abbot appealed to the king for justice. Enguerrand then demanded that he be tried by his equals on the basis of the judicial duel, in accordance with feudal law (*curia parium*); he was supported by other local lords. At this point it was Louis IX himself who established, against the custom, that the case was to be judged directly by the king, so abandoning the traditional procedure which was too favourable to the lord, and so a royal inquest proceeded to condemn Enguerrand to a severe pecuniary penalty.[45]

By the fourteenth century the jurisdiction of the Paris Parliament had been consolidated. An examination of its sentences reveals that the reference to Roman law is often absent (although some of the judges had been trained in the *ius commune*),[46] whereas there are explicit references to royal ordinances, for example concerning the oscillating value of coins.[47] The judge's powers over fact-finding were enhanced by the 'inquest' (*enquête*), but the course of justice could also be very slow, as in the case of a quarrel to do with a dowry, which was concluded sixty-seven years after the wedding celebration.[48]

The study of legal procedure in canon law has in large part still to be carried out, particularly for Italy. But a masterly study of marriage procedure in the fourteenth and fifteenth centuries in some Episcopal courts in England and France (York, Ely, Cambria, Paris, Brussels) has shown – for example, regarding the role of women in legal contentions on the marriage tie and judges' evaluation with respect to the efficacy of the marriage vow *de presenti* and *de future* – remarkable differences between the courts in York and Paris, and between these ecclesiastical courts and the Venice court.[49] And this occurred despite the common normative discipline on marriage in the different ecclesiastical European provinces, each following the same canon law rules of the *Decretum* and the decretals.

[45] The incident is reconstructed by E. Faral, *Le procès d'Enguerrand IV de Coucy*, in RHDFE, IV/26 (1948), pp. 213–258.
[46] The role of the Roman law is discussed in Timbal, I, 1973–1977, p. 357.
[47] Ibid., p. 357. [48] The case is published in ibid., pp. 491–496.
[49] Donahue, 2007, pp. 622–629; for Venice, Cristellon, 2005.

12

The Commentators

12.1 The Post-Accursians

In the first half of the thirteenth century, while Accursius was composing his fundamental work, other jurists were following different lines of endeavour. In particular Jacobus Balduinus [Sarti, 1990] was the author of acute interpretations and important theories, such as the one of making a distinction between 'ordinating' norms and 'decisionary' ones, for the first time clearly separating procedural rules from substantive rules of law, with important practical and theoretical consequences. His theses were in part transmitted by his pupil Odofredus, also a professor in Bologna in the middle of the century and in turn author of lectures which include a lively account of the early years of the university and other important historical events of the early school of Glossators, described for the benefit of the students. But after five generations of scholars, the historical function of the *Glossa*, following the ultimate achievement of Accursius' thorough apparatus, had run its course. It is significant that jurists of unquestionable standing such as Guidus de Suzzara and Dynus de Mugello expressed many of their often original theories in the form of *addenda* to the Accursian *Glossa*.

In the meantime, the model introduced by the Glossators – that is, a higher-level legal education attained exclusively on the texts of the *Corpus iuris*, using the method described previously – was expanding in Italy and Europe, through the founding of new general universities (*Studia generalia*): after Modena in 1175, new universities were founded in Padova in 1222, Naples in 1224 (this was the first state university, founded by will of Emperor Fredrick II, king of Sicily), later also in several other cities inside and outside of Italy. In the fourteenth century universities were founded in Coimbra, Heidelberg, Prague, Pavia and elsewhere, creating university centres for legal studies which would become famous in successive centuries. It should be underlined that in many places the beginning of the advanced study of law in accordance

with the Bolognese model preceded the formal recognition of the new school as a full-fledged university (*Studium generale*): this required the direct legitimisation of one of the two supreme authorities, the Emperor or the Roman pontiff. In Montpellier, Pisa, Orléans, Siena and many other cities this recognition was sometimes given even a century after the actual beginning of teaching activity.

During the thirteenth century, in addition to the doctrinal education in the universities and the teaching and doctrinal writings, both old and new literary models became prevalent which were aimed directly at legal practice. The editorial production of works on civil and canon procedure continued and intensified in the fertile tradition of the *ordines iudiciorum*. To this category belongs *inter alia* the authoritative *Speculum judiciale* by Guillame Durand, canon law jurist and later bishop, in which he summarised, at the end of the century, numerous works by earlier jurists, being for a long time of widespread use and not only for topics related to judicial procedure.[1]

There were also new notarial formularies. Complicated questions regarding the application of the norms contained in city statutes were also for the first time taken into careful consideration by thirteenth-century doctrine: among others, Julianus da Sesso [Sorrento, 1999], Albertus Galeotti and Albertus de Gandino gathered collections of *Quaestiones statutorum*. At the end of the thirteenth century Alberto de Gandino, a jurist active as *podestà* and criminal judge in many Italian cities, wrote a treatise *de maleficiis* [Kantorowicz, 1926] in which he offers a complete overview of contemporary criminal law in Italian cities: a law which was very far, both as to the substantive rules on penalties and on the procedure, from the Roman norms of the *Corpus iuris*.

12.2 The Orléans School

Among the thirteenth-century centres of study, the small university of Orléans had a particular role to play. After the Pope had forbidden the teaching of Roman law in Paris in 1219[2] a school of Roman law for the clergy had been founded in this city. Legal education (which included the study of Roman law texts, as we have seen dealing with canon law) was becoming ever more popular among the clergy, many of whom would

[1] On which see, *Guillaume Durand*, 1992.

[2] Probably not at the request of the king of France, as previously argued, but rather in order to give a stronger endorsement to theological and canonistic doctrines and teachings (Carbasse, 1998, § 83).

then rise to a higher standing in the ecclesiastical hierarchy precisely availing themselves of a sound legal method in their administrative and judicial work, while others went into service for the monarchy, that too requiring the cooperation of accomplished jurists. In Orléans – also because of the influence of Italian teachers from Bologna but not of the Accursian school, such as Guidus de Cumis (Como), a student of Balduinus and Accursius – some professors tackled the study of Roman texts using a new method. The most prominent of these, Jacques de Revigny,[3] in his writings displays (first of all in a lecture on the Code[4], then in his *Lecturae* on the *Digestum vetus* and the *Digestum Novum*, as well as in an interesting *Dictionarium iuris*) a great independence of thought with respect to the Accursian *Glossa*[5] and a particular acumen in the interpretation of the sources. The same can be said of Pierre de Belleperche, who taught in Orléans in the last two decades of the thirteenth century; he was the author of an important *Lectura* of the Code, still in manuscript form, and of other writings of commentary on the *Digest* and the *Institutions* [Bezemer, 2005]: he too was an outstanding jurist, who was to be particularly influential in Italy because of the broad acceptance of his theories by Cinus de Pistoia.

Two aspects of the new method are to be underlined. On one hand the school employed a renewed systematic work on the text of the *Corpus iuris*: the Orléans scholars, starting with Revigny, thoroughly commented on every passage with a new and skilled analysis, and in many cases the traditional exegesis was proven wrong and rectified. A well-known incident took place in Orléans in which the doctor from Bologna Franciscus Accursius (son of the author of the *Glossa*) had been invited to give a prestigious *repetitio*; Revigny at the time was a simple university student, but he dared to challenge the interpretation given by the professor from Bologna in the presence of the visiting scholar, showing by means of dialectics how a passage in the *Codex* should be interpreted differently from the approved way in the Accursian *Glossa* [Errera 2010].[6]

[3] Bezemer, 1997.

[4] This was published in print in Paris in 1519 (*Lectura super Codice*), mistakenly attributed to Pierre de Belleperche. It was Mejiers who unveiled the authorship of Revigny.

[5] The professors from Orléans did not spare the *Glossa* from bitter and even irreverent criticism: 'credo quod huic glossae diabolus revelavit id quod dicit', Belleperche exclaims on a specific point, e.g. (Meijers, 1956–1966, III, p. 113).

[6] It was the Justinian Constitution of 531 (Cod. 7. 47. 1) in which the Emperor imposed compensation amounting to double the damages caused by default on a contract involving precise quantities such as a sale or lease, whereas for other types of contracts the compensation would be decided on by a judge.

The distinctive character in the method of commentary originating in Orléans becomes evident here: the *ratio* of the norm is sought, and as a consequence the principle at its foundation, even though not expressly stated in the text, is apt to make the norm's correct application possible even in cases analogous to that contemplated in the norm. Also on the thorny subject of pacts and innominate contracts the Orléans scholars show a similarly critical attitude towards the Glossators' doctrines and are able to refer the solution of the doctrinal problems, inherent in the different structure of formal (clothed) and bare pacts (*pacta nuda* or *vestita*), back to ancient normative sources [Volante, 2001, p. 368].

On the other hand, the Commentator's attention is careful to present the students with cases and problems of their time, which, in light of the text commented on, could be put into an adequate conceptual framework. In his *repetitio* on custom, one of the most important texts both for the importance of the subject matter and the profoundness of his analysis,[7] Revigny considers the hypothesis in which a case is regulated neither by law nor by custom, but finds similarities in both: which should then prevail? Roman law makes no pronouncement.[8] Revigny concludes that preference should be given to the one of the two sources whose regime is closest to the case in question.[9]

This inclination to tackle questions arising from legal practice does not contradict the attitude of the Orleanese scholars – for example, concerning wills – to deal with the texts in a way which often seemed oblivious to practice and entirely focused on doctrinal exegesis: in fact, the analytical depth and attention to concrete cases and the world of custom (understandable in a region of customary law such as that of Orléans) are the two complementary aspects of an attitude which takes for granted that Roman texts are fit for resolving any possible legal problem, including

[7] A thorough analysis in the context of other writings on custom by Revigny and the professors from Orléans, in Waelkens, 1984.

[8] In a well-known text the Roman jurist Salvius Julianus (*Dig.* 1. 3. 32, ch. 12 note 27) declared that in case of lacuna in the law, recourse should be made to custom, whereas Revigny argues that if neither law nor custom was applicable, then it was necessary to adopt whichever norm (legislative or customary) was closest to the case.

[9] He provides an example, drawn with modifications (as shown by Waelkens, 1984, p. 186) from the treatise by Revigny's professor Jean de Monchy: if a lot given by *emphyteusis* increases in size because of flooding, to whom does the additional land belong? Feudal custom assigns it to the lord and not the vassal, whereas Roman law assigns it to the tenant, not the owner (*Dig.* 7. 1. 9. 4): Revigny argues that the first solution should prevail as the lord and the one having *emphyteusis* are alike in that they have *dominium utile* whereas the tenant doesn't. He contradicts his teacher's opinion with an unusually strong argumentative force (Revigny, *Repetitio* a *Dig.* 1. 3. 32 *de quibus*, ed. Waelkens, 1984, p. 476 s.).

questions of feudal rights (which had actually been discussed already in light of Roman sources by Glossators from Bologna such as Giovanni Bassiano); in fact, they were often discussed in the fourth book *de actionibus* of the *Institutions*, where, of course, no word is made about feuds.[10] Also Revigny's independence of judgement concerning the French monarchy is noteworthy, for example when he condemned the distance taken by the crown from Imperial authority[11]: not surprisingly, Revigny – a cleric and later bishop of Verdun – never held a role in the service of the king of France, unlike several of his colleagues from Orléans, among whom was Belleperche.

As far as France is concerned, mention must be made of the school of Toulouse, where in the second decade of the fourteenth century Guillaume de Cunh, among others, taught. As the author of a lecture on the *Codex* (which would be printed in 1513) and of commentary to the *Digest* still in manuscript form, Guillaume – whose style is particularly clear and concise: a sure method for the success of a written work – held great authority among the major Commentators who made wide use of his arguments both in Italy and in France [Meijers, 1956–1966, III, p. 189].

12.3 From Cinus to Bartolus of Sassoferrato

The independent and critical approach of scholars from Orléans had a follower of great importance in Italy,[12] the jurist and poet in the 'dolce stil novo', Cinus from Pistoia, student of Dinus de Mugello and friend of Dante Alighieri and, like the poet, supporter of imperial power in the bitter division between the Guelphs and the Ghibelines of the early fourteenth century. The great *Lectura Codicis* by Cinus, completed in 1314, marks the introduction of the method, deriving from Orléans and accepted in Italy, which would take the name of School of the Commentary. Whereas many Italian jurists of the time assigned an almost legislative[13] authority to the

[10] Cortese, 1992, p. 82.

[11] See passage mentioned by Meijers, which is quite explicit on this point: '*quidam dicunt quod Francia exempta est ab imperio; hoc est impossibile de iure [...]; si hoc non recognoscit rex Francie, de hoc non curo*' (Revigny, *Lectura Digesti veteris*, prooem., ed. in Meijers, *Études*, III, 1956–1966, p. 9).

[12] A recent and authoritative historical outline of the commentators is in the volume by Herman Lange, 2007. See the updated entries of the DBGI, 2013.

[13] '*ubicumque ergo Glosa firmat pedes, serva eam*', warned Jacobus Butrigarius in the fourteenth century, but adding '*nisi usus sit contrarius*' (Jacobus Butrigarius, *Lectura super Codice*, Paris 1516, repr. Bologna 1973, a Cod. 3. 4. 1, *qui pro sua iurisdictione*, l. *in causarum*).

Glossa ordinaria, Cinus' *Lectura* was deliberately independent from the Accursian tradition, from which on several occasions he distanced himself. In the same way, he declared his own autonomy of judgement with regard to any opinion – even one agreed on by 1,000 scholars: '*etiam si mille hoc dixissent*'[14] – if he was not convinced of the validity of a given thesis.

The criterion of Cinus' *Lectura* is one of a consistently systematic approach in his commentary on the Roman text. The author begins by stating the intent of performing the following operation on each and every passage of the *Codex*: the reading (*lectio*), the exegesis of the text (*expositio*), the formulation of examples (*casus*), the highlighting of important points (*notabilia*), the discussion of contrasts between parallel passages and the ways to resolve them (*oppositiones, solutiones contrariorum*) and, finally, the proposition and solution of concrete or hypothetical cases and questions (*quaestiones*). None of these operations was new, all of them had been applied, as we have seen, from the time of the *Glossa*; what changed was on one hand the systematic approach to the text, and on the other the shift in weight attributed to the different steps in the interpreter's work: a look at the work by Cinus clearly shows how restricted the space devoted to the first five of the operations described earlier had become, whereas the last of these (the discussion of *quaestiones*) had been greatly extended. In fact, often the *commentum* is mainly dedicated to judicial cases and also questions concerning the interpretation of city statutes in their relationship with the *ius commune* of the Roman sources.

Cinus was to have a pupil who is commonly viewed as the most important and influential among the Commentators, Bartolus of Sassoferrato. Born in 1313, Bartolus was barely fourteen when he entered the university of Perugia; he was then to pursue a doctorate in Bologna, and at an early age held public positions (among other things, he was a judge in Todi), but soon was called to teach first at the university of Pisa, and then in Perugia, where he spent his short life – he was in fact to die prematurely at the age of forty-three in 1357 – entirely occupied with teaching and doctrinal writing. Educated by the Franciscan friar Petrus de Assisi, he held deep religious convictions and was frugal to the point of asceticism, weighing his food in order to preserve his mental sharpness.[15] Bartolus expressed his medieval intellectual and ethical background at the highest level possible.

The magnitude of his work is impressive: the numerous fifteenth- and sixteenth-century editions of his writings consist of ten full folio volumes,

[14] Cinus, *Lectura super Codice*, a *Cod.* 4. 14. 5, *unde legitimi*, l. *certum*.
[15] Savigny, 1856, II, p. 638.

corresponding to around 100 volumes in modern printing format. Six volumes were dedicated to a commentary on the three parts of the *Digest* (two to the *Vetus*, two to the *Infortiatum*, two to the *Novum*), two to the *Codex*, one to the *Volumen*, and finally one to the collection of his *Consilia* (more than 100), *Quæstiones* and *Tractatus*.

Just a few examples can suffice to show the intellectual stature of this great Commentator, who had been nurtured by his contact with the personality of Cinus,[16] but had then gone forth on an intellectual journey of his own. A gift for analysis, a capacity for systematisation and construction, a sense of justice, endowed with a clear and enlightening vision, from the point of view of a jurist, of some of the historical developments in fourteenth-century Italy of particular importance: these are the foremost qualities to be found in Bartolus' thinking.

It is interesting to examine how he tackles the crucial theme of city statutes, in a well-known *repetitio* written in 1343.[17] The subject is first of all subdivided into six chapters (who is qualified to pass statutes, in what form, on what matters, towards which subjects, within what time limit, and finally within what limits may a statute be interpreted and argued in judgement). As to the first point (*quis possit facere statuta*), Bartolus bases his reasoning on the distinction between categories of local communities: those with full civil and criminal jurisdiction, those with limited jurisdiction (e.g. only for civil cases, or only for criminal cases of limited importance), and finally those communities with no jurisdictional power. To each category Bartolus ascribed a corresponding particular level of authority to legislate, that is, to exercise the power to pass statutes: the authority being full and without necessity of further dispensation from superior powers in the first category of local communities, limited to the sectors corresponding to the jurisdictional competence in the second, and finally in the third category only possible with authorisation from a superior entity: such as the dominant city or a prince.[18]

Within this framework, some points need to be underlined. First of all, Bartolus attributed the concept of *populus* (which the Roman fragment by Gaius held to be at the basis of the very notion of civil law (*ius civile*) as

[16] As stated by Baldo, the great student of Bartolus: '*dicebat mihi Bartolus quod illud quod suum fabricabat ingenium erat Lectura Cyni*' (Baldo, *Lectura de feudis*, tit. *Si de feudo fueri controversia*, § *vasallus*, n. 1; Cortese, 1995, II, p. 425).
[17] Bartolus, *Commentaria in primam Digesti veteris partem*, ad *Dig.* 1. 1. 9, *de iustitia et iure*, l. *omnes populi*, Lugduni 1590, fol. 9r–14v.
[18] Bartolus, a *Dig.* 1. 1. 9, l. *omnes populi*, nn. 3–10.

opposed to law of nations (*ius gentium*),[19] to every single group of people, whether urban, rural and even professional. This plural and multilevel concept of populus – as the *populous*, due to the Roman sources, was the subject of a legal authority concerning its law (*Dig.* 1. 1. 9) – clearly implied profound consequences on local and corporative autonomies. In second place, he proceeds from the certain to the uncertain, clarifying the boundaries of legislative power in parallel with those more easily ascertainable of jurisdictional power. In the third place, what emerges from this is a very broad concept of rural and city autonomies, as the city quarters and the rural communes with no jurisdiction were thought competent to pass rules for resolving questions relative to their own common good and rights, and within their autonomy. As to the cities which exercised full jurisdiction by imperial concession or long-time prescription, their legislative power was admitted as being virtually unbounded: it was, in fact – not unlike any other temporal power, including that of the king or the Emperor – limited only by divine law, and only if the norm diverging from the biblical precept was such as to induce to sin.

Starting from such a premise, Bartolus was able to solve concrete questions on city statutes of which the binding nature or effects was in question. Such understanding of autonomies is also congruent with the idea of a hierarchy of political power that distinguished legal thinking, not only of Bartolus. He recognises the primacy of imperial authority as the true safeguard (at least in theory, as the reality of the time was distant from it) for the supreme value of peace. For Bartolus, kingdoms and cities are not 'sovereign' entities in the modern sense of the word, but original and autonomous communities which occupy their own position in the hierarchy in which every human association (*universitas*) is coherently ordered.

Well known and ever quoted over the centuries is Bartolus' theory on the conflict of laws. We find here the foundations of modern doctrines on international private law. It will suffice to remember that the great jurist from Sassoferrato formulated a series of principles which, when combined, consented to the harmonious solution of one of the most difficult and controversial matters of the time of the communes, when the existence of a plurality of legal orders was the source of persistent controversial questions in legal relationships. Which statutory norms should be applied to foreigners present within the territory of the commune?

[19] *Dig.* 1. 1. 9.

Which norms of the statute were to apply to citizens (or possessions) outside the territory of their own city? For this purpose, Bartolus was to make a whole series of distinctions: between contracts, wills and delicts; between permissive and prohibitive statutes; between procedural norms (the applicable law is that of the place where the action is instituted, the *lex fori*) and substantive norms; between statutes related to persons (*statuta personalia*, personal statutes, which follow the person outside the territory) and statutes related to things (*statuta realia*, real statutes, which are applied on a territorial basis exclusively)[20]; for each of these categories he was able to identify a suitable solution to the conflict between statutes of different cities, as well as between statutes and the *ius commune*.

Even if the single categories and distinctions often came from earlier authors, the overall way in which the matter as a whole was organised was new, just as some theories described by the jurist on specific points of law ('*mihi autem videtur*') were also new. An original criterion for determining the effects of a legal rule was that of considering the *voluntas legis* (will of the law), which Bartolus deduced from a precise textual analysis of each normative statement, for example looking at its reference to the person or thing (as seen earlier), a method he made recourse to on numerous other occasions.

This lucid thinking is noticeable both in topics of a more classical nature such as interpretative questions of Justinian's sources treated in teaching, and in topics and legal questions emerging in the time of Bartolus, which were analysed in treatises.

On the first of these here is an example among many. A Bartolist theory, which was to be reiterated for centuries, distinguishes two forms of fluctuation in the value of money, depending on whether there is a change in the weight of the metal (intrinsic variation) or a change in value following oscillations in the monetary market (extrinsic variation): the first variation obliges the debtor to pay according to the value at the time of the loan, the second allows him to pay according to the value at the time of repayment.[21]

On the second front, various treaties by Bartolus examine traditional subjects of legal learning with great refinement and a capacity for synthesis: for example, on the subject of water and rivers (*de fluminibus*) and

[20] Bartolus, *Commentaria in primam Codicis partem*, a *Cod.* 1. 1. 1, *de summa Trinitate et fide catholica*, l.*cunctos populos*, nn. 14–38, Lugduni 1600.

[21] Bartolus, *Commentaria in secundam Digesti novi partem*, a *Dig.* 46. 3. 99, *de solutionibus*, l.*Paulus*, nn. 1–3, Lugduni 1595, fol. 92 r.

the ever topical subject of witness proof (on which, see Lepsius, 2003). Others touch on new and current questions: Bartolus' well-known classification of the different types of seigniorial or tyrannical power (*signoria*, or rather *tirannide*), explicit (*manifesta*) or concealed (*velata*), established, respectively '*ex defectu tituli*', or '*ex parte exercitii*'. It is a classification formulated in the years during which the *signorie* were establishing themselves in Italy; little remained of the autonomy of the communes, which in some cases were entirely eliminated by assigning full power to the prince, whereas in others they were apparently kept, although in fact the choices of the city magistracy were by then taken by the prince. '*Italia est tota plena tirannis*', the great jurist observed disconsolately in closing his treatise.[22] An equally famous treatise deals with the serious but at the time frequent phenomenon of the reprisal,[23] a legal institute which consented the creditor of a foreigner to obtain from his own judge the confiscation of possessions belonging to a fellow citizen of the debtor as a reprisal for the failure to pay his debt. The topic is lucidly traced by Bartolus outlining its basic cause, which is the absence of a superior power beyond that of the cities, which could effectively be imposed on 'foreigners', in cases where the cities' autonomy might lead to a veritable anarchy.

These examples should illustrate some of the characteristics of the thinking of the Commentators, exemplified in the writings of its major exponent. The more influential and long-lasting doctrines were by now no longer – as they had been at the time of the Glossators – the result of an effort to interpret 'apparent' contradictions in the sources from antiquity, but rather the result of a free and autonomous conceptual structure, dealing with questions arising from the cases arising in the day to day. The method, consisting of making distinctions and sub-distinctions, permitted the organising of a complex subject into subcategories, then inserting the innumerable questions arising in practice between the warp and weft of the whole. And if in the work of imitators this would lead to the enormous multiplication of these distinctions – following a conceptual architecture which is reminiscent of the intricate profile of juxtaposed pinnacles, typical of the Gothic cathedrals of the time – in Bartolus, the distinctions are never the result of nominal or arbitrary choice, but rather the pondered answers of the jurist to the need for justice and certainty to

[22] Bartolus, *De regimine civitatis*, in Quaglioni, 1983, p. 170.
[23] Bartolus, *De represaliis*, in *Tractatus, questiones, consilia*, Venetiis 1600, tenth volume of the work.

which the solution of every legal problem, whether theoretical or practical, must answer.

The immense fame of Bartolus' work for more than three centuries, in every part of Europe where *ius commune* was adopted, '*nullus bonus iurista nisi bartolista*', was a common saying, and more than sixty editions were printed of his works: Lepsius in DBGI, I, 177–180 – must be ascribed to the qualities of profoundness and clarity of which we have spoken. An innumerable number of authors was inspired by the great jurist from Sassoferrato, although often with results far from their model. His authority was such that in some cases legislation was passed – this was to happen in Portugal [Almeida Costa, 2005] – stating that in case of conflicting opinions, Bartolus' position should be kept: just as in the post-classic era the 'law of citations' had required with regard to Papinian. 'Bartolism' was the name given in Europe – as we shall see – to the method followed by the Commentators, as opposed to other schools of legal science.

12.4 Baldus and the Commentators between the Fourteenth and Fifteenth Centuries

In Perugia, Bartolus had a pupil named Baldus de Ubaldis (1327–1400; Cortese in DBGI, I, 148–152). Baldus was in turn to be nominated professor and to teach in various universities – among which Perugia, Pisa, Florence, Padua and Pavia – and was in the course of time to become among the best-known and best-paid professors of civil law in Italy at the end of the fourteenth century. The last decade of his long life was spent teaching in Pavia, where the *signoria* of the Visconti had recently opened a university (*studium generale*) in which Baldus' presence was sought as it was essential in acquiring the kind of prestige (thus being attractive to students wanting prestigious legal training) attributed to more established university institutions.

Baldus' scientific attributes and characteristics were rather different from those of his famous teacher. Recourse to Aristotelian scholastic terminology was typical of the jurist from Perugia: as shown, for example, in his frequent use of the notions of 'efficient cause' and 'final cause' in the analysis of contracts. He also often referred to the problematic question of equity (*aequitas*) [Horn, 1968]. In addition, in his long career as a teacher, Baldus was to illustrate not only the *Corpus iuris* (almost the whole of which he commented on), but also canon law and feudal law: he wrote a commentary on the first three books of Gregory IX's *Liber*

Extra, as well as one on the *Libri feudorum*; this one is his last work. Furthermore, Baldus was the first well-known jurist to pay particular attention to the rules and customs of commercial law, a new branch which at that time was vigorously developing outside the Roman law template, by way of custom in the cities. Baldus was familiar with it, having been, as he recalls, lawyer in Perugia for the powerful guild of merchants.[24]

What sometimes transpires in Baldus' theories and opinions is the new political setting established in Italy at the end of the fourteenth century, characterised by the *signorie*. When, for example, he tackles the prickly question of city autonomy, his position – while the discussion expresses some singularly modern notions[25] – is far more dismissive of those autonomies[26] than the theories (actually very different from each other) of Ranieri da Forlì or of Bartolus a few decades earlier. In the same way, the reflection of the Visconti principate, at the apogee of its power at the time and making extensive use of the feudal system of rules [Chittolini, 1979], is perceptible in Baldus late *Lectura* of the *Libri feudorum*, written in Pavia in 1393, probably responding to the wishes of the Visconti themselves and their legal advisers.

Baldus was also author of a great number of *consilia*. His fame as professor resulted in innumerable requests for legal opinions from both private parties and public authorities. Baldus did not disdain the economic advantages afforded him by his great fame: attempting to explain to his students the importance for the lawyer of the chapter of hereditary

[24] Baldus, *Commentaria in quartum et quintum Codicis libros*, a *Cod.* 4. 18 *de constituta pecunia*, in rubr., fol. 39 Lugduni 1585. The comment begins with the following declaration: '*quia advocatus sum artis mercantiae, ideo ponam hic super rubricam quandam summulam quae proprie respicit facta mercatorum*'. On the *signa* of companies in Baldus and the Commentators, see Mazzarella, 2005.

[25] The argument is well known (defined by Calasso as 'sublime syllogism') with which Baldus expresses the thesis that people don't need authorisation from above to exercise their statutory rights: '*quia populi sunt de iure gentium, ergo regimen populi est de iure gentium [. . .], sed regimen non potest esse sine legibus et statutis, ergo eo ipso quod populus habet esse, habet per consequens regimen in suo esse, sicut omne animal regitur a suo spiritu et anima*' (Baldus, *Commentaria in primam Digesti veteris partem*, a *Dig.* 1. 1. 9 *deiustitia et iure*, l. *omnes populi*, n. 4, Lugduni 1585).

[26] In fact, the argument quoted in the previous note, although so well expressed, does not represent Baldus' personal opinion. Having presented a series of contrary arguments supporting the thesis that the people could not legislate without the prince's consent, Baldus finally expresses his personal opinion, which is restrictive with regard to autonomy: no norm which directly or indirectly touches on the prince's prerogatives can be admitted without authorisation given by the prince himself (Baldus, on l. *omnes populi*, *Dig.* 1.1. 9, nn. 15–18).

substitutions, he is said to have stated that the *consilia* he had provided thus far in this sphere of law had already earned him more than 15,000 ducats.[27] It is therefore not surprising that he agreed to respond to the requests. His published *consilia* alone amount to 2,500 – to which can be added many hundreds more still unpublished [Colli, 1998]. They deal with every aspect of law, from civil law (dowries, successions and contracts) to criminal law, procedure and public law.

His works form an imposing body of legal opinions, often showing innovative doctrinal elements. They represent a wealth of virtually unexplored material illustrating many aspects of law and society in Italy in the second half of the fourteenth century. Beyond the incisive technical solutions for which the opinion of the most famous jurist of the time has been sought, what sometimes transpires in his opinions is not only his doctrinal stance, but also his personal sensibilities: for example when – at the end of an erudite argumentation on the limits of private peace (*pax privata*), with reference to a castle near Mantua, in which he held that the occurrence had not caused the 'breaking of the peace' – he wished, coherently with the opinion given, that on such dangerous ground as that of the breaking of the peace, 'that wars not bring about the destruction of that paradise which is Italy'.[28]

In the span of more than two centuries, from the early fourteenth century to the beginning of the sixteenth, the Commentators held a dominant role both in university teaching and in legal practice, as shown by the frequent citations of their works. Among the many professors who taught in the more prestigious universities – in Italy that was first of all in Bologna, Padua, Pisa, Perugia, Pavia, Siena, Naples and Ferrara – some naturally had greater influence and notoriety. The universities sought – with the incentive of greater remuneration – to secure the best teachers, as students (a source of income and prestige for the city) were attracted by the fame of the professors, and willing to migrate to those places where they could follow the lessons of a celebrated teacher. The

[27] Cited in Alexander Tartagni (*In primam et secundam Digesti Infortiati partem commentaria*, Venetiis 1595), a *Dig.* 28. 6, *De vulgari et pupillari susbstitutione*, in rubr., fol. 87vb. Tartagni cites the fact with reference to Raffael Cumanus' commentary, who would have heard it directly from Baldus. However in the passage indicated by Tartagni the edition of Raffaele I consulted does not mention it (Raphaelis Cumani, *Commentationes in Infortiatum*, Lugduni 1554, a *Dig.* 28. 6, *De vulgari et pupillari substitutione*, in rubr., fol. 81v).

[28] '*Quia istae disputationes possent esse periculosae quo ad status totius Italiae [. . .] suadeo omnem materiam suspicionis removeri et pacem sine insidiis servari [. . .] ut propter guerra Paradisus Italiae non dissolvatur. Baldus*' (Baldus, *Consilia sive rsponsa*, Venetiis 1575, repr. an. Turin 1970, part II, n. 195, fol. 53va).

particular literary form of the *repetitio* (examples of which have been previously mentioned with regard to Revigny and Bartolus) consists in devoting a monographical and detailed analysis to a specific law from the *Codex* or the *Digest*. The great Commentators often undertook these, also because this form was a competitive way of establishing a reputation and the ability of the professor could be openly assessed. Later, there would also be huge and impressive collections of printed *repetiones* by several authors on civil and canon law.[29]

The lasting influence of the more important jurists is above all tied to their written work, consequent to their teaching experience and activity as consultants. As in the case of Bartolus and Baldus, for a long time the commentaries and the *consilia* of the major Commentators were transcribed by hand, until at the end of the fifteenth century manuscripts began to be published in print: this, as we shall see, would be a crucial turning point in the spread of juridical culture in continental Europe.

Of the many jurists whose works have come down to us, mention will here be limited to a very few. Among those who were best known in the age of Bartolus, in the first half of the fourteenth century, was Jacobus Butrigarius (d. 1348), who had been one of Bartolus' professors in Bologna, and Jacobus de Belviso (d. 1335). Belviso was a professor at Naples, where he was a councillor of Charles d'Anjou, then in Bologna, Siena and Perugia and the author of a *Lectura* on the *Novels* and a commentary on the *Libri feudorum*; another author of an important treatise, *Super usibus feudorum*, was Andrea da Isernia in southern Italy. Mention should also be made of Oldrado da Ponte (d. 1335) from Lodi, the author of a well-known collection of *consilia* [Valsecchi, 2000]; Ranieri da Forli' (d. 1358), also a professor of Bartolus and later his antagonist in academic disputes and doctrinal opinions on controversial legal points (e.g. on the theory of statutes); and Franciscus Tigrini (d. 1359) from Pisa, well known for his memory (although a prodigious capacity to memorise Roman sources was characteristic of all members of the school, from Glossators to Commentators). Albericus de Rosciate (d. 1354) was a lawyer in Bergamo and author in 1331 of an authoritative statute for his city [Storti Storchi, 1984] as well as one of the first scholars on Dante; in later years he dedicated himself to writing commentaries on the *Corpus iuris* in which, unusually, he made ample use of canon law along with civil law; he never was a university law professor, but his work

[29] *Repetitionum seu commentariorum in varia iurisconsultorum responsa volumen primum (-octavum)*, Lugduni 1553, *excudebat Claudius Seruanius*, in 9 volumes.

was a favourite among lawyers and judges, so much so that he was designated '*magnus practicus*'. Lucas de Penne (d. 1381) from Abruzzo also never taught; he had been a student in Naples, then a lawyer and judge in his native region and the author of a very important commentary to the last three books of the *Codex* (the so-called *Tres Libri*), which had been hitherto rather ignored by doctrine[30]: a work lucidly expressing some novel ideas in the sphere of public law.

Bartolomeus de Saliceto (d. 1412) was a professor in Bologna, Padua and Ferrara, where he had to flee for political reasons during the tormented years of the Visconti principate in Bologna. He was born into a family of jurists from Bologna (his uncle Riccardo da Saliceto had been among the most renowned professors of his time: Pace, 1995) and was the author of the great *Lectura Codicis*, on which he worked for almost twenty years: it was perhaps the most complete commentary that the school was to produce on the fundamental first nine books of the Justinian Code. A student of his, Rafael Fulgosius (d. 1427)[31] was also a well-known writer of commentaries, together with Rafael Cumanus from Como. Also very well known was Johannes Nicoletti de Imola (d. 1436), a professor in Bologna, Ferrara and Padua alternating between canon and civil law: at this time some professors with degrees *in utroque iure* were to write on and teach both laws. The method used was the same for both.

Among the major jurists of the age was also Paulus de Castro (d. 1441; Cortese, DBGI, II, 1505). He had been in Perugia a student of Baldus, of whom he was a favoured pupil, then a professor for many years at Avignon (1384–1412) – but also in Siena, Bologna, Padua and Florence (where in 1415 he was entrusted with reforming the city statutes) – Paulus wrote refined commentaries on the *Digest* and the *Codex* and was the author of more than 1,000 carefully crafted *consilia* in which, unlike other no-less-renowned jurists, he carefully tried to avoid any contradiction with theses held by himself in the doctrinal sphere and in teaching. A generation later, Alexander Tartagni (d. 1477) from Imola, student of Johannes Nicoletti and Paulus de Castro, is known mostly for his vast seven-volume collection of *consilia*, for a long time used in the subsequent doctrine.

Few authors were as famous in the fifteenth century as Franciscus Accolti (1418–1486), known as Aretinus as he came from Arezzo: erudite not only in juridical but also in literary matters (he was also a student of

[30] With reference to the *Glossa*, on Rolandus de Lucca see Conte and Menzinger, 2012.

[31] Cable 2015 gives an account of Fulgosius' teachings and scholarly work, as well as his participation in the Council of Constance in 1414–1415.

the great humanist Franciscus Filelfo), he taught in Bologna, Florence, Siena and Pisa; he was also tied to Lorenzo de Medici. He distinguished himself particularly for his capacity to elaborate subtle and exhaustive analysis of the Justinian Compilation texts – he could dedicate an entire year to examining a single title of the *Digest* – but was not apparently endowed (so was maliciously said by one of his colleagues) with similar capacities in managing practical concerns of this world.[32] His student Bartolomeus Sozzini, who belonged to a Sienese family of jurists, also endowed with a sound classical culture, was a friend of the poet Angelo Poliziano and a reputable professor: his teaching took place in the Tuscan universities of Siena, Florence and Pisa.

Finally, two well-known professors, both originating from Lombardy, prospered at the end of the fifteenth century. The first, Philippus Decius (1464–1536), was a student of his brother Lancellotto and of Giasone del Majno (Jason Majnus) in Pavia, and when still a student revealed the particular quality that was to make him famous: a formidable dialectical skill in the disputations among professors of the time, so much so that he regularly won the academic disputes and in so doing attracted the great admiration of students, but at the same time the strong antipathy of his colleagues in Pisa, Siena, Padua, Pavia, Lyon, Valence, where he was called to teach, commanding a high salary.[33] He also taught both civil and canon law and left civil law commentaries and *consilia*; among his students was the great historian and political scholar Francesco Guicciardini.

Jason de Majno (1435–1519), of a family from Milan, for almost fifty years was to teach almost exclusively in Pavia. Over the years he acquired such a reputation that his opinion was sought by kings, popes and grand personages; King of France Louis XII himself, while passing through Lombardy, went to hear him give a lecture. The principal quality of Jason's commentaries to the *Digest* and the *Codex* consists in the punctilious critical examination of the various doctrinal opinions expressed by the authors who had preceded him. It can be said that his writings, published and read time and again, mark the closure of the era of the great Commentators.

[32] According to a jurist of his time, '*in agilibus mundi nihil valebat*' (Savigny, 1856, vol. II, p. 721).

[33] Evidently aware of the prestige he felt should derive from the generous sums with which different universities contended for his favours, Philippus Decius went so far as to want the salary paid him by the university of Pisa engraved on his epitaph (Spagnesi, 1993, p. 221).

13

Particular Laws

The teaching of Roman law in the Bologna school did not result in the disappearance of other normative orders which had existed for centuries in Italy and Europe; neither did it prevent the lively development of a myriad of new normative rules, which disciplined – on a customary and legislative level – legal relationships within social communities and specific classes (particular laws) or which were effectively circumscribed to within a specific area (local laws). Among the particular laws mention should be made at least of Lombard, feudal, rural, commercial and maritime law.

13.1 Lombard Law

The body of norms constituting *Lombard law* – more precisely Lombard-Frankish law – had a systematised collection ordered by subject in a compilation known as *Lombarda*, which remained effectual where Germanic influence had been greatest and more long-lasting. In particular, this occurred in some regions in southern Italy, such as in the Duchy of Benevento and surrounding territory, where Lombard law was considered a veritable *ius commune*, to which Roman law might be an adjunct only in the case of specific *lacunae*. These regions produced some learned jurists, also expert in Roman law, who dedicated themselves to the study of Lombard law first of all for the purpose of preparing legal instruments to use in practice. Around the middle of the thirteenth century, Andrea de Barletta in his treatise on the *differentiae* between Roman law and Langobardic law,[1] recalled a case in which one of the parties was being defended by a star defence lawyer expert in Roman law, whereas the defence lawyer for the opposite party was a modest provincial lawyer (*quidam advocatellus*); but he easily persuaded the judges in favour of his

[1] Published in *Corpus iuris civilis, Volumen*, as an appendix to *Lombarda*, Venetiis 1592, col. 913–928.

client because at the appropriate moment he was able to produce a pertinent quotation taken from Lombard law. Before him, Carolus de Tocco had composed an apparatus to the *Lombarda* soon to become so authoritative that it would constitute the *Glossa ordinaria* in the sixteenth-century editions. These and other jurists supplemented their exegesis of the Lombard texts by constantly linking them to the *ius commune* of the Bologna stamp, in this way actually delineating an integrated normative system, made on one hand of Lombard-Frankish norms and on the other of Roman norms filling in, in case of absences or *lacunae*. It is in this context that a well-known and controversial rule from Frederick II's Constitution of Melfi (1231) should be understood, which mentioned the presence of two *iura communia* in his Sicilian kingdom which were subsidiary to royal law, namely the Lombard and the Roman laws.[2]

Differences between these two actually persisted. This explains how authors such as the aforementioned Andreas de Barletta set out these *differentiae* between the two legal orders in a specific treatise for the use of practitioners. For example, the purgatory oath of the defendant in the absence of proof from the plaintiff pertained to Lombard law, but not to Roman law, in which normally the plaintiff unable to prove his claim automatically lost the case. In Lombard law individuals came of age at eighteen rather than at twenty-five as in Roman law. In Lombard law succession favoured the agnate line to the cognate line, and women required a legal guardian (*mundoaldus*) in order for their acts to be legally binding. The penalty for theft was eight times the value rather than four times or double as in Roman law. And so on. This double regime went on in parts of southern Italy until the eighteenth century.

13.2 Feudal Law

Feudal law – mentioned earlier with regard to its genesis in the ninth century and its development mostly through custom – reached its definitive form in the twelfth century. In fact, the feudal system was not to vanish from the horizon either in society or in the law of the new era, though it took new and changed forms [Poly-Bournazel, 1980].

On the basis of the fundamental *edictum de beneficiis*, Emperor Conrad II[3] – who in 1037 had determined the principle whereby the

[2] *Liber Constitutionum*, cost. *Puritatem*, ed. J.-L.-A. Huillard Bréholles, *Historia diplomatica Friderici Secundi*, Paris 1852–1861, vol. IV.1.

[3] *Edictum de beneficiis*, in MGH, Legum sectio IV.1, ed. Weiland, n. 45, pp. 88–91.

right of a vassal over his fief should be understood as a real patrimonial right of which no vassal could be deprived unless convicted of a legal offence, further establishing the hereditary transmission of minor fiefs and the procedures for dispute resolution before a court of peers (*curia parium*) – produced a text around the middle of the twelfth century, which for the first time set down in a precise and systematic way the principal feudal customs in effect in Lombardy.

The author of this work is not known, but a central figure who contributed to it was the jurist Obertus de Orto, an important imperial judge and consul from Milan, expert in both feudal and Roman law. Two writings by him were reproduced in the form of a letter[4] in which he illustrates some fundamental points of feudal law at the request of his son Anselminus, who had been sent by his father to study in Bologna, at that time already established as the most valuable centre for the studies of Roman law; Obertus' son had been astounded, so he wrote to his father, at not having learned anything about feudal rights at that celebrated law school. The *Consuetudines feudorum*, reworked in the thirteenth century, would later be known as the *Libri feudorum* and would from then on be added to the fifth volume of the *Corpus iuris*, as an appendix to the *Novels*. They were in this way to acquire the character of a veritable legal text and were widely circulated also because they were tied to the Justinian corpus, so becoming a basic reference for European feudal law until the eighteenth century.

It is worth mentioning how this source underlines the prevalently customary genesis of feudal law. In the *Libri feudorum*, in fact, direct or indirect reference to imperial constitutions, in particular to the *edictum de beneficiis* mentioned previously – for example, where it is stated that a vassal can defend '*tamquam dominus*' his benefice against any possessor whomsoever[5] – represents important exceptions supported by a wealth of rules emerging from a long history of customary legal practice. Clear examples are in the procedure for granting a benefice, in the modes of transmission and in the reciprocal duties and rights of the lord and his vassal. In many cases, the accepted discipline stems from decisions or opinions pronounced in those courts of peers where the opinion of eminent feudal lawyers – foremost Obertus de Orto's – had in

[4] In *Corpus iuris civilis, Volumen, Libri feudorum*, II. 1; cf. *Consuetudines feudorum*, ed. Lehmann, Gottingae 1892, repr. Aalen 1971, p. 115.

[5] *Libri feudorum*, 2. 8: '*rei autem per beneficium recte investitae vasallus hanc habet potestatem, ut tamquam dominus possit a quolibet possidente sibi quasi vindicare*'. The *edictum de beneficiis* is summarised in *Libri feudorum* 2. 34.

the course of time built up a body of rules and principles. Sometimes divergent theses[6] are mentioned. In other instances, reference is made to specific customs established in different places, in particular to those in Milan.[7]

First Pillius de Medicina (the Glossator already mentioned), then a series of jurists from Bologna at the end of the twelfth century composed a number of *glossae, summae*, commentaries and treaties on the *Libri feudorum*. An element which was common to all these was the constant counterpoint between feudal norms and Roman texts. The result is a curious hybrid between two legal systems profoundly distant in form and origin. This hybrid would beget theories whose influence would be widespread and long-lasting, such as that of the double dominion (*dominium divisum*), that of the owner and that of the tenant and actual user of the land. Pillius introduced this theory merging the idea of benefice – considered under the light of the previously mentioned understanding of feud as a real patrimonial right – with conceptual tools of Roman law, such as the *actio utilis*, for the purpose of protecting the vassal's autonomous right over his benefice.[8]

13.3 Rural Law

The feudal class was not the only one equipped with its own laws. It should be underlined that the fundamental character of medieval legal systems in every region of Europe, which was to persist until the end of the eighteenth century, consisted in a plurality of legal systems each corresponding to the different levels of personal status in which the society of the time was divided. The capacity for action, marriage and family law, succession, the system of sanctions, the right to a trial, all of this (and more, e.g., the right to vote or have access to public offices), was ordered differently according to the class to which one belonged. To these were added specific norms concerning women, secular and ordinary

[6] E.g. in the sale of a feud carried out by a vassal to a third party being convinced (as confirmed on oath) that he had full title to the property: the *Libri feudorum* say that in such a case it was up to the purchaser to choose whether to return the lands to the feudal lord or to the vassal, but add that Obertus felt that only the second option was valid (*Libri feudorum*, 2. 42).

[7] E.g. it is pointed out that '*non est consuetudo Mediolani ut de felonia aut de infidelitate pugna fiat*', despite the different regulation in the *Lombarda* which called for the duel (*Libri feudorum*, 2. 39). Milan incorporated many feudal norms in the *Liber consuetudinum* of 1216.

[8] On this, see also Cortese, 1995, vol. II, p. 168 s.

clergy and Jews. To mention one among many possible examples, the well-known normative text known as the *Usatges*, ratified by the count of Barcelona in the second part of the twelfth century, made a distinction between as many as eight social classes: *comites, comitores, vavassores, milites, cives, burgenses, baiuli* and *rustici*. The murder of a man belonging to each of these categories was given a punishment which varied in a ratio from forty to one from the first to the last category;[9] the amends for killing a *rusticus*, a peasant who was considered to be on the same level as a man '*qui nullam habet dignitatem preterquam christianus est*'[10] – was half that paid for the murder of a knight (*miles*), a town dweller or a villager.[11]

Even after the rebirth of cities, the great majority of the European population of medieval and early modern times consisted of peasants. Rural law was in turn characterised by a broad spectrum of personal status [Rosener, 1989]: servants, yeomen and freemen constituted only the principal categories, with many intermediary figures as to the capacity for action, land rights and the level of local autonomy. For example, in Italy, both the legal doctrine and legislation of the communes (as in Pisa in the thirteenth century[12]) clearly distinguished, using terminology contained in texts of late antiquity, between the *coloni* and the *ascripticii*, the first tied to a master (*dominus*) and the second tied to a specific land.[13] There were many other categories among the rural population – *manentes, reddentes, libellarii, angariales, perangarii, recommendati, massarii* and more – each regulated in a specific way, depending on the locality.[14] It is worth noting that the customary regulation and that of statutes could rightfully be seen as in contrast with sources from antiquity: as was lucidly pointed out in the thirteenth century by a scholar from Orléans, Raoul D'Harcourt, who wrote that, according to Roman law, no freeman can make himself 'man

[9] The sanction was proportionate to the personal status of the victim (which should come as no surprise), not of the author of the crime.

[10] This point is very significant: the only personal dignity recognised was a religious identity.

[11] On this see the Barcelona edition of the *Usatges* and of the related thirteenth-century *glossa* edited by Iglesias Ferreirós, 2003, pp. 511–894: *Us.* 4b, 5a, 5b, 10, 11, 12, 13a (the text cited by the preceding note is at p. 604).

[12] Pisa, *Constitutumusus*, XLI (XLII), of the year 1160, ed. P. Vignoli, *I Costituti della legge e dell'uso di Pisa*, Roma 2003, p. 284: the text qualifies the norm declaring it to be, for some reason '*bellissima constitutio*'.

[13] On this, Tavilla, 1993, pp. 7–52; Conte, 1996, pp. 91–150.

[14] '*secundum diversas et varias locorum consuetudines oportet nos istos accipere*', according to Roffredus de Benevento, *Libelli iuris civilis, de villanis*, ed. Avenione 1500, repr. Turin 1968, fol. 115vb.

of another man', so as to become the subject of a real right defensible by royal action, because this would call into question his very *libertas*, which is inalienable by contract.[15] It would be difficult to express more clearly the contractually inalienable Roman notion of *libertas*. In the legal order of medieval times, slavery such as that of antiquity (legally making a man nothing more than *res*) had essentially disappeared, but personal service could be agreed on, even on a permanent basis with hereditary encumbrance for the inheritors, as shown by the sources.[16]

In newly colonised territories, land rights were granted in various forms either on the part of the king or the lord. For example, in Germany, east of the Elba River, these concessions had different characteristics to those on the west side, as shown in the fundamental text of the Germanic custom of the thirteenth century, the *Saxon Mirror* (*Sachsenpiegel*), discussed later.[17] Often those with title to colonise also exercised lower jurisdiction over the peasantry.

The great variety of agrarian contracts, regulating the rights and duties of the tenant farmer, is of particular importance (for opposite reasons, neither the allodial owners with full title nor the serfs needed a contract to work the land). Peasants who worked the lands they did not possess full title to – such as *colons* – were by far the most prevalent category in the rural setting.

The legal discipline of their relationship with the owner and with the land was based only in part on the models from antiquity. Among the most frequent arrangements is the agrarian contract, drawn up in writing (hence named *libellus*) with a yearly rent paid in money or produce, generally for a term of twenty-nine years so as to avoid the risk to the owner of usucaption by the *colon* after thirty years. Occasionally in the early Middle Ages this was accompanied by the owner's right to personally settle any controversies with the peasant, to the exclusion of ordinary law. In Rolandinus' formulary, which is more representative of the territory around Bologna in the thirteenth century, there is also the contractual formula of *emphyteusis* (although it could go under other

[15] This text – included in Iacobus d'Arena, *Commentarii in universum ius civile*, Lugduni 1541, ad *Inst.* 4. 6. 13 *de actionibus*, § *praeiudiciales*, fol 292v – was brought to light by Vallone, 1985, p. 64, and by Tavilla, 1993, p. 64. For the attribution to Raoul d'Harcourt, see Waelkens, 1992, pp. 79–91.

[16] See, e.g., Martinus da Fano, *De hominiciis*, ed. Tavilla, 1993, pp. 241–283; and Roladinus, *Summa artis notariae, de locationibus*, ed. Venetiis 1546, repr. 1977, fol. 121v.

[17] The lively illustrations in the illuminated manuscripts at Wolfenbüttel of the *Sachsenpiegel* show, among other things, the legal relevance of the borders of Elba and the image of justice administered on the peasants.

names and never implied, as it had in Roman law, the duty of ameliorating the parcel of land) often used for ecclesiastical lands which were inalienable: the concession of lands or property was granted for three generations on payment of a considerable sum at the onset, whereas the annual rent was symbolic.[18] More prevalent were rental contracts for land, often lasting five years, between owner and peasant.[19]

In Tuscany and elsewhere the end of the Middle Ages was to see the introduction of the contract of *métayer* or sharecropping (*mezzadria*), which was to last until the twentieth century, in which half of the crops produced belonged to the owner and the other half to the tenant farmer or bailiff, who was in turn in charge of finding labourers to work the land. But the forms and types of contracts in the rural world were many, including, for example, the contract *ad laborandum* of specific portions of land to be cultivated with a joint provision of seeds and the division of the produce between the owner and the farmer.[20] In the same way the *soccida* (*agistment*) was frequent, whereby livestock was leased, with the obligation of returning it at the lease's end, and which in exchange for feeding and caring for livestock the leaseholder had a right to an equal share of the milk or wool, as well as the newly born animals; in case an animal died as a consequence of crime or fault, the responsibility was the peasant's, whereas if it was the result of an accident, the owner was at fault.[21]

Another series of customary norms originating in antiquity and medieval times, but later included in statutes and written customs, concerned the rights and liabilities over common land: the villagers' rights to pasture in the nearby fields and woodlands, the right of common use (*usi civici*). The measure in which, how and when these rights were exercised – pertaining not only to common land, but also to lands and woodlands that were the property of single public or private owners – was determined by custom and could vary from place to place, but were fundamentally uniform. A particular set of rules regulated the alpine valleys, where the herds of cattle were taken to higher pastures in summer and cared for in common, with a proportionate division of the milk products among the proprietors, then descending back to village in the autumn.

[18] Rolandinus, *Summa, de emptione, Instrumentum concessionis in emphiteusin* (fol. 56v).

[19] Rolandinus, *Summa, de locationibus, Instrumentum concessionis ad affictum* (fol. 128r).

[20] Rolandinus, *Summa, de locationibus, Instrument terrae et vinee ad laborandum* (fol. 133v).

[21] Rolandinus, *Summa, de locationibus, Instrumentum socidae* (fol. 140v–142r).

13.4 Commercial and Maritime Law

Another set of laws tied to social status, commercial law, was of more recent origin and development. It appeared in medieval Italian cities in the twelfth century and spread all over Europe in answer to the needs of merchants and artisans active in the new urban economy. The newly created *lettera di cambio* (which was to become the bill of exchange) was to permit a flexible way of payment in different currencies without having to carry metal coins, which was risky and cumbersome. The *commenda* permitted a wealthy city dweller to entrust a merchant with goods or capital for trading overseas, dividing the profit at his return, often at a proportion of one quarter of the earnings for the merchant. The *accomandita* limited the liability of the capitalist partner (*accomandante*) to the sum conferred, reserving the unlimited liability to the managing partner (*accomandatario*). Insurance on the goods shared the risk of shipwreck or theft between numbers of people, through the payment of a modest sum (*premium*) on the part of all those insured. Written guarantees (*documenti guarentigiati*), of which we have spoken – in particular a promissory signed as a public act in front of a notary – alone constituted an executive order, thereby avoiding the lengthy times of a formal trial for the legitimate owner to collect what he was owed.

These and other institutes originated as customs with the active cooperation of merchants and the ever-present notary [Santarelli, 1998] and were recognised as valid in the special courts where mercantile controversies were debated, that is, within the merchant corporations themselves.[22] Here the procedures were simplified and free from formalities; the style of argument and the criteria by which a decision was made were characteristically equitable in style and far from the complex framework of the formal procedure of the *ius commune*.

Only later, beginning at the end of the fourteenth century, did legal doctrine begin to analyse this new branch of law: after the first and fundamental contribution by Baldus de Ubaldis, other jurists began to consider, in their *consilia* and commentaries, the new commercial institutes. Some of them were to claim the superior 'equity' of the legal doctrine, ironically commenting on the *aequitas* expected of the merchants as judges.[23] In 1488 the Portuguese Pedro de Santarém composed

[22] For Bologna statutes on the *Mercanzia*, see Legnani, 2005.

[23] Paulus Castrensis bitingly commented on the arrogance of merchants '*qui faciunt se magistros aequitatis et contemnunt legistas dicentes quod vadunt per cavillationes et ipsi per aequitatem*'; whereas, Paul points out, the learned know what equity is better than the merchants know what rigour is, because the first don't just have nature on their side, but also art, whereas the second often make wrong judgements based on their presumption) (Paulus de Castro, *Commentaria ad Digestum vetus*, a *Dig.* 1. 1. 1. *de iustitia et iure*, l. *iuri*, n. 9, Lugduni 1550).

the first treatise on insurance [Maffei, 1995, p. 349]. Later in the sixteenth century systematic and complete treatises on commercial law were produced by Bartolomeo Stracca, Sigismondo Scaccia and other learned jurists, discussed later.

No less important was the development of customary rules regulating maritime navigation and overseas trade. On the basis of Roman and Byzantine[24] texts, the development of trade actively begun by the maritime republics at the end of the eleventh century involved not only the import and export of goods, but also the application of rules on maritime traffic and on the agreements made by merchants in the Far East and the northern seas. This resulted in the development of legal customs that regulated the organisation on ships, the power of the captain over his sailors, the procedure that took place in case of controversies arising in distant places, or in case of shipwreck or accident, the risks connected to all these eventualities and the frequent assault on the part of pirates. It also included the rules of insurance, the purpose of which was to share the great and constant risks involved in maritime trade.

The norms of commercial and maritime law were subsequently elaborated into written texts [Hilaire, 1986]. One source of particular importance because of its early date comes from Pisa: the *Constitutum usus* from 1160 collected and systematically set down in writing the principal customs of this important maritime republic. Among other topics, the text discussed at length institutes such as the forms of partnership in maritime trade,[25] leasing rights[26] and the discarding of goods in case of danger.[27] The norms clearly show that they were the fruit of a great number of practical situations and cases. From this and other collections – Genoa, Venice, Amalfi, Barcelona and other cities were also to set down their maritime rules in writing – the text would develop which would, later in the fifteenth century, constitute the normative point of reference for maritime law in Europe: a code of maritime laws (*Consolato del mare*),[28]

[24] *Lex Rhodia de iactu: Dig.* 14. 2. 9.

[25] Pisa, *Constitutum usus* (1160), 22, *de societate facta inter extraneos*, in *I Costituti della legge e dell'uso di Pisa (sec. XII)*, ed. P. Vignoli, Rome 2003, pp. 205–222.

[26] Pisa, *Constitutum usus*, 28 (ed. Vignoli, pp. 237–247).

[27] Pisa, *Constitutum usus*, 29 (ed. Vignoli, pp. 247–251).

[28] Among the many editions: *Il consolato del mare* with a commentary by Giuseppe Maria Casaregi, Venice, 1802.

which was translated into many languages and circulated widely in Europe and the Mediterranean countries until modern times.

Both for commercial law and for maritime law, the fundamental role of custom was spread along the trade routes. This allowed the broad diffusion of new institutions – such as the letter of exchange and insurance. But mostly it allowed testing the efficacy of customs, favouring those that proved most functional for the needs of commerce and exchange. So it happened that the more worthwhile customs won over similar but not equally effective ones. Uniformity was thus reached, so to say, spontaneously as testified by a text such as the *Consolato del mare*. From this point of view, the fact can be explained that a legal regime which is profoundly different from that on the continent, that of England discussed later, could have allowed, besides its *common law*, a special branch of law, the *law merchant*, which comes directly from the commercial customs of Italian cities.

14

Local Laws

Beside particular laws, which, as we have seen, were unconnected to specific localities and expressed the needs of particular classes or social groups beyond regions and countries, local laws were also to see an extraordinary increase in medieval Europe. They are the historical continuation of early medieval customs, the origins of which we have already mentioned, but are not limited to these: not only was a stock of new customs added, but also a substantial number of normative rules – by authoritative provision of cities and kingdoms – creating a thick interweaving of norms. This normative network was to last far beyond the medieval age, until modern codifications.

14.1 City Statutes

The political and legal autonomy Italian communes won during the twelfth century took the shape of freely elected consuls endowed not only with political and military powers, but with full civil and criminal jurisdiction. What is more, it was soon to include extensive normative power, exercised in three distinctive directions. First, upon taking office, the consuls and the other magistracies took an oath of observance of specific obligations concerning their own competence and ways of exercising their power: specific notarial documents in the form of briefs (*brevia*) analytically and precisely described these functions, which had been established at citizen assemblies. Second, when it was felt that the application of a custom should be guaranteed on the part of the judges, it was committed to writing and formally approved by the assembly, thereby transforming it into a law of the city. Third, other rules, introduced over time on the basis of choices made by the citizenry through its own magistracies and assemblies, were established in the form of laws. The *brevia* of the consuls, the written customs and the laws approved by the commune constituted the basis of the written laws of the city which were to assume the name of 'statutes'.

These three categories of norms, though adopted separately, were soon to converge into a single text beginning in the twelfth century and later in the thirteenth century to every commune. This constituted the *Liber statutorum* of the city, which was divided into several books, each of which was made up of chapters (*rubricae*) containing the specific local norms. For the drafting of the *Liber statutorum*, the communes relied on local jurists, but sometimes used jurists from other cities; so, for example, in Genoa in 1229 [Piergiovanni, 1980], the statute was entrusted to a Glossator from Bologna, mentioned earlier, who held in that year the office of *podestà*, Jacobus Baldovini.[1]

Beside the first rare statutory models of the twelfth century (among the few still in existence are those of Genoa, Pisa and Venice), others of particular interest are (to limit ourselves to some cities for which we have the thirteenth-century statutes, that is, pre-dating the age of the *signorie*) those of Milan, Bergamo, Brescia, Biella, Novara, Vercelli, Verona, Vicenza, Padua, Treviso, Venice, Parma, Bologna, Lucca, Siena, Volterra and Perugia.[2]

The consul's *brevia*, originally formulated in the first person as a sworn document, were later to be changed to the third person. The length of the term in office, the judicial, diplomatic, administrative and military powers of the consuls – and later, from the beginning of the thirteenth century on, of the foreign *podestà* elected as head of the commune – constituted the basis for the constitution of the commune. For example in Pisa, the oldest *brevia* (of 1162) imposed on the consuls that they should leave the decision on a state of war to the senators and elders from each gate of the city, that is, to the majority of the city council members convening at the sound of the bell.[3]

Customs of private, criminal and administrative law[4] were in turn organised in a systematic way, often in three or more books which usually

[1] The original edition is lost, but it can be reconstructed in part because it was reproduced in the Statutes of the Genoese colony of Pera (Statuti di Pera, ed. V. Promis, Statuti della colonia Genovese di Pera, in 'Miscellanea di storia Italiana' 11(1870), 513–780). In Bergamo the jurist (not professor) Albericus de Rosciate worked at the draft of the 1331 statute. In Florence the 1415 statute was prepared by the Commentator Paulus de Castro.

[2] For a list of the editions of these and other Italian statutes, see *Catalogo della raccolta di statuti [. . .] della Biblioteca del Senato*, 8 volumes (A–U), 1943–1999.

[3] Pisa, *Breve consulum (1162)*, in *I Brevi dei consoli del comune di Pisa degli anni 1162 e 1164* ed. O. Banti, Rome 1997, p. 59. Two years later, the same procedure was prescribed for the peace agreement (*ivi*, p. 87). On the older phase of the statutory compilations, see the reconstruction by C. Storti Storchi, 1998.

[4] Examined by Lattes, 1899; see also Ascheri, 2000.

included rules on the civil and criminal trial in addition to those concerning sanitary and urban planning provisions. For private law, the statutory dispositions were generally rather few, because where the Roman norms in the text of the *Corpus iuris* did not contrast with custom or divergent normative choices, it was not deemed necessary to repeat them in the statute. However, there were important rooted customs distinct from Roman law, some drawn from Lombard-Frank law, others developed later: for example, the system of criminal sanctions in the communes was to retain, at least until the thirteenth century, the Germanic tradition of pecuniary fines as the normal form of sanction even for the most serious crimes; another example regards the position of a daughter in matters of inheritance, as having received her dowry, she would be excluded from her father's succession; yet another example is that of the rural and commercial contracts, the former evolving in the communal age, the latter recently originated from mercantile and trading customs. It was the very ubiquitous presence of the *ius commune* that led cities to set down in writing the customs they wanted preserved by transforming them into law through legislative approval. Therefore the communal statutes consisted in large part of norms of customary origin.[5]

There were also a number of new norms – different and contrasting with customs and the *ius commune* – which were introduced in the cities through a legislative procedure: these were public decisions (*statuta*) which had the legislative feature of being general and abstract, and thus different from decisions made by city councils concerning single citizens or specific events, or dealing with administrative or fiscal provisions. These would later be included in the city statute alongside the other two categories of norms. For example, recognising the risk run by the city in case a woman possessing a sizeable dowry married a citizen of another commune, provision was made whereby the dowry of such a woman could not include land or buildings, as these could potentially turn into dangerous *enclaves* for the enemy in case of war between the two cities. The norms concerning the city magistracy election were often very detailed, with the purpose of preventing prior agreements among family groups: an example is the 1279 statute in Perugia regulating the election of officers of the commune, a complicated system of active and passive voting rights, with ballots being distributed to the electors (for greater

[5] The *Liber consuetudinum* del 1216 of Milan has this origin, in which Lombard, Roman, feudal and customary rules are expressly referred to as coexisting in the Milanese civil law and procedure of the early communal age.

security) exclusively by monks, with a procedure combining an active electorate and the drawing of lots.[6]

With every change in the commune's constitutional regime – with the passage from the consular commune to the regime of the *podestà* and later to the government in the hands of the citizenry and then the guilds, later still with the transition to the *signoria* – the statute was modified. This took place even with alternating factions, in a continuous succession of norms, sharply denounced in famous verses by Dante Alighieri, who was a victim of such bitter battles between factions, having had to flee from Florence as a result of a ban which was not to be lifted in his lifetime.[7]

Very often normative innovation was the result of interventions which imitated reforms which had taken place elsewhere: this happened, beginning in the third decade of the thirteenth century, when Italian cities introduced capital punishment for the crime of homicide,[8] thus adopting the recent ruling introduced in the kingdom of Sicily. In the same time, the effects of private peace that originally could go so far as to reduce or even to remove the penalty were limited or excluded.[9] Another example is when, in the late thirteenth and fourteenth centuries, the inquisitorial model was introduced in the criminal trial, with concomitant growing powers of the judge, side by side with the accusatory one present in the older statutes.

The legislative autonomy of the city-states in Italy was in fact boundless, the only limit constituted by canon law and its prescriptions on heresy, the regulation of ecclesiastical benefices and the juridical state of the clergy. The city statute, modifiable and frequently modified in the beginning, became generally stable by the late fourteenth century, when the rise of the *signorie* was to impose the predominance of the city lord's orders and norms rather than city legislation, but it did not abolish the statutes. This happened systematically to all the cities under the dominion of the Visconti family: for example, in Pavia in 1393, Verona in the same year, in Milan in 1396 and in many other central and southern cities. It was these late medieval versions, still in line with seigniorial

[6] *Statuto del Comune di Perugia del 1279* ed. S. Caprioli, Perugia 1996, 2 volumes, ch. 86, vol. I, pp. 104–107.

[7] '*Atene e Lacedemona, che fenno | l'antiche leggi e furon sì civili, | fecero al viver bene un picciol cenno | verso di te, che fai tanto sottili | provvedimenti ch'a mezzo novembre | non giugne ciò che tu d'ottobre fili*' (*Divina Commedia*, Purg. VI, 139–144).

[8] Bergamo, *Statuti del XIII secolo*, coll. IX. 6, ed. Finazzi in MHP XVI/2, col. 1921 ss.

[9] Padoa-Schioppa, 2003, pp. 227–242.

power but retaining many vestiges of the preceding age, which were to remain in effect – often published in print since the late fifteenth century and later – until the end of the eighteenth century without substantial modifications.

Specific territorial legislation can also be found in *rural* communes: this is attested to by hundreds of statutes of minor localities, which were drafted from the thirteenth century until the modern age. In these cases normative autonomy was greatly reduced because of the control over the territory exerted by the dominant city in the territory, which often simply authorised the transferral of whatever part of its statute was pertinent to rural life and which in any case demanded the preventive approval of local norms. The role played by the dominant city nearby manifested itself, for example, by requiring that controversies between a villager and a city dweller should be dealt with exclusively by city judges with the pretext – as expressed in an early statute from Lombardy – that this was in defence against the (supposed) cunning of the peasantry, the *malitia colonorum*.[10]

Rural statutes, as well as orders that emanated from the *signoria*, or from the feudal lordship (*signoria*) in places where feudal seigneury survived, provide a valuable source of information in understanding the management of lands, woodland and pastures, as well as an analysis of relationships within the village itself, the ties of collective responsibility[11] and other aspects typical of rural life.

In the part of Italy under pontifical rule – extending from Lazio to the Marche region, from Umbria to parts of Emilia, from Rome to Spoleto and to Bologna – local custom and city statutes were only recognised if they obtained papal approval, in these territories the Pope also being the temporal sovereign. An important legislative text was superimposed on these in 1357, by the will of Aegidius d'Albornoz, pontifical legate in Italy during the time the papal seat had been transferred to Avignon: the *Egidian Constitutions* [Colliva, 1977] regulated the powers of the local rectors, criminal law and judicial procedure. These remained in effect until the beginning of the nineteenth century.

[10] Milan 1170, in *Atti del comunedi Milano sino all'anno 1216*, Milan 1919, n 75, p. 111.

[11] The principle, often sanctioned in statutes and confirmed in judicial acts of the time, whereby the owner could, through the forced intervention of the city magistracy, obtain compensation from the entire village if any single peasant failed to pay his dues – e.g. not paying the tenancy fee either in money or produce – was a frightening deterrent and created an objective solidarity within the local community and effectively generated strong social control of its members.

14.2 The Kingdom of Sicily

The kingdom of Sicily had come into being in 1130 following the Norman conquest of Byzantine southern Italy and Muslim Sicily and was also to see a flourishing of written custom. Amalfi has left us the customs of its lively maritime commercial traffic. In the last twenty years of the twelfth century two judges, Andrea and Sparano, independently set down in writing the local customs of Bari,[12] the first pointing out the differences with Roman law, the second the differences with Lombard law, which in Puglia had long since become of great importance despite the fact that during their two centuries of dominion the Lombards had never reigned there. Benevento had its own statutes beginning in the thirteenth century. In Naples local customs, with a wealth of interesting aspects particularly in private law, were collected by twelve experts, then revised by order of Charles d'Anjou by the jurist Bartolomeus de Capua and made effective as of 1306,[13] and in this form were observed for centuries by a large part of the kingdom. In Sicily too, customs were set in written form beginning in the thirteenth century, as in Messina, Palermo and elsewhere; however, after an initial acquiescence, the Norman and Swabian kings were to demand that these could only be applied only after they had been checked and revised by the sovereign in power.

The presence of a strong monarchy manifested itself in southern Italy also on the legislative front. If the first Norman king, Roger II, had emanated a limited number of chapters in 1140,[14] the culmination came a century later, during the reign of Frederick II. The *Liber constitutionum*, edited by the jurist Pier delle Vigne, poignantly mentioned by Dante, came into being in 1231: the text was not limited to a collection of the earlier principal laws of the Norman and Swabian kings, but also introduced many new dispositions. It was divided into three books dedicated to public offices, judicial and fiscal power of the monarchy, criminal law, judicial procedure and the different institutes of private law. It demanded that the judges of the kingdom observe firstly the rulings contained in the *Liber*, secondly local customs, thirdly Lombard law (but only in the territory where it was still in effect, such as around Benevento)

[12] Published for the first time in Vincenzo Maxilla, *Commentarii super consuetudinibus praeclarae civitatisBari [...]*, Patavii 1550.

[13] Repeatedly published: see, e.g., *Consuetudinea neapolitanae, cum additionibus [...], Venetiis* 1588.

[14] Texts in *Le Assise di Ariano*, Ariano Irpino 1994, pp. 278–302.

and lastly the Roman *ius commune*.[15] It declared the equality among subjects of the kingdom under royal law, independently from their ethnic origin and their social status,[16] and rigidly restricted the *status* of the feudal lords, as when disposing that they had to seek the sovereign's approval even to marry.[17]

The Code of Frederick is an important monument of medieval European legislation,[18] in an age when monarchies rarely used this instrument of legislation to regulate public and private law [Romano, 1997]. Accompanied by the *Glossae* of Marinus de Caramanico and the commentaries of Andreas de Isernia and other jurists of the kingdom, in southern Italy and in Sicily the *Liber constitutionum* was to remain in effect as legislative text for five centuries, until the end of the eighteenth century.

14.3 The Kingdom of Germany

The fragmentation of the kingdom of Germany is also reflected in the sources of law, which attest to how the characteristics of *per stirpes* laws of early medieval origin were modified and integrated with customs developed in the single territories. In the thirteenth century some texts were written for the purpose of clearly setting out the characteristics of customary laws.

By far the most important work is the *Sachsenspiegel* (*Saxon Mirror*)[19] written between 1215 and 1235 by the jurist Eike von Repkow, who wrote it originally in Latin and subsequently transposed it with additions to Saxon German.[20] In limpid and concrete language, the *Mirror* attests to a law in which the trial is regulated according to an order which includes ordalic proof (such as the duel) and witness proof, but also imposes on the parties to take an oath which makes it possible to refuse the sentence

[15] *Liber Constitutionum*, I. 63 (see above, note 2 of this chapter).

[16] '*In iudiciis aliquam discretionem haberi non volumus personarum sed aequalitatem; sive sit francus, sive Romanus aut Longobardus qui agit, vel qui convenitur, iustitiam sibi volumus ministrari*' (*Liber constitutionum*, II. 17). Nevertheless, the small minority of Franks had a superior social rank compared to other races in the kingdom.

[17] *Liber constitutionum*, III. 23. The purpose of the norm was to avoid marriage alliances between powerful families, looked on with diffidence by the monarchy, because it might reinforce the risk of a hostile attitude.

[18] See G. Dilcher, D. Quaglioni, M. Caravale, Pasciuta et al., in *Gli inizi del diritto pubblico*, 2008; Zecchino, 2012.

[19] *Sachsenspiegel*, I. *Landrechte*; II. *Lehnrecht*, ed. K. A. Eckhart, Göttingen 1955.

[20] Lück 2013.

by contesting the judge and requesting (not without risks) a new trial. Together with *glossae* added in the fourteenth century – sometimes written by jurists of erudite learning from the school of Bologna, who tended to point out the analogies with Roman law – the *Sachsenspiegel* had a fundamental influence on many texts of customary law in eastern Germany for centuries.

In Augsburg in Bavaria the *Swabian Mirror* (*Schwabenspiegel*)[21] came to light in the year 1275–1276 deriving from the *Saxon Mirror*, but also including customary Bavarian norms together with Frank capitularies, imperial dispositions, Roman and canon texts, with a framework which was much more favourable to Church jurisdiction and rights compared to the Saxon model. This work too was widely circulated, particularly in southern Germany.

If these and other sources regulated territorial law (*Landrechte*), Germany too – beginning in the twelfth century but mostly by the thirteenth century – saw the increase in the number in city rights (*Stadtrechte*) as distinct from the first. Unlike Italy, in Germany it was the walls of the city that rigidly marked the legal boundary between town and country.

14.4 The French Kingdom

The uninterrupted survival of Roman law in southern France – through the Theodosian tradition of the Alarician Breviary to begin with, then with the reception of Justinian's *Corpus iuris* and from the twelfth century on, the new legal science from Bologna – resulted in this part of the kingdom in *Pays de droit écrit*. However, here too in many sectors of the legal regime existed rooted customs which diverged from the rules of Roman law: for example, in matters to do with family rights as to a dowered daughter being left out of paternal succession [Mayali, 1987]. It then became common practice to indicate in the acts and contracts concluded before a notary the waiving of recourse to Roman law where it contrasted with the intent of the parties: this might concern, for example, the previous *renunciatio* to recourse to a benefice ordained with the Senate consult Velleianus, which permitted the *restitutio in integrum* on the part of a woman who had concluded a contract without the presence of her father, husband or brother. In addition to the practice of the *renunciations*, several locations in the south of France drafted new

[21] *Schwabenspiegel*, ed. K. A. Eckart, Göttingen 1974.

statutes in which they inserted local customs which they were not willing to forego, in the same way of the Italian communes. Nevertheless Roman law was very present as a subsidiary source of law. When the monarchy was forced to take into account the reality in countries that had written laws, in order to avoid any potential subordination with respect to the Empire – of which Justinian Roman law was considered the expression – King Philip IV the Fair established in 1312, with an ordinance, that in the *Pays de droit écrit* Roman law was admitted, but only as a local custom, not as imperial law.[22]

Much more relevant was the role of custom in the central and southern regions of the kingdom, which were known as the *Pays de droit coutumier*. The Frank law as outlined in the *Lex Salica* over the course of the centuries in the early Middle Ages was to incorporate new elements derived from customary law. Later, with the rebirth of Roman law and the establishment of monarchic power, always for the purpose of safeguarding specific local norms, texts collecting the customs of the different historical regions of the kingdom began to appear. In Normandy, the oldest *coutumier* dates back to the twelfth century, when the region had not yet become part of the dominions of the reign,[23] whereas a broader and more elaborate version, which also includes Roman law integrated with elements of custom, was to be produced in the middle of the thirteenth century.[24]

The customs of Orléans were set down in the *Livres de Jostice et de Plet* (1260–1270), whereas those of Anjou and the Tours region were presented in the *Etablissements de Saint Louis* in 1270.[25] In the fourteenth century Brittany also was to put its customs into writing,[26] and those of the region of Paris were included in the *Grand Coutumier de France*.[27] Roman law was nevertheless of great importance also in the *Pays de droit coutumier*, often being quoted and applied as *ratio scripta* in cases where local custom was inadequate.

[22] Isambert, *Ordonnances*, III, pp. 20–27, at p. 22.

[23] *Très ancien Coutumier de Normandie* (about 1190).

[24] *Summa de legibus Normanniae* (1254), then in French by the title *Grand Coutumier de Normandie* (circa 1270).

[25] *Li Livres de Jostice et de Plet*, ed. P.-N. Rapetti, Paris 1850; *Les Etablissements de Saint Louis*, ed. P. Viollet, Paris 1881; this title is due to an ordinance of King Louis IX on judicial procedure at the beginning of the text.

[26] *Très ancienne coutume de Bretagne* (1312–1341), published for the first time in Paris in 1480.

[27] *Le Grand coutumier de France*, ed. d'Ablaing and Laboulaye, Paris 1868.

The most important and best-known work was written by the jurist Philippe de Beaumanoir,[28] who in 1280 wrote the current customs in the county of Clermont, where he was acting as a *bailli* (judge and royal functionary): his treatise is admirable for its acumen and critical eye, with which he expresses the customs of Beauvaisis, which constitute the main framework of the book.[29] But elements of Roman law are also expertly woven in together with an exposition of royal law provisions which could no longer be ignored: for example, in cases where the king was trying to eliminate or circumscribe violence and private wars with ordinances that imposed a 'quarantine' or with instruments such as the *asseurement*.[30]

14.5 The Iberian Peninsula

Between the ninth and thirteenth centuries in Spain, local law constituted by far the most prevalent source of law. Local law manifested itself in three forms which nevertheless present several common aspects.

We find first of all a series of 'people's papers' (*cartas pueblas*) in which a local lord established, in normative form, collective rights and obligations for groups of peasants to which a portion of uncultivated land was granted for the purpose of rendering it fruitful. The peasants remained dependant on the lord and adopted the rules set out in the charter. This occurred, for example, in the year 954 in the Carta of Freixá, a parcel of land in the county of Barcelona, in favour of only five named men. Thus it was in many other cases, which show pre-existing customs of private law in their norms.

The municipal *Fueros breves* present a very different character: the term comes from the Latin *forum* and means a written source indicating the royal concession of privileges to a local community, generally a town or village. These were documents of exemption with which citizens were

[28] Philippe de Beaumanoir, *Coutumes de Beauvaisis*, ed. A. Salmon, Paris 1899–1900, 2 vols. Cf. Weidenfeld in DGOJ, 2008, p. 36.

[29] E.g. obligations formally drawn up by public act were proven with the examination of the seal placed on the document by the lord, either lay or ecclesiastic, and not through the examination of the text. The seal is proof against the lord who placed it, in case of dispute initiated by a third party. If the lord denies the authenticity of the seal, it is his opponent who needs two witnesses to testify to their presence on the occasion of the seal being placed on the document. If this occurred, the lord had to pay a fine, whereas those who tried unsuccessfully to prove the authenticity of the seal were subject to more severe punishment. Beaumont felt this disparity in punishment was not justified, so much as to propose a different regulation: *Coutumes de Beauvaisis*, cap. XXXV, vol. II, p. 44 s.

[30] *Coutumes de Beauvaisis*, cap. LX, vol. II, pp. 366–374.

granted certain rights in trade and local organisation, often combined with norms of criminal law and dispositions on woodland and pasture, the ownership of which was held in common.[31] It was not rare that a *Fuero* guaranteed against prevarication on the part of nobles against the *populatores*, in this way also reinforcing the role of the king, as for example occurred in Caceres in Estremadura in 1231, with a disposition which expressly equated nobles and non-nobles, rich and poor, commanding that in the city, which had recently been conquered again for the Christians by the armies of the king against the Moors, there could only be two palaces: one for the king and one for the bishop.[32]

These privileges often caused controversy among the local lords, who aimed at retaining their traditional control over the local populations. In Leon, in Castile and elsewhere the examples of *Fueros* of this kind are many from the eleventh and twelfth centuries.[33] These sources attest to a process of atomisation of law [Tomás y Valiente, 1983 p. 146] which has lacunae and is incomplete, requiring important integrations. To this end, the Visigoth norms of the *Liber iudiciorum* made their entrance, as did judicial arbitration and very often local habits (*usus terrae*).

Towards the end of the twelfth century a new type of *Fueros* began to affirm itself. It was based on custom and also (particularly in Castile and Navarre) on judicial sentences (*fazañas*) – a term which indicates decisions taken by the judges, often with a considerable discretional power compared to local customs themselves[34], or by arbitration (*albedrío*)

[31] The contents might have coincided with the legal tradition of the community, as occurred, e.g., when King Alphonse VI in 1095 admitted a *Fuero* inspired by Frankish law and then extended to other localities in Castile, for the inhabitants of Logroño.

[32] See the passage in *El Fuero de Caceres*, Caceres 1998, p. 32; and the critical observations by Bruno Aguilera Barchet on the composition of King of Leon, Alphonse IX's privilege (ivi, pp. 162–170).

[33] In Aragon the *Fuero* of Jaca of 1063 is important, and includes Frankish law to a large extent. Similar characteristics are found in documents granting the right of self-government (*chartae franchisiae*) in Catalonia, such as the 1025 one from Barcelona (Font Rius, 1969) and in particular the *franchisiae* for Tortosa, Lérida and Agramunt, in the context of the process of repossession of territories against Islamic dominion in the middle of the twelfth century.

[34] A clear example of this discretionality – effectively recounted in Wesel, 2010, p. 231 s. – is in a thirteenth-century sentence by a judge in Burgos (Castile): a woman had been badly injured outside her home, but her husband rejected her for fear that if she died inside the home, he would be blamed for her death; the woman in fact did die shortly thereafter and he was accused of murder; the judge deliberated on her death by strangulation on the part of the husband, in accordance with local custom, but unlike local custom he assigned the man's possessions to his family without assigning a portion to the royal treasury as a public sanction for having violated the public peace with his crime.

where a norm was missing, being considered binding for future cases thereafter – that new *Fueros* were developed which were much more extensive. These aimed at offering a potentially complete regime, which would need no further addition except in exceptional cases. For these cases the *Fuero* could also entrust the decision to the judge's arbitration, though consenting to contest it with recourse to the king's council.

Historical research has identified four main groups of *Fueros* [García-Gallo, 1971], which correspond to different regions of Spain. For the Aragonese and Navarre areas, the extended version of the *Fuero* of Jaca is important, which influenced various cities, and so too the *Fuero* of Tudela. In the Leon/Estremadura zone '*boni hominis*' drew up the *Fuero* of Salamanca, besides others. The area of Castilian Estremadura has a number of *Fueros*, among which the one of Sepulveda seems to have been the original one, then extended to other localities; but by far the most important for this area was the *Fuero* of Cuenca,[35] developed in the thirteenth century (from 1233) and which brought together many sources of local custom, perhaps based on a formulary previously ordered by King Alphonse VIII. The *Fuero* of Cuenca spread to many cities and localities of Castile and other parts of Spain. The Catalan area in the thirteenth century was to have similar sources, named *Consuetudines* or *Costums*, such as that of Lérida (1228) and Tortosa (1279).

These sources, some of which were applied by extension to more than one locality, nevertheless maintained the characteristics of local custom. But beginning in the thirteenth century in Spain tendencies are manifest converging towards superseding particular laws.

In Navarre the *Fuero General* (1234–1253) unified various texts of customs in the region which had for a very long time remained, also because of its geographical position, outside the influence of common Roman law. In the kingdom of Aragon King Jaime I ordered the bishop of Huesca, don Viodal de Canellas, who had been a student in Bologna, to write a unified text of local law: in 1247 the *Fueros de Aragón* were issued, which contained norms of local custom and case law materials, referring, in case of lacunae, '*ad naturalem sensum vel aequitatem*': a last norm of the system which in practice was interpreted – particularly by the superior court of justice of the kingdom, the Justicia Major – as a reference to the Roman *ius commune*. It is worth noting here that the general law of the kingdom did not prevail over the local *Fueros*, which therefore remained in effect and were applied and given priority over the general *Fueros* and over the *ius commune*.

[35] *Fuero de Cuenca*, ed. R. de Ureña y Smenjaud, Madrid 1935.

In Catalonia, where recourse to the Visigoth *Liber iudiciourum* was becoming rarer, provision had been made from the 1160s on, to the issue of thirty chapters of *Usatges* (*Usatici*) of Barcelona[36] on the part of Count Berenguer I. In the course of the next two centuries they were to include additional norms. An important text was to issue from it, initially written in Latin and then translated into Catalan, which deals with feudal topics, the trial and criminal law, as well as commercial and maritime law. Some of the norms of the *Usatici* were widely circulated even beyond the confines of Spain. Local customs remained; none acquired a general value, not even that of Barcelona, which nevertheless was extended to many faraway Catalan localities with the expedient of considering them 'quarters' of the city. As far as feudal law, in the thirteenth century the canon jurist Father Albert from Barcelona, who had studied in Bologna, was to write the *Conmemoracions*, which were inspired by the *Libri feudorum* from which the *Costumas de Catalunya*, of the same era, was also to draw inspiration.

Royal legislation was to always remain subordinate in Catalonia to the laws previously approved by the *Cortes*, which were made up of the traditional *ordines* of nobles, clergy and city bourgeoisie. Even the ordinances (*prammatiche*) emanated by the king himself could not repeal them. Roman *ius commune* was on the other hand to play a full and intensive role in Catalonia, more than anywhere else in Spain: in the sense that it persisted as subsidiary law; and that local, customary and legislative norms were strongly influenced by it.[37]

In Castile two important sources were to develop during the thirteenth century. The translation into Castilian of the Visigoth *Liber iudiciorum*, promoted by King Ferdinand III (1217–1252), was to be called the *Fuero Juzgo*.[38] In Toledo local customary law continued to be applied for a very long time for part of the population (*castellanos*); whereas for the Mozarabic population – Spaniards of Christian religion, particularly in the southern part of Spain, who had adopted the Arab language and culture in the course of the centuries of Islamic dominion – a distinctive jurisdiction reserved for them continued to apply the *Fuero Juzgo* until the fifteenth century.

[36] See the valuable critical edition with a *glossa* edited by Iglesias Ferreirós, 2003, pp. 511–894.

[37] In 1251 Jaime I imposed the recourse, in the absence of customary rules or *Usatges*, 'according to natural sentiment' ('*secundum sensum naturalem*') forbidding the inclusion of Roman or canon law. But this actually resulted in recourse to the *ius commune*, which in 1410 was expressly indicated by the Court of Barcelona as the last subsidiary law together with equity and 'good reason' ('*dret comú, equitat e bona rahó*').

[38] *Fuero Juzgo en latin y castellano*, Madrid 1815.

A few years later King Alphonse X (1252–1284), having succeeded his father, Ferdinand III, took the initiative of having a text drafted which would make the fragmented law of the different *Fueros* of Castile more uniform. The project was entrusted to learned jurists of the kingdom, who once again took the text of the Visigoth *Liber iudiciorum* as their basis, although a number of dispositions of canon origin, taken from the *Liber Extra* of Gregory IX, were also included. The *Fuero Real*, which was in this way approved in 1255,[39] was little by little imposed on many cities of ancient Castile – among which were Aguilar de Campo, Sahagun, Madrid, Burgos, Valladolid – whereas for the territory of Leon and for the newly conquered territories the *Fuero Juzgo* prevailed. But the *Fuero Real* disposition entrusting the nomination of the city magistrate (*alcalde*) to the king and no longer by election (e.g. like the *Fuero* of Madrid) together with other dispositions centralising power, aroused such fierce opposition in Castilian cities as to force the king in 1272 to reinstate ancient privileges to municipalities which in the past had been granted autonomy.

For other cities the unifying effect was, however, achieved, together with the objective of limiting the role of judges and their power to create laws by means of discretionary judgements, the *fazañas*. But resistance did not subside. Later, at the end of the century, King Sancho IV decreed that the *Fuero Real* was valid only for judgements which were the competence of the Royal Court of Justice, not for those for which the local courts were competent, not even in cases where they made an appeal before the king's judges, because for them the pre-existing *Fueros* were still effective [Tomás y Valiente, 1984].

King Alphonse X of Castile himself was behind perhaps the best-known text in the history of Spanish legislation: the *Book of Seven Parts* (*Las Siete Partidas*),[40] written (according to the most authoritative source) in the years 1256 to 1265 by learned jurists, among whom was Fernando Martinez de Zamora, who had been a student of Azo in Bologna. In seven books, the work respectively covers: ecclesiastical organisation, sovereign power, trial and procedure, marriage, contracts and feuds, succession and criminal law. Its normative content is almost

[39] *Fuero Real del Rey Don Alonso el Sabio*, Madrid 1836, repr. Valladolid 1979.

[40] The lasting impact of the work is attested to, other than by the manuscripts, by the 1491 incunabula edition, accompanied by the *glossa* of Alonso Díaz de Moncalvo and primarily by the 1555 Salamanca edition with a *glossa* by Gregorio López, *Las Siete Partidas del sabio Rey don Alfonso el nono*, repr. Madrid 1974. See also the critical Madrid edition of 1807, *Las Siete Partidas del Rey don Alfonso el Sabio*, repr. Madrid 1972.

entirely drawn from medieval Roman law sources, from the *Corpus iuris* to the decretals and the *Libri feudorum* with recourse to the doctrines of the major civil and canon jurists of the first half of the thirteenth century. The purpose of the compilation was perhaps – according to one persuasive thesis[41] – to give credibility to the candidature of Alphonse X to the imperial throne through an ambitious legislative work which was not limited to the confines of the kingdom.

The *Partidas* were, however, not applied immediately. For almost a century the local *Fueros*, the *Fuero Juzgo* and within the limits already mentioned, the *Fuero Real*, constituted the normative sources of law in the kingdom. But in the middle of the fourteenth century the Order of Alcalá (1348) of King Alphonse XI, beyond introducing significant norms in civil law, trial procedure and criminal law, was to establish an order of the sources of law, destined to remain stable in Castile until the nineteenth century: the Order of Alcalá was the first to be applied, and this norm was understood to include in general all of the royal law as primary source; in second place the judges had to apply the local *Fueros*, including the *Fuero Real*, only in those places where they were in effect; in the third place for the legal matters not settled in the first two sources of law, the use of the *Partidas* was to be applied as subsidiary law. In this way, the Roman *ius commune* made its formal entrance among the sources of Spanish law, although reference was not to the *Corpus iuris* as such, but only to the texts which had been included in the *Partidas*.

Castilian legislation developed beginning at the end of the thirteenth century in concordance with the king and the *Cortes*, which represented the three orders of the clergy, the nobility and the patrician citizenry, although the king's power to legislate was in principle recognised in the *Partidas*. Later, in the fifteenth century, normative decisions made solely by the king were joined to the laws agreed on with the *Cortes*, with the names from late antiquity of Pragmatics (*Pragmaticas*), and that of Ordinances (*Ordenanzas*). An important collection of Pragmatics and Ordinances of the period following the 1348 Order of Alcalá was issued in 1484, with the name *Ordenamiento de Montalvo*.

14.6 Scandinavia

In the three kingdoms of Denmark, Sweden and Norway – the Scandinavian territory which had been conquered by the Germanic tribes

[41] Gibert, 1978, p. 41; Iglesia Ferreirós, 1996, II, p. 31.

before the Christian era – local customs began being written in the thirteenth century. In Denmark, the *Lex Iutiae* (Jutland) of 1241 and other contemporary laws[42] were issued by the kings based on customs dating back to the early Middle Ages. In Sweden the oldest text is that of the region of Västergötland, dating back to the first half of the thirteenth century, whereas other codes were written between the end of the thirteenth century and the beginning of the fourteenth, among which were Uppland and other central regions of central Sweden.[43] These were written in the archaic Swedish language and mostly dealt with private law – family, patrimonial rights, agrarian contracts – and attest to the existence of a substantially uniform society, made up of communities of freemen [Lindquist, 1997].

Not much later, around 1350, legislation applicable to the entire kingdom was to intervene through the initiative of King Magnus Eriksson, in the same way as it had in Norway in 1270, through the auspices of King Magnus Lagaböter. The Swedish code (*landslag*) applied to territories outside the cities, whereas for the cities Magnus Eriksson himself was to issue in 1352 a law unto itself (*stadlag*), this too of a general nature. These texts were juxtaposed to the provincial codes for which they were only a partial substitution. They remained in effect, although with some innovations, until the general legislation of 1734. Their contents largely coincide with provincial legislations, inasmuch as over time royal codes adopted norms drawn from them.

The 'sworn pacts', named *edsöre*, have a different character, in which the king and his subjects promised through a collective public oath to conserve the public peace. These were accompanied by penalties imposed by royal judges, through a specific set of procedural rules which attributed broader judicial powers in fact ascertainment in criminal matters. The *edsöre*[44] constituted an important instrument in the affirmation of monarchic power: the respect for public peace, entrusted to the king and his judges through sanctions and procedures predisposed for the purpose, allowed greater control of the territory and a role as guarantor in the relationship between social classes.

[42] Published in *Danmarks gamle Landskabslove*, ed. Brøndum-Nielsen and Jørgensen, 1932–1961.
[43] Published in *Svenska landskapslagar*, ed. Holmbäck e Wessén, 1933–1945.
[44] Lindkvist in Padoa-Schioppa, 1997, p. 217.

15

The Medieval *Ius Commune*

The combined presence within a single regime of juridical sources so distinct from each other in origin and nature as Roman and canon law; the different normative levels within each of these two great universal complexes; the coexistence of particular laws (feudal, rural and commercial law); the local laws (royal ordinances and city and village statutes); the flourishing of new legal customs: all posed a series of very difficult practical and theoretical questions, because it was necessary to identify criteria by which all these sources were to be coordinated [Calasso, 1951].

The major jurists of the Middle Ages dedicated their attention to solving those problems, in a centuries-old debate concerning which we shall limit ourselves to touch on some points over which discussion was particularly lively. Their significance was not only theoretical, but eminently practical. The first two themes touched on here – the dualism of strict law and equity and the relationship between law and custom – will be examined in reference to the school of Glossators.

15.1 Strict Law and Equity

The first debate in the age of the *Glossae*, some characteristics of which we consider, is the role of equity (*aequitas*) in the interpretation and application of legal norms.[1]

The great importance for the Glossators of the ideal concept of equity is clear from early writings of the school, as when an author (perhaps Martinus, pupil of Irnerius) recalls the Ciceronian notion of *aequitas* as a virtue which 'assigns equal rights in equal situations',[2] qualifying such

[1] For the many reflections dedicated to this subject from Savigny onwards, see Meijers, IV, 1966, pp. 142–166; Lange, 1954, pp. 319–347; Cortese, 1962, vol. II, pp. 320–362; Padovani, 1997, pp. 143–152.
[2] Cicero, *Topics*, 23: '*Valeat aequitas, quae in paribus causis paria iura desiderat*'.

a virtue as divine: '*nihil aliud est equitas quam Deus*'.[3] God himself is therefore considered as the source of equity. If pursued by man with constancy, *aequitas* translates into *iustitia*; if turned into norms – written or customary – it gives life to *ius*.[4] The Glossators qualified *aequitas* transformed into legal rules as *constituta*,[5], whereas equity not yet turned into law was defined as *rudis*, crude.[6] The author of one of the most refined works produced by the school (the *Quaestiones de iuris subtilitatibus*) imaginatively describes Equity as intent on weighing the rationale of Law on a scale in the name of Justice; men worthy of esteem are represented in the act of erasing those precepts of the Law that are not consonant with what is prescribed by Equity itself.[7]

Difficulties were to arise in trying to establish what the role of equity should be in the administration of secular justice (for canon law, this problem would acquire different and specific connotations, of which we shall be speaking). As usual, the origin of the school's reflection came from the contrast, certainly not easy to reconcile, between two texts of Constantine, both of which had been included in the Justinian Code: whereas a constitution (*Placuit* law) decreed that equity should always be given preference over the rigour of strict law,[8] another constitution (*Inter* law) attributed the power to settle contrasts arising between *aequitas* and *ius* exclusively to the Emperor.[9] On this question a clear dissent arose between the schools of the two great pupils of Irnerius.

Bulgarus and after him Rogerius made a distinction between two meanings of *aequitas*: written equity and non-written equity. Following

[3] *Fragmentum Pragense*, ed. Fitting, *Juristische Schriften des früheren Mittelalters*, Halle 1876, p. 216. A constant feature of Glossators' thinking was to link equity to God, understood to be its source in medieval Christian thought. On this see Cortese, 1962, vol. I, pp. 57–59.

[4] On this see Grossi, 1995, pp. 175–179.

[5] Again Cicero had defined the *ius civile* as '*aequitas constituta iis qui eiusdem civitatis sunt ad res suas optinendas*' (*Topics*, 9).

[6] '*Equitas bipartita est. Est equitas constituta que, manens quod erat, incipit esse quod non erat, idest ius. Est et rudis, et in hac iudicis officium deprehenditur [...], ideo iudicum officium in hac specialiter esse dicitur. M[artinus]*' (ed. Dolezalek, 1995, II, p. 599). See also Vallejo, 1992.

[7] '*Iustitia [...] causas enim et Dei et hominum crebris advertebat suspiriis easque lance prorsus equabili per manus Equitatis trutinabat [...]; honorabiles viri [...] sedulo dantes operam, ut si que ex litteris illis ab Equitatis examine dissonarent, haberentur pro cancellatis*' (*Questiones de iuris subtilitatibus*, 4–5, ed. G. Zanetti, Florence 1958, p. 5).

[8] *Cod.* 3. 1. 8: '*Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem*'.

[9] *Cod.* 1. 14. 1: '*Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere*'.

the *Placuit* law, they assigned the priority to written equity (mentioned in the sources, which in specific instances repeatedly set *aequitas* against *rigor juris* or *ius scriptum*[10]), which prevented the judge from deviating from written law in the name of non-written equity (*aequitas rudis*), which only the prince can translate into precepts of law.[11] Martinus and his followers, on the contrary, held that it was admissible that the judge himself, if he thought it necessary, should champion crude equity as opposed to the strict law: for them, the *Inter* law reserved the task of dictating the authentic and general interpretation to the Emperor, but did not prohibit the judge, in specific instances, to even give precedence to non-written equity over rigour of the strict law.[12] An analogous attitude, particularly favourable to the principle of equity – conceived as a severe examination with regard to laws and customs – can be found in some important works of the time, written in southern France: the prologue to the *Exceptiones Petri* prescribes (as we have seen) the brutal 'stepping on and stomping all that is useless, abrogated or contrary to equity' that might be found in Roman law.[13] Also a notable *glossa* of the school of Vacarius takes the view point of Martinus.[14]

Some of the ideas held by Martinus are of particular interest. His was the thesis whereby, in the name of equity, the judge could grant a multifunctional procedural instrument (*actio utilis ax aequitate*) that allowed for situations in which the strict law of the *Corpus iuris* granted no protection: for example, an action in favour of someone who has successfully managed a negotiation on behalf of a third party, though spending in excess of the limit agreed on.[15] In contrast with the rule which did not allow the judge to stipulate an agreement on behalf of a third person – '*alteri stipulare nemo potest*'[16] – Martinus held that the subject represented could take action for the purpose of directly obtaining (instead of through the intervention in judgement of his representative as actor) fulfilment of

[10] E.g. in *Dig.* 4. 1. 7 and *Dig.* 39. 3. 2. 5.

[11] Bulgarus, ed. Beckhaus, p. 79; Rogerio, ed. Kantorowicz, 1969, p. 286; *Dissensiones dominorum*, ed. Haenel, *Coll. Hugolini*, § 91; Azzone, *Lectura Codicis*, ad Cod. 3. 1. 8, l. *placuit*.

[12] Other texts in Meijers, IV 1966, p. 147 s.

[13] *Exceptiones Petri*, prol. (ed. G. Mor, *Scritti giuridici preirneirani*, II, Milano 1980, p. 47): '*si quid inutile, ruptum, aequitative contrarium in legibus reperitur, nostris pedibus subcalcamus*'.

[14] Glossa to Vacarius, *Liber Pauperum*, ed. De Zulueta, p. 69: '*nos dicimus rudem equitatem iuri preferendam ubi apparuerit*'; but a little later he points out that the task of affirming 'crude' equity was up to the prince, as prescribed in *Cod.* 1. 14. 1.

[15] Lange, 1954, p. 107 s. [16] This is the Roman rule, according to *Dig.* 45. 1. 38. 17.

the obligation on the part of the third party who had concluded the agreement with the representative:[17] this was particularly important, as it anticipated the modern recognition of the principle of direct representation, which Roman law in general denied.

Adversaries were to express bitter criticism of Martinus and his followers: Rogerius called them 'fools' and 'impudent';[18] others were to accuse them of preferring rules dictated arbitrarily by their heart or brain[19] to the text of the law. Actually, modern scholarship has made clear that the position of the '*Gosiani*' on this front was actually not so subversive: considered singly, the cases in which they felt the judge should give preference to equity rather than rigour all referred, even if indirectly, to rules contained in the texts of the *Corpus iuris*.[20]

Bulgarus' thesis was the one to prevail, in this and many other fields, in the following generations: the specific 'equitative' solutions Martinus suggested were almost always rejected by Azo and Accursius, although they continued to be quoted [Lange, 1954, pp. 102–108]. This does not in any way mean that the school precluded recognition of the role of equity with regard to juridical norms seen as being too rigid. On the contrary, the dominant direction repeatedly aimed to broaden the boundaries of the judges' power, but went about it in a different way than Martinus (although he had had an inkling of it), that is by acting on two fundamental principles. The first of these was the basic criteria of interpretation which, once having met with a discrepancy between the *mens* (or *ratio* or *causa*) *legis* and its *verba* – that is, between the reasoning behind the norm and its literal formulation – allowed argumentation based on the *ratio legis*. The second was based on the criteria of seeing the *ius strictum* as the rule and the *ius aequum* as the exception, the second prevailing on the first in accordance with the principle that the exception prevails on the rule; which in turn is based on the criteria – more general and of rhetorical-dialectical origin – of the *species* deferring to the *genus*.[21]

[17] Accursian Gl. *utilis* ad *Cod.* 3. 42. 8. 1: '*item nota quod ex hac lege dixit M[artinus] ex alterius pactu semper dari utilem actionem*'. The Code's constitution admitted an *actio utilis* as far as deposit; Martinus makes a general statement of its meaning.

[18] '*stulti (sibi licere quodlibet putantes, equitatem quoque, quam non noscunt, se scire inverecunde temereque asserentes, legibus apertis principum auctoritati suum proferentes sensum) contra dicunt*' (Rogerius, *Enodationesquaestionum super Codice*, ed. Kantorowicz, 1969, p. 284).

[19] '*Martinus vero ex aequitate cordis sui dicebat*' (Azo, *Brocardica, de pactis*, 54).

[20] See the argument put forward by Cortese, 1964, II, pp. 324–328, 339 s.; Meijers, IV, 1966, p. 126.

[21] Cortese, 1964, II, pp. 345–349.

In instances where one could argue that the legislator had made recourse to words (*verba*) which expressed something more or something less than his intentions (*voluntas*) or the objective purpose (*ratio*) of the law itself, the right was recognised of appealing to equity even if against the words of the law. For example, Johannes Bassianus and his school argued that the prohibition of giving money to one's son, established by the Senatus consultus Macedonianus, could be superseded in particular cases, such as for expenses for study and other circumstances at the discretion of the father.[22] In the same way, the Justinian norm by which it was necessary to prove both the *actio furti* and the *actio servi corrupti* with regard to a third party who had instigated a servant to commit a theft of his master,[23] should be extended in the case it was the son of the master and not the servant to commit the thievery: this by virtue of the fact that the *ratio aequitatis* should prevail on the *ratio iuris stricti*.[24]

With the adoption of these criteria, on one hand the primacy of the law over non-written law was reaffirmed, by precluding all argumentation using equity to violate the law, where the law was explicitly expressed;[25] on the other, it was seen as licit to use the instrument of interpretation to argue that the will of the legislator had been improperly expressed, thereby allowing recourse to the criterion of equity on the part of the judge, even just as an exception. This model satisfied the potentially conflictual needs for both certainty and justice.

15.2 Law and Custom

Another question the Glossators debated concerns the crucial subject of the relation between the two fundamental sources of law: law and custom.[26]

[22] '*Ecce enim: [Senatusconsultum Macedonianum] indeterminate prohibuit ne pecunia filio familias daretur, non excipit aliquem casum senatusconsultum, equitas tamen excipit, scilicet degit alibi studiorum causa, vel in hiis in quibus paterna pietas non recusaret*' (*Comment* to i. 1. 14. 3, l. *inter*, ms. di Paris, BN, lat. 4546 – ed. Cortese, 1964, II, p. 339).

[23] *Cod. Iust.* 6. 2. 20: the case assumed that the servant had committed the action with his master's consent, with the intention of catching a third party and having him punished; the Justinian norm resolved the contrast expressed by the *veteres*, who had disagreed on which of the two actions (the *actio furti* or the *actio servi corrupti*) should be applied with regard to the third party.

[24] Also this text by Johannes Bassianus to the l. *placuit* (Cod. 3. 1. 8) – extracted from MS Napoli, *Biblioteca nazionale*, Branc. IV. D. 4 – was edited and analysed Cortese, 1964, II, p. 351 s.

[25] E.g. one could not apply the *actio utilitas* if not in the presence of an explicit norm.

[26] Legal historiography has delved deeply into this subject: see Cortese, 1964, II, pp. 110–138; Gouron, 1988a, pp. 117–130; Grossi, 1995, pp. 82–90.

After what has been described as the Glossator's method, it will come as no surprise that this question was viewed from the beginning as a conflict between laws and analysed through the usual model of the *solutio contrarium*. As is well known, Justinian sources offered a twofold answer to the question of the relation between law and custom. The classic thesis, handed down in the *Digest* through a fragment of Salvius Julianus, considered people's will (*voluntas populi*) fundamental to both law and custom, thus the only (and not so important) difference was in the way popular consensus was expressed or not expressed; the level of legitimacy between them therefore being equal, the level of obligation in custom was necessarily equal to that of a law, and law could be abrogated by a successive custom which was contrary to it.[27] The post-classic thesis, shaped in an equally well-known constitution of Constantine, sanctioned the priority of law over custom in case of conflict between the two sources.[28] Clearly the two norms correspond to the two historical phases in the evolution of Roman law:[29] whereas the first mirrors the structure of sources in the republican and classical age, the second establishes the primacy of imperial legislation in the attempt to hold back the onslaught of the many customs current in the different regions of the vast Empire.

For the reasons stated previously, a purely historical explanation of the contrast between the two texts was of no use to the Glossators, as they wanted to maintain every fragment of the *Corpus iuris* as effective law. Moreover, their attention was drawn to the fact that the role of custom, in its relation to law, in the twelfth century presented an enormous problem of a practical as well as a theoretical nature: in a world teeming with local customs – which were beginning to be set down in writing: the first Italian statutes, the French *Coutumes*, the Spanish *Fueros*, the Germanic

[27] The well-known passage by Salvius Julianus (*Dig.* 1. 3. 32. 1) is as follows: '*Inveterata consuetudo pro lege non immerito custoditur, et hoc est ius quod dicitur moribus constitutum. Nam cum ipsae leges nulla alia ex causa nos teneant, quam quod iudicio populi receptae sunt, merito et ea, quae sine ullo scripto populus probavit tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? Quare rectissime etiam illud receptum est, ut leges non solum suffragio legis latoris, sed etiam tacito consensu omnium per desuetudinem abrogentur*'.

[28] *Cod.* 8. 52. [53]. 2: '*Consuetudinis ususque longaevi non vilis auctoritas est, non usque adeo sui valitura momento, ut rationem vincat aut legem*'. In the following considerations, we shall examine the relation between *consuetudo* and *lex*, bypassing the *lex–ratio* and the *consuetudo–ratio* further relationships, both also present in Constantinian's text and broadly discussed by the Glossators.

[29] See on this Lombardi, 1952, pp. 21–87.

Landrechte – made it essential to clarify to what point the quintessentially secular 'Law' of the Justinian texts could impose its primacy to the point of prevailing over all different customary norms.

The debate began early on, with the second generation of Glossators. A rigidly restrictive thesis – probably supported by Jacobus, if not Irnerius himself[30] – opted for Constantine's position, that the advent of the Roman Emperors' dominion would have definitely taken any legislative power from the people:[31] from then on, custom would have lost its status of parity with imperial law, which as a consequence no custom could ever repeal. Curiously this was to be a position based on an essentially correct, but inappropriate historical argument. Martinus also agreed on this thesis, adding for his part the detail that the text of the *Digest* remains valid only for those laws that come into being locally (i.e. municipal statutes), and these alone might be repealed by a successive contrary custom.[32]

But another of the four scholars expresses a completely different thesis. The Glossator Bulgarus made a double, fundamental distinction: distinguishing first of all between general customs – which might repeal even the law – from special or local customs. As to the latter, he made a distinction between an inadvertent contrast with the law, resulting from simple error, and a deliberate contrast with it (*ex certa scientia*): the law is not repealed, but in the second instance the custom would prevail over the law.[33] This theory, the innovative audacity of which has been duly noted [Gouron, 1988, pp. 119–126], reconciled the contrast of Roman sources in a way that left ample space to customs contrary to the

[30] Irnerius having originated this theory is uncertain in my opinion, considering that in a Parisian manuscript (lat. 4451) it is accompanied by the initial 'I.', attributable to Iacobus.

[31] The *glossa Dig.* 1. 3. 32 says: '*loquitur hec lex secundum sua tempora, quibus populus habebat potestatem condendi leges, ideo tacito consensu omnium per consuetudinem abrogabantur; sed quia hodie* [i.e., with the advent of the Empire and with the regime which includes Constantin's constitution incorporated in *Cod.* 8. 52. 2] *potestas translata est in imperatorem, nihil faceret desuetudo populi*' (ed. Cortese, 1964, II, p. 126 s.).

[32] '*secundum M[artinum] loquitur ibi [i.e.Dig. 1. 3. 32] de alia consuetudine scripta, scilicet iure municipali, quae tollitur a sequenti consuetudine, non autem lex scripta in corpore iuris tollitur consuetudine, ut hic*' (as in the Accursian *Glossa*, gl. *aut legem* ad *Cod.* 8. 52. [53]. 2).

[33] '*B[ulgarus] enim distinguit utrum [consuetudo] fuerit universalis vel specialis, scilicet alicuius municipii; si fuerit specialis, subdistinguit aut per errorem sit introducta vel ex certa scientia; si per errorem non obtinet, sed si ex certa scientia legem non abrogat, sed prefertur sicut superior. Et huic opinioni consonat Io[hannes]. b[assianus]*' (ed. Meijers, 1959, III, p. 254).

laws of the *Corpus iuris:* it was enough to want to repeal the law for the custom to be admitted.

The successive generations of Glossators continued to refine their understanding of this text, which was too crucial to be dealt with without additional doctrinal input. One current – found also in Romanised southern France, where limits to custom had come at an early age also because of the influence of canon law[34] – followed in the footsteps of Iacobus and Martinus' theory, with a decisive contribution made by Placentinus:[35] he bitterly criticised the theory whereby customs in deliberate contrast with the law would have had preference over customs that were inadvertently '*contra legem*'.[36] Equally worthy of note is the theory mentioned by Placentinus and quoted by Pillius, which made the distinction between laws which had been corroborated by custom (*consuetudine roboratae*) and laws which had never been applied[37]; this thesis adopted – appropriating elements of sources from antiquity[38] – a criteria of 'effectiveness' of the norm which seems rather modern, although the difficulty of ascertaining which norms had been applied and which hadn't rendered it difficult to operate. Pillius again made a distinction – probably derived from canon law – between 'good' customs and 'bad' customs, that is, between customs which '*rite et racione adinventae*' and irrational customs,[39] obviously granting the power of appeal only to the first of these.

[34] A. Gouron highlighted the canonical influence, particularly through Yves from Chartres, on the subject of custom perceptible in the Tübingen book, the Ashburnham book and the Exceptiones Petri (the received edition of which, although may not be the oldest, is probably from southern France, around 1130), in Gouron, 1988b, pp. 133–140.

[35] Placentinus, *Summa Codicis* 8. 56 *quae sit longa consuetudo*, Moguntiae 1536 = Torino 1962.

[36] Placentinus, *Additiones* to Bulgari *ad Digestorum titulum de diversis regulis iuris [. . .]*, ed. F. G. C. Beckhaus, Bonn 1856 = Frankfurt/Main 1967, p. 136: '*miror itaque qua ratione, qua fronte inquiunt quidam populum Romanum ex certa scientia contra legem [. . .] facientem sicque delinquentem vel abrogare legem vel abrogando legem contrariam condere*'. Similarly Accursius, gl. *aut legem* ad *Cod.* 8. 52. [53]. 2, who does not, however, indicate the origin of the criticism.

[37] Placentinus, *Summa Codicis* 8. 56 *in fine*; Pillius, *De consuetudine* (ed. Seckel, 1911, p. 378: '*Et cum de hac consuetudine confidere quis videtur, explorandum in primis, an etiam contradicto aliquando iudicio confirmata sit*'. See also the fourth of the theories referred to anonymously by Accursius (gl. *aut legem* a *Cod.* 8. 52. [53]. 2), where this thesis is expressed with greater clarity.

[38] See *Cod.* 1. 14. 11; cf. Rogerius in H. Kantorowicz, 1969, p. 286, lin. 14.

[39] Pillius, *De consuetudine* (ed. Seckel, 1911, p. 378: '*consuetudo vero specialis male adinventa etiam longo tempore obtenta non servatur [. . .]; consuetudo specialis rite et de racione adinventa omnino est servanda in eo municipio seu civitate vel provincia [. . .]*'.

Another thesis, formulated by Albericus, made a different distinction, this time within the category of law: the power was attributed to custom to prevail on those norms which could be waived, as those which private parties could agree to revoke with a licit and enforceable pact before the judge, whereas imperative norms could not be abrogated or revoked by a contrary custom:[40] the interesting point made by this thesis is that it equated custom with pact and made it easy to identify irrevocable norms, those which the Justinian texts themselves qualified as such (e.g. the rate of interest in usury, or a *pactum commissorium*). This theory opened up a considerable space to customs, but also fixed a precise limit, where the legislator of antiquity had forbidden conventional revoking of a legal rule.

It was with fine and persuasive arguments that Johannes Bassianus came to oppose the theory offered by Albericus, showing how the analogy between custom and pact was only apparent;[41] thus he returned to the thesis of his teacher Bulgarus, having also eliminated the fragile notion of the necessity of consciously contrasting the law in order to recognise the custom. With some last adjustments on the part of Azo, the thesis that was ultimately included in the Accursian *Glossa* stemmed from the line of thinking of Bulgarus and Bassianus: a general custom, effective everywhere, could abrogate a law; a local or special custom could not, but – as long as it was deliberately intended by those who practised it[42] and not

In canon law the 'goodness' or not of customs was implicit in the fact that approval from above was necessary for the custom to have validity; this was not the case with civil law: for this reason, this theory (related also by Accursius) was not easily practicable.

[40] '*Albericus et eius sequaces dicunt totiens specialem consuetudinem legi derogare, quotiens pactum speciale possit legi derogare*': some examples follow. This argument is quoted in a Glossa *Liber Pauperum of Vacarius*, ed. De Zulueta, London 1927, p. 18, n. 32. Accursius also relates it as third anonymous theory, adding Bassianus' objections (gl. *aut legem* a *Cod.* 8. 52. [53]. 2).

[41] Specifically, Bassianus argued that, contrary to what happened in pacts and contracts, custom was effective also with individuals without legal capacity, so the analogy could not hold. Furthermore, it was not possible to oppose the argument whereby the custom was determined by the will of the majority, because it was precisely this aspect that differentiated it from the pact and the contract: the majority can decide on the rights of a community (e.g. electoral norms), but not on the rights of an individual (on these important theoretical points which are of interest also in the history of the principle of the majority, see the *Fragmentum de consuetudine*, ed. Cortese, 1964, II, p. 440; and in particular the dispute cited in Accursius, gl. *aut legem* ad Cod. 8. 52. [53]. 2, objections to the third argument). See on this Chiodi, 2001, pp. 91–200.

[42] On this point see the example given by Azo (*Lectura Codicis*, a *Cod.* 8. 52. 2, nr. 4–5): in Modena and Ravenna lands belonging to the Church were often granted to laymen in *emphyteusis*, without the provision that the failure to pay the biyearly rental fee made the

contrary to the prince's will – it would be valid and applicable in the place in which it had been established.[43]

Given this context, the space open to custom – both in the non-written form and in written form of local statutes and legal norms within kingdoms – became very broad indeed. With the authoritative basis of doctrine – developed through the long debate mentioned earlier, by the play of a sophisticated set of distinctions applied to two texts of the *Corpus iuris*, each time making distinctions either within the concept of law or within the concept of custom – the role of precedence of local norms over Roman norms took hold and was to remain a persistent feature for hundreds of years in the doctrine of the *ius commune*.

Naturally the debate on the crucial theme of the relation between law and custom did not come to an end with the Glossators. It was to be a subject to which everyone, from the post-Accursians, to the Commentators beginning with those from Orléans, legal humanists and all successive schools of legal science from the late medieval to modern time would constantly revisit, reaching different conclusions depending on the time and the place. But the approach set out by the *Glossa* would remain fundamental up to the modern codifications.

15.3 *Ius Commune* and *Ius Proprium*

The *ius commune* founded on the texts of the Justinian *Corpus iuris* and the innovative work of the Glossators and the Commentators had, as we know, an extraordinary success not only in Italy, but throughout the whole of Europe. University training on the continent, on the model of the one in Bologna, of professional jurists, beginning in the twelfth century had the effect of spreading and giving recognition not only to the techniques of interpretation and argumentation, but also to the contents of the *Corpus iuris* [Bellomo, 1988]. The presence of the Church, which broadly applied Roman law in symbiosis with canon law, constituted an essential and fine-tuned instrument for the spread of the civil *ius commune*.

contract void, contrary to what was prescribed by Justinian law (see *Cod.* 4. 66. 2). According to Azo, this is possible because in these regions the previously cited custom was introduced *ex certa scientia*, whereas customs practised by simple error or ignorance of the law would not have the effect of making the law itself void. Bulgarus' argument was in this way confirmed. But Accursius would adhere to the criticisms expressed by Placentinus: gl. accursiana *aut legem*, a *Cod.* 8. 52. [53]. 2.

[43] See the vast summary by Accursius in his *Glossa* on the question, which lists seven different positions of the school: gl. *aut legem* a *Cod.* 8. 52. [53]. 2.

In some European regions *ius commune* was adopted drawing directly from the Justinian texts. This occurred, for example, in southern France, in the regions of the *droit écrit*, and was legitimised by Philip IV in 1312. In Catalonia too, beginning in the twelfth century the Visigoth *Liber iudiciorum* gradually began to lose ground, in favour of the infinitely more complete and complex Justinian norms. In other regions the assimilation took place more indirectly: in Castile, as we have seen, the Roman discipline of the *Partidas* of Alphonse X was included as subsidiary, beginning in the middle of the fourteenth century. The foundation of the College of Spain, initiated in 1369 in Bologna by Cardinal Gil de Albornoz, gave further weight to the *ius commune* among Spanish jurists who had trained at university.

Although the *Partidas*, which came into effect in 1348 as subsidiary law, excluded direct recourse to the *ius commune*, the Spanish doctrine constantly drew on the sources and doctrines of European civil jurists who had worked and were working on Justinian and canon sources. A law (*Pragmática*) issued in Madrid in 1499 ordered that in case of conflict between jurists on a point of law, preference should be given to the opinion of Johannes d'Andrea and subordinately to Panormitanus for canon law, and Bartolus and subordinately to Baldus in civil law. However, this restriction created contrasts and opposition, so much so that soon a repeal was consented with the Toro laws of 1505 [Tomás y Valiente, 1983, p. 247].

The compilation of Alphonse X was successful also in regions other than Castile. In Portugal, which had become an independent kingdom in the twelfth century, the *Partidas* were translated into the local language; the university of Coimbra, which was founded in 1290, taught Roman law following the method of Italian jurists. Later, in 1447, the Ordinances of King Alphonse V (*Ordenançoes alfonsinas*) imposed the *ius commune* as subsidiary law [Almeida Costa, 2005]. Even in places where local custom prevailed, such as in northern France or Navarre, the *ius commune* was the point of reference – developed by learned jurists present everywhere – and understood as 'written reason' in cases which were harder to solve with local laws.

The question of the relation between *ius commune*, particular and local law was actually constantly present in the doctrine and was considered widely both in the doctrines and in the *consilia*.

In Italian communes, the rule was the combined presence and effectiveness of local law and the *ius commune*: the judge had first to apply the statute, subsequently filling any lacunae with recourse to the *ius commune*.

The Venetian legal system was an exception, as from the twelfth century on and in the thirteenth century statutes, it was established that the lacunae in the Serenissima's laws should be filled with recourse to analogy, local custom and finally the judge's discretion conform to equity (*aequitas*), in that order [Zordan, 2005]. Particular limits, presented in some decretals of Innocent III [Migliorino, 1992] held back the phenomenon of the *ius proprium* that was naturally present also in the territories of the Church state.

At the basis of the general criteria adopted by the communes was therefore a choice which we see stated in many city statutes: that local norms had to prevail over the *ius commune*. City consuls and *podestà*, during the act of being sworn in, had to take the oath of a closed-book observance of the statute. Clearly this was to guarantee that customary laws or those that had been issued *ex novo* locally would actually be applied even if they were contrary to what had been established in the *ius commune*: in fact, what is certain is that many statutory dispositions, particularly in private and criminal law, mentioned earlier, were generated by the very intent of repealing the *ius commune*. More than that, the statutory legislation could integrate or actually revoke – as was declared by a doctrinal authority of the highest degree, Bartolus – even the prescriptions that came from natural law and the *ius gentium*.[44]

Particular laws also prevailed over the *ius commune* in that they concerned special persons and relationships: this was the case, for example, with feudal law. But it should be noted that the *ius commune* was widely used to interpret and integrate this matter, although entirely extraneous to the Roman law experience: the treatises of feudal law are full of quotations from Roman law. On the other hand, a point made by the Lombard Obertus de Orto has a paradigmatic significance, when he affirms the priority of feudal customs over Roman law by using the well-known Constantinian constitution, but consciously overturning its meaning:[45]

[44] Bartolus, *Dig.* 1. 1. 9 *de iustitia et iure*, l. *omnes populi*, n. 21: '*Si [statuta] fiant super his quae disposita sunt a iure naturali vel gentium, non possunt tollendo in totum, sed in aliquo derogando vel addendo sic*'. Followed by a complex reasoning (n. 22–23) in which Bartolus clarifies when the statute can override norms of *ius divinum* expressed in the Scriptures, e.g. the requirement of two or three witnesses (Deuteronomy 19.15), thus introducing a notable difference from Roman norms and from some city statutes which demanded a greater number.

[45] The proposition in Cod. Iust. 2. 52 (53). 2, mentioned earlier, is reversed by Obertus de Orto with the assertion '*legum autem Romanarum non est vilis auctoritas, sed non adeo vim suam extendunt, ut usum vincant aut mores*' (*Libri feudorum*, II. 1; *Consuetudines feudorum*, ed. K. Lehmann, *Das Langobardische Lehnrecht*, Göttingen 1896, p. 115).

an erudite as well as an iconoclastic quotation, which admirably expresses the liberty with which jurists used words from antiquity to regulate a new reality.

It might seem that with all this the specific weight of the *ius commune* was somehow diminished in comparison to the local *ius proprium* as well as particular law, which had precedence over it. But this conclusion would be incorrect for various reasons. In the first place, it must be remembered that a large part of the legal system – in particular many institutes of civil law, matters to do with personal rights, property rights, obligations and contracts, succession etc. – was absent from statutory norms because Roman law, integrated with doctrine, was accepted unaltered as a valid normative base; for this reason, in all these sectors in the absence of local norms it was the *ius commune* which was directly applied.

In the second place, the interpretation of many terms and of many institutes mentioned in the statute was elaborated by recourse to the categories and the dispositions of the *ius commune*: if, for example, the statute contained a procedure which established a certain procedure for the sale by auction, the criteria by which the contract was deemed viable as to capacity to act, malice, performance were drawn from the vast heritage of rules and doctrines of the *ius commune*; in the same way on the subject of wills, legal capacity and so on.[46]

In the third place, the dominant thesis defended by the doctrine and not contested in practice was to consider the norms of the *ius proprium* as exceptions to those of the *ius commune*, and as such – based on the Roman principle shared by the doctrine[47] – not extensible by analogy. This thesis was confirmed by the authority of Bartolus, who sustained it in particular with regard to statutory norms which addressed matters which were already regulated (differently from the statute) by the *ius commune*.[48]

As to the limits and the ways the statute was interpreted,[49] jurists expressed a plurality of positions which did not always concur [Massetto,

[46] This is the species of extensive interpretation that Bartolus defines as 'passive' ('*utrum leges se extendant ad statutum*'). The answer is clearly affirmative: '*quando passive, tunc indistincte dico quod sic*' (ad *Dig.* 1. 1. 9, *de iustitia et iure*, l. *omnes populi*, n. 60).

[47] See *Dig.* 1. 3. 17: '*quod propter aliquam utilitatem introductum est non est producendum ad consequentias*'; Dig. 50. 17. 81: '*in toto iure generi per speciem derogatur*'.

[48] The extensive interpretation which Bartolus defines as 'active' operates only if it doesn't act in the sphere of the *ius commune*, if on the other hand, similar cases '*sunt decisi per ius commune, tunc ad illos statutum non extenditur*' (Bartolus, ad *Dig.* 1. 1. 9, l.*omnes populi*, n. 60).

[49] A significant example of the difficult relationship between statutory norms and *ius commune* in the doctrinal thinking and the activity as consultant of Paolus de Castro is

1996; Sbriccoli, 1969]. Sometimes the statute contained a norm explicitly forbidding interpretation of the statute itself, with the intent of reinforcing its literal application; but it was easy for jurists (Ranerius de Forlì, Bartolus and others) to argue that it was impossible to apply such a norm, considering that a 'declarative' interpretation was indispensable for the statute to be applied. Some jurists excluded analogy for unforeseeable cases, others admitted extension by analogy only if the *ratio* of the norm was declared in the statute,[50] others still admitted extension only for those statutory norms which were favourable but not for those termed 'odious', which is discriminatory or restrictive with regard to the addressee, in particular for criminal norms.[51] It became accepted (by Albericus da Rosate and Baldus, but others as well) that the strictly literal application of a norm could persuasively be argued as leading to an absurd result (*absurditas* already constituted, since ancient rhetoric and to the present, a valid element in arguing against a specific interpretation of the norm).[52]

A number of jurists – not meaning to deny the principle whereby the statutory norm was 'strict law' (*stricti iuris*) – nevertheless declared that the statutory norm could also be extended by analogy when its *ratio* was present (or actually strengthened) in a case not expressly foreseen by the statute. Jason del Majno, for example, affirmed this with regard to the statutory norm which excluded a dowered daughter from her father's succession: he further declared that there was all the more reason for the exclusion to apply to the sister with regard to her brothers, or to the woman with regard to family members in a transversal line, as it is more reasonable to exclude the more remote relative than one who is closer.[53]

examined by G. P. Massetto, 1996 (esp. pp. 343–350) on the subject of dowry monies: what portion should be left to the children from a first marriage of a widow who had remarried?

[50] Jason del Majno, *In Primam Digesti Veteris partem Commentaria*, a *Dig. De legibus et senatus consultis*, l. de quibus, n. 16, Venetiis 1585: '*sed quando ratio est expressa in lege corrigente [ius commune] vel habetur pro expressa, licita est extensio etiam in correctoriis*'. Note how this argument broadens the analogical significance of the statute, as the ratio could also be unexpressed.

[51] These different opinions are all quoted by Baldus, *In Digestum vetus Commentaria*, a *Dig.* 1. 14. 11, *de legibus*, l. *non possunt*, additio (ed. Venetiis 1599, fol. 18vb).

[52] An example often repeated by jurists concerned the statutory norm which did not allow the export of grain outside the city on the back of a donkey(with reference to Ranerius de Forlì, see Sbriccoli, 1969, p. 425): a literal interpretation would have seen it as licit to export grain in a cart pulled by oxen, which would have been *absurdum*.

[53] '*maior [est] ratio excludendi in remotiori gradu quam in proximiori*': Jason del Majno, *In Digestum Novum commentaria*, Venetiis 1590, *de adquirenda vel amittenda possessione*, l. *veteres*, nn. 24–26; on which see Piano Mortari, 1956, p. 176.

It is clear, therefore, that the sum of all these criteria, even with the specifications and the great openness towards statutes, still left a wide space within which the *ius commune* could be applied even in the presence of an abundance of constantly evolving local norms. If to this we add that the existence of particular laws – feudal law, Lombard law, commercial and other laws, mentioned previously – also intersecting with both with the *ius commune* and with local law, it is easy to understand what a complex interweaving connected the many normative levels.

15.4 *Aequitas* Canonica

In canon law the theme of equity and its relation to strict law had a particular importance because it touched on the relationship between law, justice and charity: a subject which was taken up on different occasion by the Fathers of the Church, beginning with Augustine, who in a famous text denied the existence of any conflict by saying that perfect charity is perfect justice.[54] But in the seventh century Isidore of Seville wrote that equity and justice were equivalent concepts, contrasting them to the less rigid criterion of indulgence and mercy.[55] Gratian in turn qualified Jesus' refusal to condemn the woman caught in adultery (John 8. 7) when Mosaic law condemned her to stoning, as a sentence dictated by equity.[56] The contrast between law and equity, recurrent as mentioned earlier, in the civil Glossators, is then found again in pronouncements of popes such as Eugene III and particularly Alexander III and Innocent III [Landau, 1994], who tempered the rigidity of some procedural rules of Roman law (e.g. the requirement of the oath *de calumnia* and the imperative nature of the exceptions opposed by the defendant), in the name of *aequitas*.

Nevertheless, many among the canonists, like many legists, held the principle that you could not, in the name of equity, deny the application of a written norm which was legally valid; however, the recourse to the criteria of equity was legitimate where the written norm was missing; this was prescribed in a decretal by Honorius III[57] and it was affirmed also by

[54] '*Caritas magna, magna iustitia est; caritas perfecta, perfecta iustitia est*': Agostino, *De natura et gratia*, LXX, 84 (CSEL, 60, 1913, p. 298).

[55] Isidore, *Sententiae* III. 52 (PL 83, col. 721).

[56] *Decretum Gratiani* C. 32 q.6 pr.

[57] '*In his vero super quibus ius non invenitur expressum, procedas, aequitate servata, semper in humaniorem partem*' (*Liber Extra*, 1. 36. 11, to the cardinal of Santa Prassede, on irregular practices on the part of clerics of the Eastern Church). The Pope expressly excludes that the '*severitas canonica*' may be excluded on the subject of marital ties.

Huguccio and Bernardus Botone in the ordinary *glossa* to the *Liber Extra*.[58] Whereas for other canonists, equity constituted a criterion that worked in the day-to-day application of canon law: in the name of equity 'the [canon] judge must favour mercy over rigour', Johannes Teutonicus had stated in the ordinary *glossa* to the Decretum[59]; and Hostiensis considered equity a reasonable way to render justice.[60] Moreover, for the purpose of ensuring the salvation of the soul, even some legal precepts might be overlooked in the name of equity: for example, the Roman precept whereby the occurrence of bad faith (*mala fides superveniens*) does not interrupt the prescription of a right, was considered by Hostiensis – and later also by Baldus de Ubaldis [Horn, 1968] – invalid for canon law for the very reason that it was dangerous for the *salus animarum*.

In time this led to a peculiar concept of equity, the *aequitas canonica*, which in medieval and modern canon law became a key by which many doors could be opened in the interpretation of norms and in the interstices of legislative ordinance. It is still included in the canon law code of 1983 (can. 9).

15.5 The Interpretation of Legal Transactions

It was not just the law that needed to be interpreted in an actual case. Legal transactions also required a correct interpretation, as a controversial question arose between the subjects to which the transaction referred. The *ius commune* doctrine approached this crucial question from the onset, contributing a wealth of theoretical analysis over the centuries on the part of hundreds of jurists. It was a matter in which not only local laws and statutes rarely intervened, but the Roman law sources themselves (e.g. with regard to legacies and bequests) were far less contradictory than in other sectors. The Glossators adopted exegetical techniques which were often close (and precursors) to those developed by the modern exegetists of the codes many centuries later. Only two examples will here be given, drawn from recent historical research.

[58] '*[aequitas] tunc tantum servanda est cum ius deficit*': gl. *Aequitate, Glossa ordinaria* to *Liber Extra* 1. 26. 11; on Huguccio, Lefebvre 1938.

[59] '*Potius debet iudex sequi misericordiam quam rigorem*': ordinary *glossa* to the *Decretum Gratiani* C. 1 q.7 c.17.

[60] '*Aequitas est iustitia dulcore misericordiae temperata*'; '*aequitas est modus rationabilis regens sententiam et rigorem*' (Hostiensis, *Summa aurea*, lib. V, *de dispensationibus*, n. 1). On the definitions of *aequitas* in Hostiensis see Landau, 1994.

The interpretation of wills was to be thoroughly and broadly developed and generally free from contradictory rules, in the Roman law sources, particularly in the *Digest*. For this reason, it is interesting to observe how the Glossators' careful exegesis – studied in an thorough modern analysis – had first of all looked for the *ratio* of the solutions proposed in the sources, underlining the central role of the testator's will, to be reconstructed on the *usus loquendi*, eventually even restricting the literal meaning of the words in the will if these contrasted with the expressed wishes: this was an argument put forth by Rogerius, the first author of an *apparatus* to the *Infortiatum* [Chiodi, 1997, pp. 272–276]. Moreover, the different significance (regulated in the Roman sources) of a subject's *voluntas* in a will and in a contract was justified by the fact that in the first case the transaction was unilateral and that a 'fuller' (*plenior*) value could therefore be given to his will and the free interpretation of the words in the will, whereas in the contract, because of its bilateral nature, this liberty of interpretation could not be consented: such was Johannes Bassianus' argument.[61]

In contracts the questions dealt with in the doctrine were innumerable and often delicate. A difficulty was to establish the criteria to adopt when in the act – be it a sale, donation, company, dowry, pact etc. – discrepancies or ambiguities were to be found so as to make it unclear what legal discipline should be applied, thus creating conflict and controversy between the parties involved.[62] Here too the relation between *verba* and *voluntas* played a key role. The latter constituted the primary criterion, which, however, was to be ascertained through the careful analysis of the act. More generally, in the qualification to be given to a contract, the *nomen* (i.e. the qualification present in the act) was very important in legal doctrine, but

[61] Bassianus gave an example of a will on which impossible or illicit conditions were made by a woman who was giving birth and then died: the conditions expressed by the woman were thought to be inappropriate for safeguarding *pietatis causa* of that particular woman's will (Chiodi, 1997, p. 476).

[62] E.g. in a Florentine donation during the late fourteenth century by a woman in favour of her son, it was declared on one hand that the act was irrevocable ('*perpetuo firmare et contra eum aliquod [. . .] nec facere in futurum*'), and on the other that the disposition was to come into effect after the woman's death: was it a *donatio inter vivos*, and so with immediate effect, or instead a *donatio mortis causa*, to come into effect at a later date? The Commentator Angelus de Ubaldis, who had been commissioned with a *consilium*, argued that despite the irreversibility clause, the express mention of the death as the moment the act would come into effect should prevail: the first clause was to be interpreted in a restrictive way, precluding only a revocation *in toto*. The event and the doctrine of Angelus (*Consilia seu responsa*, Lugduni 1539, cons. CCLIV) are reconstructed by Massironi, 2012, pp. 125–127.

connected pacts also were of significance and could lead the interpreter and the judge to attribute to the transaction a different meaning from the apparent one [Massironi, 2012, pp. 181–298 and p. 396]. The task of the interpreter (and of the judge) was therefore to perform this operation using the techniques of textual analysis and to weigh (to ponder) the different options.

Once again the image of the scales, repeatedly used in legal texts and old prints, reveals the true nature of legal reasoning.

15.6 The Two Universal Laws: *Utrumque Ius*

As we know, a vast spectrum of juridical relationships was ordered by the other great universal normative system that went hand in hand with Roman law, that is canon law: from the juridical regime of marriage to the rules on ecclesiastical benefices which interested up to a third of landed property, from the personal statute of secular and regular clergy to the organisation of churches and judicial procedure before ecclesiastical judges, the space covered by the juridical regime of the Church was vast during the centuries of the *ius commune*.

Connected – though distinct from the relationship between the two legal orders, the civil Roman law and the canon law – was the relation of human laws with the supreme religious precepts, present in the text of the divine revelation; although the understanding was universally shared that it was superior, for jurists it did not necessarily imply a mechanical transposition to the level of human laws, because the ways of God are not the ways of man, as the Scripture itself warned.[63]

The question of the boundary between *ius commune* and canon law was clear in principle, in that the first regulated the sphere of secular and temporal affairs, the second the spiritual sphere. This principle (which picks up the thread of Gelasius I's tradition) finds clear and explicit expression in the thinking of the legists. With a crossed double negative, the Accursian *Glossa* defined it: 'neither the Pope in secular questions,

[63] One example among many. When the Accursian *Glossa* discusses Ulpian's definition of justice ('*voluntas ius suum cuique tribuens*': *Dig.* 1. 1. 10; Inst. 1. 1 pr.), the question arises of the relation between this precept and what is in the Gospel regarding the equal treatment given by the owner to the worker who had come at the last minute and the one that had been working since dawn (Matthew 20.1–16); the solution given by the *Glossa* was to understand the parable in a mystical and allegorical sense, signifying that the penitent who arrives at the last minute has an equal chance to go to Heaven as someone who has been righteous all along (Accursius, gl. *Iustitia ad Inst.* 1. 1 pr., on which Quaglioni, 2004, p. 38 s.).

nor the Emperor in spiritual questions'.[64] This thesis was to be confirmed by Baldus, among others, in the second half of the fourteenth century.[65]

Although respecting the distinction between the two spheres, when there was a contrast between the two laws there was, for the legists themselves, a limit to the effect of the civil law: although they were addressed to temporal affairs, they had to be repealed if their application led to sin which endangered the salvation of the soul; in this case canons were preferable to secular law.[66] But specifying how the principle should be applied was not a simple matter. For example, there was bitter debate over the question of the jurisdictional competence of the canonical judge on an agreement reinforced by an oath: as the perjurer endangered the salvation of his soul. Civil law jurists openly defended the boundary of temporal jurisdiction, with some criticism aimed at the Church: among others, Odofredus blamed it for wanting to interfere with matters outside its sphere of pertinence.[67] Whereas Cinus de Pistoia – like Dante Alighieri he was a strong supporter of the autonomy of the Empire with respect to the papacy – only crimes directly concerning religion (e.g. the crime of heresy) could be included in the jurisdiction of the canonical judge, not common crimes, although these were naturally the result of sin. For Cinus, therefore, the broadening of the canonist sphere with the pretext of sin[68] constituted a usurpation of sorts. The two universal regimes addressed persons in their twofold role as citizens and as the faithful, which made the relation between the two laws even more difficult.

From antiquity to the Middle Ages, from the modern era until today, the fine line is ever changing and in discussion, of the boundary between what is 'of Caesar' and what is 'of God'.

[64] '*Ergo apparet quod nec papa in temporalibus, nec imperator in spiritualibus se debeant immiscere*': Accursius, *Glossa magna*, gl. *conferens generi* a Nov. 6 pr. = *Authenticum*, Coll. 1. tit. 6, *Quomodo oporteat episcopos*, pr.

[65] Baldus, *Commentaria ad Digestum vetus*, a *Dig.* 1. 4. 1. *de constitutionibus*, l. 1, n. 14: '*papa et imperator sunt supremi principes et si conveniant omnia possunt, si dissonant quilibet potest in sua iurisdictione, non in alterius potestate*'.

[66] Bartolus, *Commentaria, Super primam partem Codicis Commentaria*, a *Cod.* 1. 2. 8. 1, *de sacrosanctis ecclesiis*, l. Privilegia. As an example of secular law which can induce to sin and should therefore not be followed, Bartolus quotes the Roman norm whereby usucaption is also permitted to an ill-intentioned possessor appearing at a later date ('*mala fides superveniens non nocet*': cf. *Dig.* 41. 4. 2. 19 e *Dig.* 41. 3. 43 pr.), whereas the rule accepted in the *Liber Sextus* reads as follows: '*possessor malae fidei ullo tempore non praescribit*' (*Liber Sextus*, 5. 12. 2). In this case the canon rule had to prevail.

[67] Odofredus, *Lectura super Codice*, a *Cod.* 1. 1. 8 *de summa Trinitate*, l. *Inter.*

[68] Cinus de Pistoia, *Lectura super Codice*, ad *Cod.* 1. 3, 32 auth. *Clericus* (Nov. 63. pr., c. 3).

16

English Common Law: The Formative Age

16.1 Introduction

The advent of the Normans in 1066 opened a new era for England, the imprint of which has characterised English history among others, until the present day. The common law created by the Normans in time has constituted an imposing legal system. It was a 'common' law for several reasons: because it contrasted with the multiplicity of local and customary laws of pre-Norman England which the conquerors did not abolish; because it was created and managed in a unitary and centralised way by royal judges with the instruments of judicial procedure of which we shall be speaking; because it was applied generally, that is, more broadly than sovereign privileges, special laws or norms pertaining to specific social groups; because it was managed by secular courts and not ecclesiastical courts which applied the canon law of the Latin Church; and because it was separate from the parallel body of rules of equity which emerged at the end of the Middle Ages through the Chancery.

Common law is characterised by fundamental differences with respect to the *civil law* of the continent: among them, the absence of a code of law and a written constitution; lack of a clear separation between public and private law; the eminent role of judges; the marginal role played by doctrine and legal academia; the lack of separation between substantive law and procedure; criminal procedure resting on an accusatory rather than an inquisitory model; an 'exclusionary rule' that binds judges to the letter of the law avoiding investigation of the legislative intention; and others.[1]

English law stems from the creativity of royal judges, which through an uninterrupted stream of decisions on specific cases beginning in the twelfth century constructed a vast and complex body of rules and principles producing a quintessentially judge-made law, in which

[1] On these distinguishing features of the English *common law* from continental law, see Van Caenegem, 1991, pp. 8–60; id., 2002, pp. 38–54.

legislation, though not absent, has a relatively marginal role. The Roman legal tradition handed down in the *Corpus iuris* and the heart of the continental legal tradition has remained mostly outside the principal line of development of common law. In addition, doctrinal legal science – the fruit of analysis, coherent study and systematisation undertaken by learned university jurists, which has so profoundly influenced the development of law on the continent – had a more circumscribed role in English law. The training of jurists and the structure of legal professions in England followed a different route than that on the continent, as English lawyers and judges were trained in the practice of their profession, not at university; and it is in the pursuit of their jurisprudential practice that in time a sophisticated body of legal skills was developed.

It is a system, therefore, both different and original, the worldwide historical influence of which has been vast and profound: one need only remember that the law of the United States stems directly from the English model. Other regions of the planet such as Australia, India and Canada have in the course of the modern era adopted it either by direct influence or indirectly under English dominance.

Common law has nevertheless also interacted with European continental law: historical research has brought to light clear evidence of how Roman, canon, customary and commercial law, as well as the university-learned doctrine of the continental law has time and time again, in the course of the Middle Ages and the modern era, directly inspired a whole series of institutes which have become part of English common law: from wills to bills of exchange, from marriage law to the regime of juristic persons.

In turn, English law had a strong impact in some phases of continental legal history: for example, influencing the basic architecture of the modern constitutional states; giving currency to the separation of powers introduced in England in the seventeenth century and developed in the European Enlightenment; in the transplanting to France at the end of the eighteenth century of the English criminal jury system; in the reception of English commercial law on the continent during the nineteenth century.

The two-way relations between common law and continental civil law have therefore always been important, beginning in the Middle Ages until the present day.[2]

[2] See the vol. *Relations between the ius commune and English Law*, 2009.

16.2 The Norman Kingdom

With William the Conqueror (1028–1087), the English kingdom acquired some characteristics which remained unchanged over time.[3] The first is the principle that the entire territory of the kingdom belonged to the king, so every right over land and immovable property was held to legally derive, either directly or indirectly, from royal concession. It follows that every man was a 'king's man' also in relation to his property rights, according to a very different view from that of the Roman free *dominium*, adopted by continental law. A minute inventory of landed property was undertaken by order of King William in the 1086 compilation of the *Domesday Book*, an extraordinary enterprise of analytically registering the census of every parcel of land in the kingdom, with momentous consequences in terms of dependency and of revenues for the crown [Hudson in OHLE, II, pp. 118, 224].

Another important feature was the line drawn between royal and ecclesiastical jurisdictions, which during the Anglo-Saxon kingdoms had been for centuries, not unlike on the continent, often intermingled: this separation was aimed at reclaiming not only the king's sovereignty and autonomy from the Church, but also his control over ecclesiastical power [Helmholz, 2004]. As is well known, the relationship between the king and the archbishop of Canterbury was bitterly conflictual at the time of Bishop Anselm of Aosta. Their 1107 reconciliation with regard to the investiture of bishops sanctioned the primacy of the Church over the king, along the lines of the Diet of Worms, fifteen years later in 1122, which was to end the long and bitter battle over investiture on the continent. However the conflict between the Church and the state did not come to an end in England. In fact, during the kingdom of Henry II – who had further legislated on the relationship between Church and state in the Court of Assizes of Clarendon (1164) – the conflict resulted in the tragic murder of Thomas Becket, the intransigent bishop who would not bend under royal pressure.

The fundamental means by which the crown of England gained control of the entire territory was with the progressive expansion of royal jurisdiction [Van Caenegem, 1959]. The Normans retained the Anglo-Saxon territorial partitioning and organisation: the kingdom was divided into *shires*, each of which was headed by an *earl* (a noble vassal of the king), but effectively controlled on behalf of the king by the *sheriff* (*shire reeve*) who was nominated by the king to a directly dependent and revocable position. Traditional justice was administered by the *county courts*, made up of *freeholders* of land, and within the counties by the *hundred courts*, these too dating back to Anglo-Saxon times and common among many other Germanic kingdoms of the early medieval period, although many were by then defunct. To resolve judicial cases, recourse continued to be made, in the first phase of the Norman reign, to traditional English customs, which were reiterated in a text written around 1108, during the reign of Henry I, the *Leges Henrici Primi*.[4]

[3] Alongside the great basic works by Maitland and Holdsworth, see the valuable summaries by Baker, 2002; Brand, 1992; Hudson, 1996; Langbein et al., 2009; Milsom, 2007, as well as the recent vast *Oxford History of the Laws of England* (OHLE).

It was taken for granted that a king was first of all a judge in early medieval European kingdoms. The Norman king's council (*Curia regis*) therefore also dealt with judicial matters, in which the sovereign himself would often take part. If the king moved from one place to another on the territory, trials could take place anywhere he would reside. It became more and more frequent for English subjects to turn to royal justice when ordinary county justice had not dealt with or resolved a case to their satisfaction. By the twelfth century this was to produce a range of effects. Some members of the *Curia regis* were entrusted to exercise their judicial functions by moving from place to place within different districts (*circuits*) and to instruct and decide on cases in the name of the king, in procedures which took the name of *assize*. Otherwise a claimant had access to royal justice by going to court, unless in the meantime (*nisi prius*) a judge delegated by the king had intervened to resolve the case locally.

16.3 Writs

The active intervention of the English monarchy in the sphere of justice was to unequivocally manifest itself only a century after the Conquest, during the reign of Henry II (1154–1189). The ways in which it became possible to establish the primacy of royal jurisdiction over seigniorial and local laws, which had previously prevailed, constitutes one of the most interesting features in European legal history. The Norman kings of England on one hand made use of their duty to safeguard internal order (the king's peace), and on the other hand availed themselves of the power given the *sheriffs* of the counties, as they could impose on the local lords the alternative of either doing justice themselves or having the

[4] *Leges Henrici Primi*, ed. L. J. Downer, Oxford 1972.

case taken away from them and transferred to royal judges. Thirdly, royal justice provided a set of procedural instruments which were more effective than the traditional ones of the duel and the ordeal, instruments which only the king himself could establish and impose on his own judges. The combined action of these three elements ensured, in the span of two centuries after the Conquest, the full victory of the king's jurisdiction.

In the instance of a litigant turning to the king to claim that his lord (the feudal superior to the litigants and competent to judge cases concerning his vassals) had refused him justice over a right, the king granted access to the county court (administered, as we have seen, by a sheriff nominated by the king) in case the lord continued to deny justice to the litigant after the king had ordered him to do so. The brief memorandum (*breve, writ*) written by the Royal Chancery and addressed to the lord was the *writ of right (breve de recto)*.[5] For lands which a lord had received directly from the king, the *writ* was sent by the king's chancellor directly to the local sheriff, in the form of an order that the defendant accept the request of the plaintiff – who had turned to the king in order to obtain the *writ* – for the immediate return of the contested lands (*writ praecipe quod reddat*).[6] Should the defendant fail to do as ordered, the *sheriff* would order his appearance before the king's judges.

Through a supplementary procedure of amendment promoted by the Royal Chancery, the *writ* was in this way to substantially undermine the lord's jurisdiction over the territory. By the late twelfth century, it was already impossible to reclaim rights over lands against a *freeholder*; this dispute could not be heard by the feudal lord without the plaintiff having previously obtained a *writ* from the Royal Chancery. Despite the barons having in the thirteenth century obtained the concession of jurisdiction over lands not granted directly by the king,[7] recourse to royal jurisdiction on the part of freeholders was to take root.

At the same time, in controversies concerning land rights the defendant was empowered by King Henry II to argue his side through the testimony under oath of twelve neighbours (*Grand Assize*), rather than

[5] The formula for the *writ of right*: '*Edwardus rex [. . .]comiti Lancastriae salutem. Praecipimus tibi quod sine dilatione plenum rectum [right] teneas A. de B. de [. . .] viginti acris terrae cum pertinentiis in I., quae clamat tenere de te per liberum servitium unius danarii per annum, quod W. De T. deforciat. Et nisi feceris, vicecomes Nottingham faciat, ne amplius inde clamorem audiamus*' (Baker, 2002, p. 538). See Langbein et al., 2009, p. 97; Milsom, 2007, pp. 124–133.

[6] See the formula in Baker, 2002, p. 240.

[7] Magna Carta (1215), c. 34.

the judicial duel. This was an early appearance of what was to become one of the most important institutions of common law that is the *trial by jury*, although in this instance the witnesses were called on to pronounce themselves on the existence of a right, not a question of fact.[8]

A similar procedure – through the sworn testimony of a group of neighbours (*petty jury*) – was introduced in the same years to decide on controversies over possession. A subject claiming that he had been illegally deprived of the possession (*seisin*) of lands could obtain a *writ* from the Royal Chancery for the purpose of having it reinstated (*writ of novel disseisin*).[9] Akin to the *interdicta*, and possibly inspired by them, but not in fact in every way equivalent to Roman law,[10] these *writs*[11] provided the safeguarding of real estate possession as distinct and autonomous from that of the right of ownership. The basic Roman and continental distinction between possession and property does not have an exact parallel in common law, in which the *writ of right*, regarding the validity of the right of property, is governed by each of the parties trying to prove that his possession (*seisin*) goes further back in time or is more well-founded than that of his adversary [Plucknett, 1956, p. 358].

These legal instruments provided a strong and effective strategy for ensuring royal jurisdiction: they provided appropriate, timely and efficient protection, which royal judges could grant through a probatory regime unique to them; the sworn testimony of neighbours (*jurata, jury*), which was a far more reliable instrument than the traditional ordalic proof: the duel; the ordeals themselves and the sworn statement of the

[8] The fundamental role of the monarchy and the derivation of the English jury from the Norman model were clearly illustrated for the first time by Maitland in 1895 (Pollock and Maitland, 1968, I, pp. 140–142).

[9] *Writ of Novel Disseisin*: '*Rex vicecomiti N. salutem. Quaestus est nobis A. quod B. iniuste et sine judicio disseisivit eum de libero tenemento suo in C. [. . .]. Et ideo tibi praecipimus quod si praedictus A. fecerit te securum de clamore suo prosequendo, tunc facias tenementum illud reseisiri [. . .] usque ad primam assisam cum justiciarii nostri in partes illas venerint. Et interim facias duodecim liberos et legales homines de visneto [neighbourood] illo videre tenementum illud [. . .] et summone eos quod sint coram praefatis justiciariis ad praefatam assisam*' (see Baker, 2002, p. 544; Langbein et al., 2009, p. 101; Milsom, 2007, pp. 137–142).

[10] Actually the Roman distinction between property and possession does not coincide with that of common law, which follows a specific notion of property. Moreover, possession is protected by different procedural rules from Roman law as in *common law* it is tied to the violation of the 'king's peace' as well as being founded on the testimony of the jurors.

[11] The *writ mort d'ancestor* (introduced in 1176) belongs to the same category for the ascertaining of the legitimate possession of a property of an inheritor of someone who is deceased; and so does the *writ darrein presentement* on the right of a patron to nominate a beneficiary for the possession of ecclesiastical property.

defendant's trustees (*wagers by law*). In this way, royal jurisdiction gained considerable ground, although it entailed considerable expenses for the litigant. All *writs* were in fact issued on payment of a substantial sum.

During the reign of Henry II there was another advance in royal jurisdiction. During the Anglo-Saxon period a specific range of crimes and behaviours were severely punished because they were held to violate the 'king's peace'. With the Normans, this range was extended to include all serious crime: a sort of legal fiction held that all criminal acts could be said to disturb the 'king's peace' and were therefore prosecutable before the king's judges. In 1166 the Clarendon Court of Assizes ruled that the king's judges should periodically visit various parts of the kingdom in the guise of itinerant judges, in order to investigate crimes committed on the territory based on the accusations and witness accounts presented by local juries. Before the king's judges, the perpetrator of a crime could be prosecuted not only as an offender of the victim, but also as one guilty of 'felony' for having violated his fiduciary pact with the king and disturbed the king's peace by his behaviour. In this way, all crimes became *pleas of the crown* (*placita coronae*):[12] a result which has been judged to be a defining step in the history of criminal law [Maitland, 1950, p. 109].

Originating from the 'king's peace' and 'felony' was another important action known as the *writ of trespass*,[13] which beginning in the middle of the thirteenth century gradually became the principal instrument for obtaining retribution from one who had committed a tort. The *trespass* presupposed an act of violence against either a person or a movable or real possession, and was based on proof submitted to the jury for deliberation, and granted the right of demanding compensation from the king's judges for the damage inflicted. Originally *trespass* included a limited number of offences, but gradually grew to include a numerous and disparate array of torts, the recovery of damages depending on the plaintiff's ability to provide a precise factual account of the tort.[14] In time a more general form of action for torts was to develop, known as *trespass*

[12] *Placita corone or La corone pledee devant justices*, ed. J. M. Kaye. – London 1966 (Selden Society, Suppl., 4).

[13] Writ of trespass: '*Rex vicecomiti S. salutem. Si A. fecerit te securum de clamore suo prosequendo, tunc pone per vadium et salvos plegios B. quod sit coram nobis in octabis Sancti Michaelis ubicumque fuerimus tunc* in *Anglia ostensurus quare vi et armis in ipsum A. apud N. insultum fecit et ipsum verberavit*' (Baker, 2002, p. 544); on a 1341 case, *ibi*, p. 554. See Langbein et al., 2009, p. 103.

[14] '*ostensurus quare*': the plaintiff had to demonstrate why (*quare*) and on the basis of which facts was his recourse to the king's justice.

on the case, which, unlike the original *trespass*, was only civil in character and did not involve the arrest of the defendant.[15]

For contracts the genesis of the procedural protection before the royal courts was more complex. At the end of the twelfth century Glanvill still declared that the king's justice did not include 'private agreements'. What did exist was the *writ of debt*,[16] but this was a crude form for simply requesting the 'restitution' of a sum of money which the plaintiff claimed was owed him without having to provide proof of the cause (it constituted almost a subspecies of the *writ praecipe quod reddat*); furthermore, it implied recourse to the proof by duel and finally it involved an expense on the part of the litigant equal to a third of the value of the sum demanded [Plucknett, 1956, p. 632]. Half a century later, Bracton attests to the existence of an action which made express reference to a contract (*writ of covenant*), but this was to be brought about only if the plaintiff could show a formal written act stamped with a seal, or if the money or goods had already exchanged hands. Proof was obtained by means of an oath taken by the 'co-jurors' (*wager of law*), in the medieval style of sacramentals (*sacramentales*).[17] A more effective protection of contracts was to develop at a later date, as discussed later.

There was a historical phase during which the Royal Chancery created a growing number of new *writs* – only a few have been mentioned here – to protect claims presented to the king, in this way extending the scope of sovereign jurisdiction. At the end of the thirteenth century, in the fundamental Westminster Statute of 1285,[18] the barons obtained that no more new *writs* were to be enacted, so as not to lose any further ground in their judicial power. But it was admitted that the usual and current writs (*brevia de curso*) could also be applied by analogy to similar cases (*in consimili casu*), whereas for cases for which a *writ* did not exist,

[15] On the origin of this instrument and on some cases decided in the mid-fourteenth century, see the analysis by Ibbetson, 1999, pp. 48–56; the *writ of trespass* becomes the instrument to validate the breach of contract using royal justice without the actor having to prove the 'breaking of the peace'.

[16] Formula: '*Rex vicecomiti N. salutem. Praecipe A. quod juste et sine dilatione reddat B. centum solidos quos ei debet et iniuste detinet ut dicit. Et nisi fecerit etc.*' (Baker, 2002, p. 540).

[17] The attempt at having a parallel canon safeguard alongside these forms of contract through a solemn promise or oath – which as such was drawn into the sphere of canon law and ecclesiastical legislation as it put the salvation of the soul at risk – was scotched in 1164 by the will of Henry I (Clarendon Constitution, which denies ecclesiastical jurisdiction in matters to do with contracts).

[18] Statute of Westminster (1285).

and for which the intervention of the king was sought, recourse to Parliament was needed.

The system of *writs* is fundamental to the genesis of common law and influenced all of English law until the present day.[19] Based on specific forms of action, in the twelfth and thirteenth centuries the king's judges originated a complex set of rules to solve civil controversies and to punish civil and criminal torts. The procedure was rigidly formalised, not only in the sense that – at the risk of otherwise losing the case – it was compulsory for litigants to immediately indicate the *writ* to which they planned to make recourse, but also because the procedure – in particular having to do with proof – was not the same for all *writs*: only a few *writs*, for example, allowed proof by jurors rather than proof by co-jurors or a judicial duel. Moreover, the competence of the courts was not the same, as some *writs* could only take place in one of the royal courts and not in others. The sanctions also varied and were specific in the different *writs*. In any case, one could not act outside the recognised and admitted *writs*.

This rigidity is reminiscent in many ways of the formulary system of classic Roman law, although common law affirmed itself by its own strength and outside, if not in contrast with, the Roman system of the Justinian Compilation, the spirit of which was, in any case, at this point very far from the law of the classical era.

16.4 Royal Courts and Judicial Decisions

The extension of justice administered by the king's judges, through the instruments mentioned previously, imposed a new and more complex organisation of the courts. Local county justice and feudal justice did not altogether disappear,[20] but their activity was reduced, whereas the

[19] As Frederic Maitland famously wrote, 'The forms of action we have buried, but they still rule us from their graves' (Maitland, 1948, p. 2).

[20] A significant example among many, is given by Hudson (in OHLE, vol. II, 871–1216, p. 304 f.): in the lawsuit of a private individual against the Abbot Gunther of Torney around 1110 to claim the rights over land in Charwelton, asking that he should be given possession (*saisitio*), the abbot's court – the abbot being one of the parties in contention – asked the plaintiff to prove within a single day his full right (*maius rectum*); the men sent by the royal sheriff to closely examine the case (after the plaintiff had turned to the king's justice) joined the abbot's judges in declaring his rights over Charwelton. The case is interesting also because it is an example of a historical phase in which the king's justice was exercised jointly with traditional seigniorial justice.

activity of the royal judges was to grow exponentially.[21] The increase in cases subjected to the king forced him to implement the expedient of periodically sending some of his judges out into the territory in the guise of itinerant judges (*justices in eire* from the Latin *itiner*), to administer civil and criminal trials in his name. But this measure was not to curtail the increase in the number of cases reaching London.

In the course of the thirteenth century this led to the branching out of the original single royal court into three separate central courts: the *Court of Common Pleas* that decided on disputes between private parties, no longer in the presence of the king; the *Exchequer*, the oldest of the three, which dealt with fiscal justice, but also other high functions of an administrative and financial nature; whereas the more important criminal, civil and feudal cases were dealt with by the *King's Bench*, in which in the thirteenth century (but not thereafter) the king would still be present in person. This tripartite division was to last for more than six centuries, until the nineteenth century [Holsworth, I, 1922].

It was in these central courts that common law was to take shape and rapidly develop. Based on the *writs* granted by the Chancery, the few but highly qualified judges nominated by the king were to give life to a body of decisions that between the end of the twelfth and the middle of the thirteenth century had already constituted a complex network, if not yet a real 'system'. It has correctly been observed [Van Caenegem, 1988, p. 90] that the non-reception (even with some exceptions, as we shall see) of the Roman *ius commune*, which has separated England from the continent[22] by creating a dualism between civil and common law, is probably due to the early development of the system of *writs* and the king's judges beginning in the twelfth century, precisely at a time when the influence of the new legal science was gaining ground on the continent. If this early development of common law had occurred only a few decades later, it is not improbable that the new university legal science of Roman origin would have spread also to England as it had, for example, to Normandy, and to the kingdom of Sicily, which in many respects, as

[21] An example of this process of expansion: the 1278 statute of Gloucester established that no case valued at less than 40 shillings should be heard by the king; but the royal judges soon had a different principle prevail, i.e. that no case of superior value could be heard in the local courts.

[22] This happened despite the fact that in the twelfth and thirteenth centuries a number of Italian jurists travelled to England, among whom were Vacarius, Bassianus, Franciscus Accursius, Johannes Bononiensis and others; furthermore, canon law was very much alive in England, on which see Brundage, 2008, p. 92; Helmholz, 2004; Zulueta-Stein, 2002.

far as being centralised monarchies, were quite similar to the Norman kingdom of England.

The decision of the king's judges began to be transcribed in 1194 into specific registers named *Plea Rolls* written in Latin. The oldest minutes of discussions which took place in the language of the Norman rulers (Law French) at the trials before the king's judges are from a century later, in 1292: these are the *Reports*, documented in the *Year Books*,[23] an indispensable source in following the historic development of common law which has the character of judge-made law, stemming in great part from judicial decisions. Actually the *Reports* contain the live exposition of the debate that took place before the king's judges, with the *narratio* (*count*) of the case on the part of the *serjeant*, mentioned later, and with the arguments leading to a precise identification of the object of the controversy and the facts to be presented to the jury for a verdict.

The editing of the *Reports* was probably in the hands of young aspiring lawyers who assisted the hearings to learn the techniques of common law [Baker, 2002, p. 179]. Only the actual contact with judicial controversy, and a direct understanding of the dynamics of the trial, could teach the difficult profession of the common law jurist.

16.5 Glanvill and Bracton

Two works by jurists offer a precise and detailed picture of the formative stages of common law. The first compendium of Anglo-Norman[24] law was to see the light around 1187 and was attributed to Ranulf of Glanvill, chief justice at the court of King Henry II. In it he describes the system of *writs* still in the process of developing, the primary reference being the *writ of right* and the Assizes: this is an irreplaceable source of information on the initial phase of the new system. A little more than half a century later, around 1250, an exceptionally clear account of the by now mature system of common law – drawn from a complex of around 500 judicial decisions of the time[25] – is represented by the vast treatise *De legibus et*

[23] A series of critical editions of *Reports* dating back to the beginning of the fourteenth century was progressively included in the principal collection of studies and historical sources of common law, promoted by the Selden Society of London.

[24] Glanvill, *The Treatise on the Laws and Customs of the Realm of England [. . .] (De legibus et consuetudinibus Angliae)*, ed. by G. D. G. Hall, London 1965.

[25] An example: Bracton declares that English law (*Lex Angliae*) says that the personal or hereditary possessions of a wife who has died should belong to the husband on condition that from the marriage was born at least one live child. The proof must be furnished by the witness account of the infant having cried out at birth and the cry having been heard 'within the four walls', i.e. in the room and witnessed directly. Bracton adds that an alternative proof can be the baptism of the child, as it occurred in the minutes of the hearing of the royal judge Martin of Pateshull, well known in Lincolnshire in the tenth year of the reign of Henry [III: anno 1226]: Bracton, *De legibus et consuetudinibus Angliae*, f. 438 (ed Woodbine-Thorne, vol. IV, p. 360).

consuetudinubus Angliae attributed to Henri Bracton,[26] also a king's judge. The rules outlined in the treatise are those developed in the central courts by judges of the highest level such as William Raleigh, who was also author of some new *writs*. The systematic scheme adopted by Bracton was founded instead on the continental model drawn from Roman sources, in particular on the system of the Justinian *Institutions* and the teachings of the great Glossator from Bologna, Azo, whose works the author knew well.[27]

Despite the system's derivation, as far as contents and framework, the differences with the Roman continental *ius commune* are deep-rooted and undeniable.[28] The role of the trial instruments was decisive in the evolution of substantive law: it was the protection introduced with the *writs* that shaped the regime of real patrimonial rights and of contracts: as Sumner Maine put it, in England 'substantive law developed in the interstices of procedure'.

16.6 Legal Professions

Litigants who made recourse to royal jurisdiction were soon required to appoint someone to represent them, travelling to London if necessary: beginning in the thirteenth century attorneys from different counties were present with the power to represent the party by whom they had been chosen. Their decisions regarding procedure were binding for their client. In 1292 a *writ* from the king addressed to his judges prescribed that attorneys should be centrally controlled, meaning by the judges themselves.

In this early phase, another completely separate function, as representatives in the judicial proceedings, belongs to a different category of

[26] Bracton, *On the Laws and Customs of England*, ed. by G. E. Woodbine; trans. by S. E. Thorne, Cambridge (Mass.) 1968–1977, 4 volumes.

[27] Maitland, 1895.

[28] E.g. the claim to movable possessions (most of all animals: *chattels*) for *common law* does not feature as real action (*actiones in rem*) in that the plaintiff could have chosen to demand restitution or compensation for damages, which is a personal action.

jurists. It was the work of *narrators* (counters) to set out the controversy of the case in judgement, particularly to illustrate the specific reasons that had induced the plaintiff to appeal to the judge. The narrators (or perhaps only some of them) were later to qualify as *serjeants*, which would seem to indicate a role of service to the king. They eventually succeeded in monopolising legal assistance in the Court of Common Pleas, competent for most of the cases that came under the king's jurisdiction. In the fourteenth century a distinct corporation came into being – the Order of the Coif[29] – where only a few *serjeants* were chosen and admitted annually by the king.

Two branches of the profession came into being in this way, henceforth remaining quite distinct: on one side attorneys later known as *solicitors*, representing the litigant, on the other the defender (*narrators* or *serjeants*). To the latter were added other jurists of lower rank, beginning with young aspiring legal professionals, some of whom would later have access to the small circle of *serjeants*, who carried out the more complex tasks and discussed the more lucrative cases.

The dynamics of the debate[30] (pleading) entrusted the *narrator* of the plaintiff with the task of relating the facts of the case thought relevant to the decision. The exposition[31] was in Law French, a particular language which had been brought to England by the Normans and that only in the course of the seventeenth century was gradually replaced with English. Whereas an account of the trial (to be transcribed in the Plea Rolls), was written in Latin, after the initial phase of oral debate during which the discussion could still lead to the modification of the disputed facts, whereas the minutes in Latin of the Plea Rolls could no longer be altered.

The defendant could simply deny the fact claimed by the *narrator*, or deny it in part, or confirm its being correct but adding another fact which altered its meaning, or, lastly, confirm the fact *in toto*, but argue that it conformed with the law (*demurrer*). Only in this last instance was it up to the judge to untangle the question, whereas in the first three instances (which were much more common) the conflict between the version of the plaintiff and that of the defendant constituted the specific issue examined by the jury [Baker, 2002, p. 77].[32]

[29] *Coif*: because its members wore a white linen or silk cap.

[30] On this see the clear account by Baker, 2002, pp. 76–85.

[31] Known as *count*, that is narration (*narratio*).

[32] An example, drawn from Bracton. To the woman requesting the return of her dowry (according to the concession in the *writ of dower*), the husband can counter saying: a) that the woman was never his wife ('*nunquam fuit ei desponsata*'); b) that she was married, but with an act rendered null and void because the husband was already married to another woman; c) that she was, but is no longer his wife, as they had been divorced (Bracton, *De legibus et consuetudinibus Angliae*, f. 302, ed. Woodbine-Thorne, vol. II, p. 372). Each of these exceptions naturally had to be proven and subjected to the jury.

Whereas on the continent beginning in the twelfth century legal education took place at the universities – although in the middle of the century there are traces of legal teaching at Oxford (1149) entrusted to Vacario, the Lombard expert on Roman law, who for the purpose was to write a summary of Justinian law known by the title of *Liber pauperum*[33] – a different system was to take hold in England: common law jurists were in fact trained in the central Courts of justice, under the skilled instruction of readers. Young trainees were expected to become conversant with legal techniques not only through simulated court proceedings and arguments, but also by annotating discussions from proceedings and producing texts which were subsequently collected in Reports and in the Yearbooks. Before becoming *narrators* or *serjeants*, they were trained as apprentices in the specific techniques of the *writs* and of crown court procedure. Once admitted to the role of defensor, they entered into a corporation of *serjeants* (Inn of Court),[34] the four most important of which are still in existence today.[35]

Soon kings began to adopt the criteria of choosing central court justices exclusively from the pool of *serjeants* in the Order of the Coif, among those who had acted for many years in the prestigious role of defence councils. The justices were therefore all older and authoritative lawyers, with a direct acquaintance with their colleagues in the Inns of Court. This explains the extraordinary integrity, the prestige and mutual respect which have until the present age characterised the English legal profession, the two fundamental components of which are justices and barristers.

16.7 The Jury

A fundamental aspect in the history of English law is the institution of the jury, entrusting ordinary lay citizens with a central role in the

[33] Vacarius, *The Liber pauperum of Vacarius*, ed. by F. de Zulueta, London 1927.

[34] This way of training jurists in the common law has remained constant in time. Until the twentieth century the qualification of *barrister* was not obtained through a university course but after a number of years of practice (pragmatically attested to by the number of meals had *in loco*) in one of the four Inns of Court.

[35] Lincoln's Inn, Gray's Inn, Middle Temple, Inner Temple.

decision-making of judicial cases. This aspect has a long and complex history,[36] traversing the entire lifespan of English law.

From the end of the twelfth century, as said earlier, in disputes concerning property royal justice granted the defendant an alternative to the judicial duel. This was the 'grand assizes', by which the question was put to twelve knights (*milites*, who belonged to the king's army), who were chosen by four knights nominated by the two parties. Crucially, these jury members had a role as witness, not judge. In the same way, again during the reign of Henry II (1133–1189), to those claiming they had been divested of the possession of land the crown judges granted a specific *writ* with which the sheriff had to choose twelve local men who could testify to the divestment having taken place.

In both cases the procedure was one reserved uniquely to the king's justice, carried out on the payment of a conspicuous sum of money. But it nevertheless provided a better guarantee to the litigant than the traditional ordalic procedure and for this reason, though an exceptional procedure to begin with, it quickly affirmed itself and extended the range of application of crown justice.

In criminal law the genesis of the jury system was different. Beginning in the Norman era, the procedure for bringing the author of a crime before the judges took two forms: the first was with the accusation on the part of the victim of the crime or his relatives, the second by *indictment*, that is by means of interrogating a group of local men to whom the itinerant royal judges would ask information regarding crimes that had been committed in the territory, requiring from them an opinion as to whether the suspected offender should be prosecuted. Indictment (which is at the basis of the English *grand jury*, finalised to producing a formal accusation, as distinct from the jury that makes a judgment, the *petty jury*) became the norm with the Assizes of Clarendon and of Northampton of 1166.

The person accused by indictment had to defend himself by means of recourse to the judicial duel, in the same way as one who had been accused by a private party. But in the age of Henry II, it became more frequent for the accused to request and be granted the possibility of defending himself from the accusation by recourse to the testimony of twelve neighbours rather than the duel: in these cases, it was said that the accused *'ponit se super patriam'*, that is, he subjected himself to the testimony of his countrymen. Following the Fourth Lateran Council of

[36] On the origins, see Langbein et al., 2009, pp. 5–85.

1215, the Church forbade the clergy from making recourse to ordeals, among which the judicial duel and this form gradually fell into disuse also in lay trials. In theory it remained possible to request a duel as opposed to a jury, but in practice those who chose to refuse recourse to the testimony of jurors were severely punished. In case they were to say nothing, so as not to have to make the choice, the penalty inflicted was 'firm and harsh' (*peine forte et dure*), a form of judicial torture so cruel as to sometimes lead to death.[37]

So at the end of the thirteenth century the trial by jury had become the usual way of proceeding both in civil and in criminal cases. It was actionable by means of recourse to a plurality of procedures connected to specific kinds of actions and *writs*; the jurors functioned as expert witnesses, not fact finders; and unanimity was not required.

The greater responsibility of the judge, who was no longer tied to the result of ordalic justice, but author of the decision even at the risk of not saving his soul, would evolve in time and lead to the formulation of sentencing only when culpability was proven 'beyond a reasonable doubt': a doctrine whose origins are theological and of canon law [Whitman, 2008].

With these characteristics, though they would be modified in the course of time, the role of the lay jurors had become an essential component of the common law system.

16.8 The Magna Carta

The active involvement of citizens in the English kingdom, all the more significant because applied within a constitutional system which attributed very decisive powers to the crown, also manifested itself in another context. In 1215, in a moment of weakened royal authority, the barons obtained the recognition of a vast gamut of rights and powers, which found expression in the momentously important document of the *Magna Carta*.[38] This celebrated text was edited and modified a number of times – the final version in which some prerogatives granted to the barons at the expense of royal power had been deleted, is dated 1225 – was not limited to reiterating the freedom of the Church and that of the City of London, but recognised the prerogatives of the lords with regard to their subjects, freemen and tenants, in particular to do with their judicial rights, which the *writ praecipe* could in any case no longer in the future interfere.

[37] The punishment used, for a long time not inflicted, was formally abolished only in 1772.
[38] *Magna Carta*, ed. J. C. Holt, Cambridge 1992.

Moreover, it was established that 'no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land' (c. 39 of the 1215 text). This provision originally had a markedly feudal character, as the 'court of peers' (*curia parium*) was made up, in England [Baker, 2002, p. 472] as on the continent, of vassals of the same rank as the plaintiff in the case. However the *Magna Carta*, unlike similar privileges of the medieval sovereigns on the continent, in England was kept alive and constantly referred to in the successive centuries, so that the same formulas in time acquired different meanings. In the seventeenth century the great assembly of the reign still had feudal characteristics, and was made up essentially of barons and grandees; in the course of the same century not only were representatives of the cities and villages added to the county representatives – the king's direct 'tenants in chief' – but these three categories also became part of Parliament through an elective process, no longer by a choice at the discretion of the *sheriff*: this figure now being limited to ensuring the election of two knights per county (shire), two citizens for each city (town), two burgesses for each village (borough).

The elected members not only jointly deliberated in Parliament, but their deliberations bound the electorates of their respective shires, towns and boroughs throughout the kingdom: they therefore had full power of representation. Only the dispositions approved by Parliament were to be called *statutes*, as opposed to the ordinances approved by the King's Council. From 1295 onwards, the institutional structure exhibited by Parliament on the occasion of a new convocation has been retained. It must be stressed, however, that English statutes are not comparable to the statutes of the Italian commune and even less to the laws of modern parliaments: the essentially jurisdictional nature of the English Parliament is reflected also in the statutes, which in certain ways are similar to judicial decisions with extended and permanent effect.

If the reasons that lead to the approval of the *Magna Carta* are, as always in history, also due to contingencies – Henry II, looking for funds to support the wars and expenses of the kingdom, was forced to expand the pool of contributors from whom he could extract revenues and involve them in decisions on taxes, thereby greatly strengthening their role – this does nothing to diminish the historical importance of this early evolution, which places the English kingdom at the origin of the European system of political representation.

PART III

The Early Modern Period (Sixteenth–Eighteenth Centuries)

The transition from the Middle Ages to the early-modern period, disregarded at the time and only gradually perceived as being fundamental in the political, economic, artistic, cultural and religious history of Europe, was still less marked in the sphere of law. Indeed, some essential features of continental law in the last centuries of the Middle Ages – the existence of a plurality of legal orders, and the duality of *ius commune* and particular and local laws – were to hold fast for another three centuries. Furthermore, the vast body of doctrines formulated by the Glossators and the Commentators continued to instruct conceptual thinking as well as the judiciary's and advocates' solutions to problems arising in legal practice. In Europe a profound caesura was to occur – the impact of which was comparable to that of the twelfth century, with the rise of the new legal science – only at the end of the eighteenth century with the reforms of the Enlightenment and the first modern codifications marking the demise of the *ius commune*.

The early modern period, however, shows clear signs of discontinuity with the preceding age. The building of complex state structures – primarily in France and England, but also in Spain and other regions of Europe – was made possible largely by exploiting a variety of tools offered by the law. This was the case with sovereign power, centralised jurisdiction, the hierarchical order of civil servants directly dependent on the king and the more widespread use of state legislation, all of which brought about great changes in the legal sphere, though in different ways and at different times throughout Europe. While in the first half of the sixteenth century Charles V's vast dominions – on the European continent limited only by the powerful French kingdom, but outside that extending to the New World and beyond – might have provided the grounds for a reconstitution of the Christian empire, Charles V's division of the Hapsburg territory into two parts transformed continental Europe and Great Britain into a complex of states that for more than four centuries would dominate world politics.