possible for scholars to separate all the fragments contained in the Digest, sort them by jurist and then, for each jurist, sort them by work and then by book (e.g., Ulpianus, *libro octavo decimo ad edictum*). This approach was begun by Jacobus Labittus, a sixteenth century Legal Humanist, in his *Index legum omnium quae in Pandectis continentur [. . .]*, published in 1557. In this work Labittus listed: the texts of the Digest according to their authors, the works in which they appeared, and the books of those works from which they were excerpted; other Digest texts which cited that jurist; those jurists who were not themselves excerpted in the Digest but who were referred to by other jurists therein; and finally those texts in the Codex and Novels which mentioned specific jurists. However, he did not try to restore the original order in the works of individual Roman jurists – this was done in the nineteenth century by Lenel, author of the more extensive *Palingenesia iuris civilis*, I–II (1889). It should be noted here that, as the compilers of Justinian's *Corpus* retained only about 5 per cent of the available texts, a complete reconstruction of the original works was impossible. Nevertheless, with respect to those jurists whose works were extensively used, it is possible to gain a good impression of the scope and structure of a particular work.

The Institutes furnished an important model, since this was the only part of Justinian's codification that contained a real system.[102]

The new school of thought was created in France by the Italian jurist Andreas Alciatus (1492–1550),[103] but its effects permeated throughout Europe. The leading representatives of this school included Jacques Cujas (Cuiacius, 1522–1590)[104]; Hugues Doneau (Donellus, 1527–1591)[105]; Guillaume Budé (Budaeus, 1467–1540)[106]; Ulrich Zasius (1461–1535)[107]; Antoine Favre (Faber, 1557–1624)[108]; Charles Annibal Fabrot (Fabrotus, 1580–1659)[109]; and Jacques Godefroy (Godofredus, 1587–1652).[110] The method adopted by the Humanist scholars in

[102] In this connection, reference should be made to the French Humanist Franciscus Connanus (Francois de Connan, 1508–1551), who in his *Commentaria iuris civilis libri decem* attempted to re-order legal material in a more rational way under the tripartite division of law into persons, things and actions derived from the Institutes. Hugues Doneau (Donellus), a sixteenth century French Humanist, in his *Commentarii de iure civili libri viginti octo* (Frankfurt 1595–1597), departed from the traditional approach to law that gave priority to actions and procedure and regarded the rights of the individual as being of greater importance than the methods by which these rights could be defended. This new approach is clearly reflected in the structure of his work. Moreover, Donellus separated the law of obligations from the law of property, both originally considered to constitute aspects of the law of things. See P. Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge 2007), 202; P. Stein, "Donellus and the origins of the modern civil law", in J.A. Ankum et al (eds) *Mélanges F. Wubbe*, (Fribourg 1993), 448–452.

[103] Alciatus was born at Alzano near Milan and studied in Pavia under the master Jason de Mayno, a prominent member of the Bartolist school. He taught civil law at Avignon and Bourges, which became the principal centre of Legal Humanism in France. Moreover, he established the so-called 'School of the Cultured Men' or 'Cultured Jurisprudence' (*Scuola dei Culti*), which reached its apex with Jacques Cujas in the later sixteenth century.

[104] Cujas was born and studied in Toulouse and taught at Cahors, Valence, Paris and Bourges. Probably the greatest of the French Humanists, he applied his immense knowledge of ancient classical literature and social and political history to elucidating the development of Roman law within its general context. His principal interest was directed at textual exegesis and the doctrinal contributions of individual Roman jurists.

[105] Donellus studied at Toulouse and Bourges, where he taught until the St. Bartholomew's massacre of 24th August 1572, when he fled to Heidelberg. In 1579 he went to Leiden, where he taught law until 1587. He is best known for his extensive commentary on the civil law: the *Commentariorum de iure civili libri viginti octo*.

[106] Budaeus was born in Paris and his university education at his home city and at Orléans centered on the study of law and the classics, especially Greek. His work on Roman law *Annotationes in XXIV Pandectarum libros* (1508) was a milestone in the Humanist challenge on medieval jurisprudence.

[107] Zasius was professor at Freiburg and a member of Erasmus' circle at Basel.

[108] Faber was born at Bourg-en-Bresse and served for some years as president of the Court of Savoy. His most important works include the *Codex Fabrianus* (1606), *De erroribus pragmaticorum* (1598) and *Rationalia in Pandectas* (1604–1626).

[109] Fabrotus was born in Aix en Provence, where he served as advocate to the local parliament and university professor. He is best known for his translation of the *Basilica*, published in 1647. He also edited the works of several Byzantine historians and composed a number of antiquarian treatises.

[110] Godofredus was born in Geneva, where he was appointed professor of law (1619) and, later, councilor of state. His principal work, on which he laboured for thirty years and which was

France for the study of Roman law became known as *mos gallicus* (in contradistinction with the *mos Italicus* of the Bolognese jurists) or *Elegante Jurisprudenz*. From the late seventeenth to the mid-eighteenth century Legal Humanism also flourished in the Netherlands, where it engendered a highly advanced approach to the study of Roman legal sources, referred to as the Dutch Elegant School.[111]

In general, the Humanist movement did not exert much influence on the practice of law as the courts in France and elsewhere remained faithful to the Bartolist tradition.[112] This largely derived from the fact that most Humanists were concerned chiefly with the historical analysis of Roman law and paid little attention to problems relating to the practical application of the law or the need to adapt Roman law to contemporary conditions. At the same time, however, the Humanists' approach to Roman law as a historical phenomenon helped jurists to appreciate the differences between Roman law and the law of their own times. By illuminating the historical and cultural circumstances in which law develops, they prepared the ground for the eventual displacement of the *ius commune* and the emergence of national systems of law.[113]

7.9 The School of Natural Law

In the seventeenth and eighteenth centuries, European legal thought moved in a new direction under the influence of the School of Natural Law.

The idea of natural law has its origins in ancient Greek philosophy, but was given a more concrete form by the Stoic philosophers of the Hellenistic and early Roman eras. As previously noted, under the influence of Stoicism, Roman jurists treated natural law as a body of law equally observed by all peoples, and therefore

published after his death (1665), is his edition of the Theodosian Code (*Codex Theodosianus cum perpetuis commentariis*).

[111] Among the leading representatives of this School are Gerard Noodt (1647–1725) and Henrik Brenkman (1681–1736).

[112] In Italy the Bartolist method prevailed in legal education throughout the sixteenth and seventeenth centuries. However, this method appears to have lost much of its earlier scientific rigour and was confined mainly to the training of practitioners.

[113] On the Humanist movement see P. Stein, *Roman Law in European Legal History* (Cambridge 1999), 75ff; D. Maffei, *Gli inizi dell'umanesimo giuridico* (Milan 1956); D. R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law and History in the French Renaissance* (New York 1970); O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), ch. 10; M. P. Gilmore, *Humanists and Jurists* (Cambridge Mass. 1963); F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), 120 ff. W. Kunkel and M. Schermaier, *Römische Rechtsgeschichte* (Cologne 2001), 237–8; G. Kisch, *Humanismus und Jurisprudenz. Der Kampf zwischen mos italicus und mos gallicus an der Universität Basel* (Basel 1955).

also called it *ius gentium*.[114] Stoic philosophy furnished the terminology on the basis of which the early Church Fathers were able to formulate the first conceptions of the Christian natural law and to impart them to the world of their time. The Church Father Aurelius Augustinus (AD 354–430) promoted the idea of a divine origin of law and founded a theory that contributed a great deal to the transition from ancient philosophy to Christian jurisprudence. Augustinus held that the *lex naturalis moralis* is imprinted on the soul, heart, and mind of humankind. Nonetheless, he recognized that temporal or human positive laws are necessary in order that humankind might make manifest that which has been obscured through sinfulness and vice.

The greatest figure in medieval theology is, without doubt, Thomas Aquinas (1225–1274). Aquinas's work is a blending of earlier traditions: the philosophical thought of Aristotle[115] and the theology of the early Church Fathers, especially that of Augustinus. In his most important work, the *Summa theologiae*, a manual for students of theology, Aquinas defines natural law as man's participation in God's eternal law (or God's purpose in creation). Human beings, like all other entities in the universe, are subjects upon which the eternal law moves. However, the crucial difference between human beings and the rest of the created order is *freedom of choice*. This means that people do not necessarily behave in accordance with the eternal law. Thus, two distinct sources of guidance are provided for our benefit: divine law and natural law. These operate by two different means namely, revelation, that is God choosing to make known His will in the Holy Scriptures, and reason respectively. But if we can all know natural law through reason—and we all have reason—how can we account for disputes over fundamental moral issues or differing understandings of right and wrong at different times? Aquinas explains this by the process through which particular natural law precepts are deduced from general principles. He links this process of deduction both with human inclination and with the nature of reason itself. Reasoning about morality is practical rather than speculative. The fact that the conclusions of practical reason are not equally known by everyone does not affect their truth. Furthermore, in the process of application of practical reason to more and more situations, inevitably exceptions to general principles will have to be made and so the result may be variations in the natural law over time and place. Thus, while the primary precepts of natural law (such as the promotion of good and avoidance of evil) are unchanging, the secondary precepts of natural law are variable in content. But if we have Natural Law discoverable by reason why do we need human law? Aquinas defines human law to be an ordinance of reason for the common good, made by him who has care of the community, and explains the need for such law as arising both from unequal knowledge of natural law and the fact that knowledge is not the same as conduct:

[114] See relevant discussion in Chap. 2 above.

[115] Aquinas was able to draw on recently made translations of the works of Aristotle by Willem van Moerbeke (*c*. 1215–*c*. 1286), which had made available works that had not been in circulation until that time.

people are free to disobey. Hence, human law can help train us to act in accordance with natural law.[116] Although Aquinas sees human law as deduced from natural law, he recognises that because this deduction depends on practical reason it can lead to more than one possible conclusion. Variations in human laws between societies and over history are partly explicable by variations in the secondary natural law precepts from which they are deduced and partly because the process of deduction allows a measure of freedom and creativity. The doctrines of Aquinas dominated the theological, philosophical and intellectual landscape of Western Europe until the sixteenth century, when the traditional ideas about man and his relationship with God and the world began to be challenged by Humanism, Protestantism and the discovery of the New World. From this period, the natural law discourse began to untie itself from its associations with scholastic theology, and to increasingly use the language of reason. Of particular importance in this development was the work of the Dutchman Hugo Grotius (1583–1645), also known as the founder of modern international law.[117]

In his famous work *De iure belli ac pacis* (1625)[118] Grotius expounded the idea of a purely secular natural law freed from all ecclesiastical authority. He stated that even if we were so bold as to assume that there is no God, or that God is not interested in human affairs, there would still be valid natural law.[119] This freeing of natural law from its religious bonds made it possible for him to place the law outside the bitter opposition that the conflict in matters of religion had engendered since the time of Reformation and Counter-Reformation. What he really did was to return to the common and rational basis of all law, which the Humanist thinkers generally recognized through their rediscovery of the Stoics. It is on this basis that Grotius developed his theory of international law as a law binding all nations by reason. His starting-point in developing out of natural law a set of usable principles for the mutual relations of states (and, so far as applicable, individuals) was the notion that man is by nature sociable: "Among the traits characteristic of man is an impelling desire for society, that is, for the social life _ not of any and every sort, but peaceful, and organized according to the measure of his intelligence, and with those of his own kind."[120] "The maintenance of the social order . . . which is consonant

[116] Aquinas answers the question of why human laws are necessary by drawing on Cicero and suggesting that human laws must be necessary to ensure the fulfillment of the divine plan because of humankind's limited participation in both natural and eternal law.

[117] The secularism of the natural law of this era accounts for its relative lack of popularity in Italy, where, especially in the seventeenth century, the cultural environment of the Counter-Reformation tended to stifle new ideas. It is thus unsurprising that the famous Italian scholar Alberico Gentili (1552–1608), regarded as one of the founders of the Natural Law School, came under suspicion for heresy and had to seek refuge in England, where he became regius professor of civil law at the University of Oxford.

[118] This work was partly inspired by a desire to devise rules that might lessen the horrors of war, although Grotius sought to formulate a system of law for peacetime as well.

[119] *De iure belli ac pacis, Prolegomena* 11.

[120] *De iure belli ac pacis, Prolegomena*, 6.

with human understanding, is the source of law properly so called. To this sphere of law belongs the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the reparation of a loss incurred through our fault, and the infliction of penalties on men according to their deserts."[121] As the above statement suggests, Grotius viewed the law of nature as essentially the injunction to maintain peace by way of showing respect for the rights of other people.[122] He notes, asserting his own personal faith, that even though this law stems from man's inmost being, it is still deservedly attributed to God, whose will is that the relevant principles should reside within us.[123] And so, summarizing his view, though again without prejudice to the assumption that God might not exist, he writes that "natural law is the command of right reason, which points out, in respect of a particular act, depending on whether or not it conforms with that rational nature, either its moral turpitude, or its moral necessity; and consequently shows that such an act is either prohibited or commanded by God, the author of that nature."[124] Notwithstanding his repeated statement of his own Christian faith, his hypothesis was to be decisive in freeing the doctrine of natural law from the bonds of theology. It should be noted, further, that Grotius employed the comparative method to place his natural law doctrine on an empirical footing. Believing that the universal propositions of natural law could be proved not only by mere deduction from reason but also by the fact that certain legal rules and institutions were recognized in many legal systems, he used legal materials from diverse countries and ages to illustrate and support his system of natural law.

The idea of a rational natural law was developed further by the German philosophers Samuel Pufendorf (1632–1694), Christian Thomasius (1655–1728) and Christian Wolff (1679–1754). For Pufendorf, natural law is purely the product of reason and, as such, has no connection with divine revelation. A fundamental principle is: "Let no one act towards another in such a way that the latter can justly complain that his equality of rights has been violated."[125] More concrete rules derived from reason and thus nature are: not to harm others, and, where harm is caused, to make reparation; to treat others as having equal rights by reason of the dignity of all human beings; to assist others as far as one is able to do so; and to carry out the obligations one has assumed.[126] Pufendorf was the first modern legal

[121] *De iure belli ac pacis, Prolegomena*, 8.

[122] According to Grotius, one of the rights derived from the law of nature is the right of self-defence. *De iure belli ac pacis,* 2. 1. 3. Furthermore, a natural right to punish a wrongdoer must be assumed, for otherwise such a right could not be possessed by the state by cession from its subjects. *De iure belli ac pacis,* 2. 20. 1–2. The law of nature is also the source of validity of various forms of acquisition, and underpins rights emerging through promises and contractual agreements. *De iure belli ac pacis,* 2. 3. 4 f. and 2. 11. 4.

[123] *De iure belli ac pacis, Prolegomena*, 11–12.

[124] *De iure belli ac pacis,* 1. 1. 10. 1–2.

[125] *Elementa jurisprudentiae*, 2. 4. 4.

[126] *De officio hominis et civis*, 1. 3. 9. 6–9.

philosopher who elaborated a comprehensive system of natural law comprising all branches of law.[127] His work exercised an influence on the structure of later codifications of law, in particular on the 'general part' that is commonly found at the beginning of codes and in which the basic principles of law are laid down.

Like other natural law thinkers, Christian Thomasius draws attention to the shift from a *iurisprudentia divina*, a theological mode of legal study, to a doctrine of law whose foundation lies in reason and in nature. A central theme in Thomasius's natural law theory is justice (*iustum*): the forbidding of any transgression against the rights of others, in service of which the state is entitled to exercise the right of coercion. This is distinguished from the demands of honesty (*honestum*) and decency (*decorum*). In this way, Thomasius separated the domain of law from that of morality. Drawing on the work of Leibniz and Pufendorf, Wolff proposed a system of natural law that he alleged to make law a rigorously deductive science. His system exercised considerable influence on the eighteenth and nineteenth century German codifiers and jurists, as well as on legal education in German universities.[128]

The School of Natural Law challenged the supreme authority that medieval jurists had accorded to the codification of Justinian. The challenge proceeded on the grounds that the *Corpus Iuris Civilis* was an expression of a particular legal order whose rules, like the rules of any other system of positive law, must be assessed in the light of norms of a higher order that were eternal and universally valid—the norms of natural law. Natural law was construed as rational in its content, since its norms could be discovered only by the use of reason, logic and rationality. It was deemed as common to all men of all times with a higher moral authority than any system of positive law. From this perspective, the practitioners of natural law rejected certain 'irrational' features of the Roman system revealed by the Humanists (such as the remnants of the old Roman formalism detected in the *Corpus Iuris Civilis*) on the basis they were specific to the Roman system of social organization and restricted in time. At the same time, however, they recognized that Roman law contained a large number of rules and principles that reflected or corresponded to the precepts of natural law—rules and principles that they regarded as the product of logical reasoning on the nature of man and society rather than the expression of the legal development of the Roman state. The Roman doctrine of *ius gentium* and *ius naturale*, in particular, seemed to lend support to their own theories. Many legal

[127] Pufendorf is best known for his book *De iure naturae et gentium* (on the Law of Nature and Nations, 1672). His earlier work *Elementa iurisprudentiae universalis* (Elements of a Universal Jurisprudence, 1660) led to his being appointed to a chair in the Law of Nature and Nations especially created for him at the University of Heidelberg. As E. Wolf remarks, in his work "Pufendorf combines the attitude of a rationalist who describes and systematizes the law in the geometrical manner with that of the historian who rummages through the archives and who explores historical facts and personalities." *Grosse Rechtsdenker der deutschen Geistesgeschichte*, 2nd ed. (Tübingen 1944), 298.

[128] Other important representatives of the Natural Law School include Gottfried Wilhelm Leibniz (1646–1716) and Jean Domat (1625–1696).

principles espoused by Roman jurists appeared as suitable materials to utilize for building a rational system of law. The Natural Law School, with its system building approach to law, inspired a renewed interest in codification as a means of integrating the diverse laws and customs of a national territory into a logically consistent and unitary system.[129]

[129] On the rise and influence of the School of Natural law see A. P. D'Entreves, *Natural Law: An Introduction to Legal Philosophy*, 2nd ed. (London 1970); O. F. Robinson, T. D. Fergus and W. M. Gordon, *European Legal History* (London 1994), ch. 13; F. Wieacker, *A History of Private Law in Europe* (Oxford 1995), ch. 15; P. Stein, *Roman Law in European History* (Cambridge 1999), 107–10; D. Tamm, *Roman Law and European Legal History* (Copenhagen 1997), 231 ff. C. von Kaltenborn, *Die Vorläufer des Hugo Grotius auf dem Gebiete des Ius naturae et gentium, sowie der Politik im Reformationszeitalter* (Leipzig 1848, reprint Frankfurt 1965); H. Thieme, *Das Naturrecht und die europäische Privatrechtsgeschichte*, 2nd ed. (Basel 1954); H. Welzel, *Naturrecht und materiale Gerechtigkeit*, 4th ed. (Göttingen 1962).