PART I

Late Antiquity to the Early Middle Ages (Fifth–Eleventh Centuries)

The transition from the ancient to the medieval world, between the fourth and sixth centuries, and the concurrent influx of Germanic settlers who in previous centuries had dwelled on the outskirts of the Empire engrafted Europe with a corpus of new institutions and customs which were far from Roman law but equally far from the traditional customs of the Germanic races. The law of the late Roman Empire nevertheless had a considerable influence on the public precepts and private law itself of the Germanic people, who had by then relinquished their original nomadic state and were permanently settled throughout the territory.

Thus began an era which was to last around 600 years, until the end of the eleventh century, during which time what had survived of Roman law within the Germanic kingdoms of Western Europe variously intermingled and coexisted with Germanic customs, part of which were set down in writing, mostly in Latin, from the sixth century onwards. The Church was to exercise its authority and with it a fundamental cultural, religious and pastoral role, but also a social and political one. It contributed by transmitting to civilised society many rules of law derived from Roman law which the Church had made its own, but also and more importantly the inestimable heritage of ancient Greek and Roman culture, of which all that has survived are the texts chosen and transcribed by medieval clerics and monks.

Although the written laws of the Franks, the Lombards, the Visigoths, the Anglo-Saxons and other Germanic peoples include many rules willed by the kings who issued them, their primary root is undoubtedly that of custom. Following the ninth-century resurgence of the Western Empire under Charlemagne, for the first time in history the premises were created for a political and juridical union of Western Europe.

These were the centuries during which custom dominated the sources of law, ultimately giving life to new and complex institutions which cannot be considered either Roman or Germanic. The feudal

relationships which were to take root on the continent through custom were to develop by the same route. Custom is not static, but transformed in time and space, at different times in different areas. Neither was custom always nor solely spontaneous: feudal law and the servile condition, at once flexible and stable, resulted from the forces which had been present in the arena for centuries and in the course of which public power underwent profound changes, which were then reflected in the laws of the time. Personal status, family structure, contracts, the criminal system and trials were wrought by a harsh and often violent reality, in which the exercise of force coexisted with the very different values of the Christian message.

Despite the extraordinary variety of local customs, many fundamental common elements exist in early medieval European law, deriving both from common religious beliefs and the similar conditions in which the predominantly rural and military societies lived.

This historical condition of Europe was to undergo a profound change with the great 'renaissance' of the legal system in the eleventh and twelfth centuries.

1

Law in Late Antiquity

1.1 Political Structures

In the last centuries of the ancient world – the centuries between the age of Constantine (313–334) and the age of Justinian (527–565) – Roman law experienced a series of profound changes, which were to have an influence on the entire successive cycle of legal history in Europe. The vast territory of the late Empire included the area of the whole Mediterranean basin extending as far as the Rhine, the Danube and southern England. It was divided into 114 administrative provinces, equally split between the Eastern and Western Empires, the first with a capital to begin with in Rome then in Milan and Trier; the second with a capital in Constantinople. The bipartite political, juridical and administrative division between the empires of East and West was emphasised at the end of the fourth century [Demougeot 1951], becoming irreversible with the fall of the Western Empire in 476. This did not prevent the leadership being centred on a single man during some phases of late antiquity, under the governance of some great emperors, among them Constantine, Theodosius I and Justinian. The apogee of power was at once powerful and fragile. Succession to the throne entailed two emperors (the *Augusti*) and two designated successors (the *Caesars*), in a partnership which was in practice often disregarded and in any case characterised by mutual diffidence, so well expressed in the fourth-century sculpture in Venice representing four personages forming a single group: one hand leans on the shoulder of a colleague, but the other grasps the hilt of a sword.[1]

Civil and military administration had been separated from the time of Constantine [E. Stein 1968], by a radical reform in antithesis with the classical Roman principle of the indivisibility of the *imperium*. Three distinct hierarchies stood side by side in the territory, in a legal order whose articulated complexity induced a great historian to state that in comparison 'all hierarchical settings of successive eras seem the mediocre

[1] The 'Four Tetrarchs', relief in porphyry from St. Mark's Basilica, Venice.

work of beginners' [Mommsen 1893]. The military hierarchy revolved around *duces* and *magistri militium* posted in various parts of the Empire, as well as mobile military units that followed the Emperor as needed. After the decline of the classical formular procedure and the advent of the *cognitio extra ordinem*, the functions of the civil hierarchy were both an administrative and public order, but also included the function of civil and criminal judiciary. This was separated into as many as five levels, which included, in ascending order, the city *defensores*, the governors of the provinces, the vicars at the head of the dioceses (there were six in the Western and six in the Eastern Empire) and the four prefects of the *praetorium* in Italy, Gaul, Constantinople and Illyricum. A third hierarchy of functionaries, itself divided into two branches, exercised the vast tax and financial competencies of the Empire. Above the three hierarchies operated the Imperial Court.

By this time, the Emperor had a legitimate hold on all powers. It was he who was in charge of nominating the provincial governors, he who also nominated all other posts for civil, judicial, military and financial administrators. Legal cases, on which he made a final decision, reached him from every part of the Empire. And finally, it was to him that the exclusive right of legislative power was reserved.

Imperial bureaucracy, centrally recruited from the vast Eastern and Western territories, was certainly not devoid of vice and abuses such as corruption, greed and arrogance [Jones 1964]. Nevertheless, the high professional level of the offices is undeniable, particularly that of the central offices whose task was to set in motion the course of the legislative and jurisprudential evolution of law. The hundreds of edicts and rescripts that have come down to us are a clear evidence of this. It has been said that with the post-classical age 'the spirit of Roman law did not die out but migrated to another body' [Schulz 1946].

1.2 Post-classical Legislation

As to the sources of law, the distance from the preceding age could not have been greater – the age in which a number of great jurists had elaborated the admirable set of principles, categories, rules and methods which constitute the backbone of classical Roman law having ended; every task in the production of norms during the late Empire rested solely in the hands of the Emperor. He officiated through the agency of his central offices which were under the direction of a handful of high commissioners whom he selected and could dispose of at any time.

The *Quaestor* of the Holy Palace (responsible for questions of law) and the Master of Offices (head of the Imperial Chancellery) – with the aid of designated officers equipped with advanced technical skills – drafted the constitutions (*edicta*)[2] which, upon the Emperor's approval, became binding law in either the Eastern or Western part, if not throughout the entire territory of the Empire.

To this was added the judicial function at the highest level, also exercised by the Emperor through his central judges. Cases were assigned to him in the phase of final appeal, after at least two inferior levels of judgement. There were direct appeals to imperial justice on the part of imperial subjects. Not infrequently there were requests from local officer-judges, mostly provincial governors, regarding questions which were not resolvable with existing laws. The imperial court, through its central office (*scrinium a libellis*), solved such cases by issuing a rescript or a consult in the name of the Emperor, a brief text in which the controversial question was set in legal terms based on the facts provided by whoever had submitted it for superior judgement.[3] As the parties were not present, the rescript often contained a clause in which the solution of the case was conditional on the facts included corresponding to the truth, to be duly verified *in loco*.[4]

The rescript was then used not only for the specific case that had originated it, but also for similar cases occurring in other parts of the empire, by other judges who had come to have knowledge of the imperial judgement. Emperors intervened forbidding the rescripts issued by the central office to go against general rules (*contra ius elicita*)[5] and to prevent the surreptitious spread of the contents.[6] Rescripts were in fact to acquire a normative role, a role which became official and was formalised when a select number became part of Justinian's compilation.

As a result the classical system of sources was profoundly transformed. Customs and uses (*mores*), opinions (*responsa*) of accredited jurists, the *senatumconsulta* and other sources still referred to by Gaius in the second century were already relegated to the background, whereas the only

[2] All the constitutions in the Theodosian Code, as we shall see, belong to this category. For example: *Cod. Theod.* 11. 30. 17, incorporated with modifications in *Cod. Iust.* 1. 21. 3: the Justinian compilators replaced the penalty of deportation inflicted on those who had addressed a plea to the Emperor rather than appealing a decision, with the less severe penalty of infamy.

[3] Only one example among the hundreds of rescripts included in Justinian's Code, Cod. 1.18.2 of the year 211–217, denies an adult who had appealed to the Emperor in a case involving inheritance the possibility of pleading ignorance of the law.

[4] Cod. 1. 22. 5: '*Si preces veritate nitantur*'. [5] Cod. 1. 19. 7. [6] Cod. 1. 14. 2.

source regarded as central in the evolution of law consisted of imperial decisions in the dual form of rescripts on specific cases and edicts of a general nature. Post-classical theorisation in this way reduced the sources of law to two categories: on one hand, the *iura*, which included the traditional sources of civil and honorary law, still valid unless expressly or tacitly abrogated, and, on the other hand, the *leges*, that is, imperial statutes.

Post-classical and Justinian legislation intervened in almost every field of law, introducing profound changes with respect to the classical era. The influence of Christianity may be perceived in many of the dispositions concerning the law of persons and family law from Constantine onwards: for example in the sanctions introduced against the abuse of children on the part of fathers and the lessening of the characteristically rigid *patria potestas*[7] (which some sources now qualify with the very different expression *paterna pietas*); in making redemption possible for parents forced by poverty to the all too frequent practice of selling their children;[8] in the equality between male and female in legitimate succession;[9] in the introduction of obstacles to divorce.[10] The ban on splitting slave families in the division of inheritance,[11] the simplification of manumission[12] and the possibility of acquiring freedom through prescription[13] may also indicate a Christian influence. Greek law was also in various ways to influence imperial law, for example imposing the restitution of the wife's dowry in case the marriage was dissolved,[14] the introduction of the practice of registering mortgages in public registers (*apud acta*) and allowing the withdrawal from a purchase agreement by forfeiting the deposit in contrast to classical Roman law.[15] In some cases, the Old Testament also influenced the law through the Christian religion,

[7] Cod. 9. 15. 1 of 365; Cod. 8. 51 (52). 2 of 374: sanctions for the killing of a son and the exposure of infants.

[8] *Cod. Theod.* 5. 10. 1 of 329; Justinian accepted the provision, but interpolated the text limiting the lawfulness of the selling to cases of extreme poverty (Cod. 4. 43. 2). In a Novel of 451, Valentinian testifies to the practice of selling one's children because of the terrible hunger ('*ob obscaenissimam famem*') caused by famine (*Nov. Valentiniani* 33, in *Nov. Post-Theodosianae*).

[9] Nov. 118.

[10] Nov. 22 of 536; Nov. 117 of 542.

[11] *Cod. Theod.* 2. 25. 1 of Constantine = Cod. 3. 38. 11.

[12] *Cod. Theod.* 4. 7. 1 of 321 = Cod. 1. 13. 2.

[13] Constantine required a period of sixteen years and good faith (*Cod. Theod.* 4. 8. 7 of 331), Anastasius was to subsequently extend the period necessary for prescription to forty years (Cod. 7. 39. 4. 2 of 491).

[14] Cod. 5. 13. 1 of 530: *actio de dote*, granted also to the heirs.

[15] Cod. 4. 21. 17 of 528.

for example when the rule on evidence was imposed requiring the declaration of at least two witnesses.[16]

1.3 Theodosius II to Justinian

Legislative enactments in the fourth and sixth centuries were innumerable. It is therefore understandable how the necessity arose for collecting the *corpus* of the constitutions of the Emperors into homogeneously conceived texts. Rescripts up to the age of Diocletian had already been collected in the Gregorian and Hermogenian Code,[17] but far greater importance was given to the Theodosian Code, issued by Theodosius II, in which all the general constitutions from the age of Constantine until 438 were collected in sixteen books. Every book was subdivided under titles, under which the successive constitutions were listed in chronological order. The Code, which included the constitutions generated in Constantinople as well as those written in the West, was extended to both parts of the Empire [Archi 1976]. In the West, it exercised a lasting influence in the course of the early Middle Ages, until after the eleventh century.

The sixth century saw the origin of Justinian's great compilation (527–567). This Emperor, who was to mark the end of a span of more than 1,000 years of the law of Roman antiquity, played an unsurpassed role as legislator as well as being among the great rulers in history. Hundreds of constitutions ratified by him and compiled by a small group of jurists and high-ranking functionaries introduced new norms – adding to or derogating from post-classical law – in every field of law, from private to criminal, from procedural to public. But most of all Justinian was the promoter of the great collection of texts to which his fame is tied: an enterprise, however (as has often happened historically with innovative events), which his contemporaries entirely neglected.

In the short space of five years, from 529 to 534, three works appeared which together with the later *Novellae* formed what would be called the *Corpus iuris civilis*.

The *Codex* was (in the second issue of 534 which has come down to us) systematically collated in twelve books, each of which was subdivided

[16] Cod. 4. 20. 1 of 334. See Deuteronomy 19.15 and Daniel 13.

[17] The two collections have not survived, but are worth remembering, as use was made for the first time of the term 'Code' later to become current, although with different meanings, in subsequent eras.

into titles by subject, containing thousands of rescripts and imperial constitutions from the first century to the age of Justinian himself.[18]

The *Digest*, which dates from 533, comprises a vast selection of classical legal science texts collected in fifty books, each of which was subdivided into titles. It was the result of work undertaken by a commission headed by the jurist Tribonian, *magister officiorum*, who also made use of many works from his own extensive library. Though in fragmentary form, the *Digest* saved for posterity the writings of the greatest Roman jurists of antiquity, from Salvius Iulianus to Labeon, from Paul to Ulpian, from Pomponius to Callistratus, from Modestinus to Papinianus and many others. What we know of classical jurisprudence and the form of reasoning and argumentation of Roman jurists is essentially owed to this work of incommensurable value to the legal historian. Without it the most perfected brainchild of Roman civilisation would have been lost. And it is truly surprising that the *Digest*, this imposing monument to Roman legal wisdom, was conceived and produced far from Rome; equally surprising is the fact that this work began having an effect in the West only six centuries later, as if it had been conceived for a Europe which did not yet exist.

Justinian's compilation includes a brief summary, the *Institutiones*, modelled on the Institutes of Gaius, and the *Novellae*, a collection of constitutions[19] promulgated by the same Emperor in the thirty years of reign after the Code was issued.

Justinian intended to create a work which would substitute all other sources of law[20] and which would be applied in full by the judges of the Empire, to the future exclusion of all other sources: even commenting on it was strictly forbidden[21] (one of the most disregarded commands in history). Justinian's undertaking was all the more ambitious if we consider that the collection included texts generated in ages very distant from each other both in time and in the nature of the legal institutions.

[18] Confirming that the separation of the two parts of the Empire was already under way, it is significant that no constitution after the year 432 of the *pars occidentis* of the Empire is included, despite the abundance of legislation of Italic origin in the fifth century.

[19] The number varies in the three versions that have come down to us: 124 Novels in the Latin *Epitome Juliani* of Julian, a law professor in Constantinople, circulated in the West during the early Middle Ages; 134 Novels in the Latin *Authenticum* commentated on by the Bologna School; 168 Novels in the Greek collection, with 10 Novels promulgated by the Emperor Tiberius II (578–582).

[20] *Digesta, de confirmatione Digestorum*, const. *Tanta*, § 19: '*omne quod hic positum est hoc unicum et solum observari censemus*'.

[21] '*Nemo [. . .] audeat commentarios isdem legibus adnectere*' (const. *Tanta*, § 21).

The collection, translated into Greek and including the constitutions of the subsequent Emperors, remained the basis for Byzantine law for almost ten centuries, until the fall of Constantinople to Turkey in 1453. Justinian wanted to introduce the compilation to the West in his re-conquest of Italy,[22] but was unsuccessful in his attempt, as Spain and Gaul were already the territory of Germanic reigns, whereas almost immediately after his death southern and central Italy were occupied by the Lombards who had descended into the peninsula in 568. Only with the rediscovery in the twelfth century would Justinian's work begin its life-cycle as the principal source of the new *ius commune*. As such, it would dominate continental law in Italy and in Europe until the end of the eighteenth century.

The fact that the work of Justinian and his jurists would play a key role from the twelfth century onwards is due primarily to the contents and conceptual structures that the work was able to transmit. Their richness is indeed extraordinary, if only because it portrayed so momentous a historical evolution, from the law of the republican age, to the era of transformations of the Empire, to the events and upheavals of the post-classical age to Justinian. It is, however, undeniable that the principles of classical origin are its most defining trait. As selected and systematically arranged in the great Justinian compilation, they were to re-emerge in the work of the jurists and the imperial rescripts of the first centuries.

These traits, characteristic of the Roman concept of law, may be summarised in some basic principles[23] which constitute what Jhering called 'the spirit of Roman law'.[24] Among them are the separation of law from norms of a different nature, in particular deliberately focusing on private law, according to the principle of 'isolation'; the concentration on the resolution of concrete cases, thus avoiding definitions, generalisations, classifications and the systematic arrangement of the subject matter; the combinatory and almost mathematical approach, in which legal concepts are often handled as if possessing a life and an objective reality;[25] the weight attributed to tradition, to authority, to the certainty

[22] *Pragmatica sanctio*, § 11 (of 554), in *Novellae*, ed. Schoell-Kroll, p. 800.

[23] On this, we follow the lucid account by Schulz in *Principles of Roman Law* (Oxford 1936).

[24] R. v. Jhering, *Geist der römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1852–1865).

[25] As F. v. Savigny had already noted in his *Vom Beruf unserer Zeit für die Gesetzgebung und Rechtswissenschaft* (1814), § 4. As Schulz wrote, 'private Roman law as portrayed by classical writers attains an extraordinary, almost logical, definiteness. The number of juristic conceptions which play a part in it is comparatively small, as all which pertain to special or non-Roman variations are set aside. The legal rules take on the character of

of acquired legal relations,[26] to good faith, to the freedom and autonomy of individuals, notwithstanding the entrenched strict social hierarchy.[27] It is surprising that these characteristics – which perceptive historians have brought to light and which our modern sensibilities interpret as embodying the quintessence of Roman law – were almost never expressed by the ancients themselves, evidently being so natural as not to necessitate expression.

In their sober account of cases and their solution – not least of the reasons for which they wield such fascination – the authoritative opinions of the jurists and the decisions of the imperial rescripts would inspire medieval and modern scholars to engage in the analysis of the texts and in the techniques of analogy. But most of all it was the art of argumentation, the wisdom of proposed solutions and the austere sense of justice unleashed with every proposition, that would bring these texts back to life in medieval and early modern Europe. Nor should the contribution of Greek culture to the more decisive phases of Roman legal science be overlooked.[28]

These principles belong primarily to classical law and were only in part to be retained in the last centuries of antiquity. They were to be transmitted in the successive ages by the classical texts collected in the *Digest* and *Codex* by the Justinian compilers.

It was mostly in the field of institutions that the law of late antiquity was to make its most creative contribution to the history of civilisation. As Peter Brown fittingly put it, 'Seldom has any period of European history littered the future with so many irremovable institutions. The codes of Roman Law, the hierarchy of the Catholic Church, the idea of the Christian Empire, the monastery-building – up to the eighteenth century, men as far apart as Scotland and Ethiopia, Madrid and Moscow, still turned to these

apodictic truths, as any limitations imposed by public law or extra-legal duties are ignored. Often the jurists' statements almost give the impression of a mathematical treatise or rather of a treatise on a law of Nature' (1936, pp. 34–35).

[26] This differs from the modern sense of legal certainty: Roman jurists deliberately intended to keep law in a fluid state, rather ensuring '*ius quaesitum*'; the disinclination towards legislation in the classical and republican age also reflects this idea.

[27] 'The fact that it [Roman law] developed in the context of a historically localized aristocracy did not prevent it from acquiring universal value; in the intensive intellectual elaborations of the classical jurists ... the aristocratic nature of the social structure is translated ... into an equality of native and notable individuals. ... The more substantial the equality in a historical society, the more valid the Roman law principles' (Lombardi 1967, p. 58).

[28] On this, see the papers collected in the two volumes, *La filosofia greca e il diritto romano*, Rome, 1977.

imposing legacies of institution-building of the Late Antique period for guidance as to organize their life in this world.'[29]

The crisis of the Roman Empire was therefore not a crisis of its laws, nor did it prevent its survival. On the contrary, the law of late antiquity, including those elements of the earlier traditions which had not been superseded, would constitute the basis of institutions, procedures, norms and customs which in various forms and measure would be transmitted through the succeeding ages after the end of Roman dominance in the West.

The fact that, together with classical law, a large number of imperial texts of the fourth, fifth and sixth centuries were inserted in the Justinian compilation endowed it with a polyvalence that was among the factors in its posthumous success. Further, what might have hindered the success of the work would act instead as a stimulus: as we shall see (see Chapter 7), the contradictions within the compilation would in fact, beginning in the twelfth century, engender a body of creative intellectual work.

The tendency to legislate and codify law, combined with the classical outlook fostered by some of the foremost jurists of the sixth century, led to a work destined to become the principal medium by which the law of antiquity was to survive.

In the West, the continuity of Roman law occurred at first through other channels: the Theodosian tradition, as reproduced in the Romano-barbaric laws, was to remain in effect as custom and also influence the law of the Germanic peoples of late antiquity and the early Middle Ages. Had this not been so, the legal renaissance of the twelfth century, founded on the rediscovery of Justinian's compilation, would probably not have been possible.

[29] *Religion and Society in the Age of Saint Augustine*, London 1972, p. 13.

2

Christianity, Church and Law

2.1 The Organisation and Hierarchy of the Early Church

The establishment of Christianity in the last centuries of antiquity constituted a religious event of extraordinary importance for the Roman Empire and for the subsequent history of Europe and the world, but its influence was profound also on laws and institutions. The reason for this might be ascribed to the new faith's contents, to the form in which its values and rules were expressed, to the institutions created to preserve and disseminate those values and to the influence of all this on law and secular institutions.

The evangelical message included a series of statements of a religious nature, many of which, however, involved direct or indirect consequences on the regulation of the relationship between people and in the individual's relationship with secular institutions. One need only recall precepts such the insolubility of the marriage tie,[1] the requirement for loans to be repaid without interest,[2] the obligation of respecting secular authority and the distinction between secular and religious authority[3] and the rejection of the law of retaliation.[4] More generally, the commandment to love one's neighbour, the respect for human dignity – every person, man or woman, slave or free man, citizen or foreigner – implied a revolution in customs, institutions and precepts rooted over a millennium. This might explain how the normative enactment of these principles has in turn taken centuries and millennia – remembering the abolition of servitude and the modern human rights bills – a historical evolution which cannot be regarded as having yet been concluded.

From the very beginning the small group of Christ's disciples presented the characteristics of an institution equipped with rules. By the

[1] Mark 10.9; Matthew 19.6; Luke 16.18.
[2] An important reference in the history of the prohibition of usury is in Luke 6.35; but for the condoning of deposits with interest, see Matthew 25.27; Luke 19.23.
[3] Matthew 22.21; Mark 12.17; Luke 20.25. [4] Matthew 5.38, in relation to Exodus 21.24.

time the twelfth apostle decided to substitute Judas, a composite procedure was enacted, in which the choice between the two candidates indicated by the assembly of the faithful – constituting the small primitive church in Jerusalem – was left to lots (Acts 1.15–26). Soon the church would make a distinction between apostles and priests (Acts 15.2) and these from deacons, also elected by the assembly and deployed for the material assistance of the faithful (Acts 6.3–5), as well as the management of property and the resources of the church. The ardent and charitable spirit of the original church is well expressed in the Acts of the Apostles, which attests to property being held in common, thus personal possessions being renounced in the first Christian communities;[5] also assistance was extended to other communities in difficulty, in case for example of famine (Acts 11.49).

Early on the Church assumed the form of a hierarchical institution, in answer to the necessity of creating a solid and compact entity, able to withstand the deflecting forces of other well-rooted cultures, such as the Gnostic: 'Christianity survived because it possessed an ecclesiastical organizational system and a principle of authority' [C. Dawson 1932]. The Apostles' successors were given the name originating from the Greek term for bishop, *episcope*, with pastoral responsibility for a city and its outlying territory, designated as *diocese* (also a Greek term, derived from Byzantine administrative language). Answering to the bishops were the priests and deacons. From the first centuries a hierarchy was in turn created among the bishops based on the greater or lesser importance of the city where the diocese had its seat. The bishops with the more important seats (*metropolitan*) were responsible for coordinating the bishops of the region (*suffragan*) and had the power to re-examine appeals to their decisions. For the nomination of bishops in late antiquity the contrivance of an election by the local clergy became customary, followed by the acclamation by the faithful and the consecration by other bishops of the ecclesiastical province and by the metropolitan bishop.[6]

The bishop of Rome was soon recognised as having the highest role among all the rest: Christ himself had placed Peter at the head of the

[5] 'Anyone who owned property or goods sold and shared them with everyone, according to their need' (Acts 2.44); 'the multitude of those who had come to believe had a single heart and soul and no one called what belonged to him his, but everything was in common between them' (Acts 4.32).
[6] See *Statuta Ecclesiae Antiqua*, 1 (of circa 475), which lists as requisites for election the '*consensus clericorum et laicorum*', the '*conventus totius provinciae episcoporum*' and the '*metropolitani auctoritas vel praesentia*'.

Church (Matthew 16.17–18); and as Peter was the first apostle to carry the Christian message to Rome, after his martyrdom the concept prevailed that it should be his successors who would inherit the primacy, in this way maintaining the pre-eminence for the Church preconised by its Founder. Some evidence of supremacy was apparent between the end of the fourth century and the beginning of the fifth, through the predominantly ecclesiastical and pastoral directives given to other bishops by popes such as Siricius[7] and Innocent I;[8] thus it was that the first pontifical decrees came into existence. It was to be forcefully reiterated in the fifth century with the vindication of the role of bishop of Rome enacted by Leon I, a pastor whose great moral authority had imposed itself even upon fearsome warriors such as Attila and Genseric.[9] It is from this time on that the Eastern Church was obstinately resistant to recognising the supremacy of the bishop of Rome in the same way that it was accepted in the West.

2.2 The Sacred Text

An essential aspect of the new religion – undoubtedly derived from the Israelite tradition – is the presence of a canonised sacred text in written form, known therefore to everyone and not just to the priesthood, within which the precepts of the revelation are expressed in definitive and unalterable form. Christianity, like the Jewish and the Islamic religions later on, is a 'religion of the book'. In fact many of the precepts in Scripture – drawn both from the Old and the New Testaments – determined in a permanent way the laws and institutions both religious and civil of the people and countries that embraced the Christian religion, sometimes indeed until the present: it suffices to remember (to add some further examples to the ones already touched upon) precepts such as the festive sanctification of the seventh day (Exodus 20.9), harvest tithes (Deuteronomy 14.22), the irrevocability of the priestly order (Psalms 110.4) and the supremacy of the bishop of Rome.[10]

In the Christian world the study of the Scriptures was present from its inception. The Gospels clearly confirm how often Christ himself referred

[7] Siricius, Epistle 1 (of 385), in PL 13. 1131–1143.
[8] Innocent I (402–417), Epistolae 2; 5; 13; 25; 29–31, in PL 20, col. 472–582.
[9] Leo I (440–461), Sermo 4, in PL 54, col. 149–151: 2 '*de toto mundo unus Petrus eligitur, qui [. . .] omnibus apostolis cunctisque ecclesiae patribus praeponatur [. . .]; transivit quidem in alios apostolos ius potestatis istius.*'
[10] Matthew 16.18.

to texts of laws and of the prophets. The Scriptures were used not only to understand the precepts revealed, but also as a guide to the behaviour of the faithful in case of doubt and to resolve controversies between Christians: questions of a practical nature tied to the life of the Church and of the faithful. It is significant that beginning with the choice of the twelfth apostle, Peter was inspired by a precept in the Psalms to find the appropriate procedure to adopt.[11]

The flowering of the great Greek and Latin Church Fathers attests to the profound study on the part of Origen and the Eastern fathers, and Augustine and the Western fathers, of the sacred books of the two Testaments [Simonetti 1994]. For the Church Fathers the Scriptures constituted a single entity, which was coherent because it came as the revelation of the one and only God [De Lubac 1959–1964]. It was eloquently expressed in the fifth century by the two Spanish fathers Eterius and Beatus: 'the entire series of books of the sacred Scriptures forms a single work.'[12]

Naturally problems of the coherence among the various passages of Scripture emerged at every step, not only between the Old and the New Testaments, but also within each of the two parts of the Bible. Augustine makes use of a very significant expression to clarify how to overcome the problem: 'if we were not aided by our intellect the divine words would seem to contradict one other.'[13] It would therefore seem that we must call on reason, in order to demonstrate that the dissonances in the text are only apparent. And the basic criterion is clearly outlined in the expression of patristic origin '*diversi, sed non adversi*' [De Lubac 1951–1952]: differences can be explained in such a way as to avoid contradiction.

We shall be seeing what great relevance this would have later on in the field of law.

2.3 Early Canon Law

The crucial religious and theological questions – in the first centuries these were the questions relative to the human and divine natures of Christ and on the relation between the three persons of the Trinity, but

[11] Acts 1.15–25.
[12] '*Tota Bibliotheca unus liber est, in capite velato in fine manifesto*': showing the relation between the Old and the New Testaments (Eterius e Beatus, *ad Elip.* 1. 99, in Migne *Patrologia latina* (PL), 126. 956).
[13] '*Litigare videntur divina eloquia: contraria putantur sonare nisi adsit intellectus*' (Augustine, *Sermones de Scriptura*, 24. 4, in PL 38. 164).

also seemingly minor questions, such as that of the licit or illicit nature of images of God and Christ – were entrusted to the deliberations of bishops gathered in a council. This meant either all the bishops (the ecumenical council) or, for pastoral and minor liturgical questions, the bishops of single Christian regions (the local synod). The ecumenical councils of Nicaea in 325, of Constantinople in 381, of Ephesus in 431 and of Chalcedon in 451 each constituted a milestone for the Church.[14] In the same way as in its first council – held in Jerusalem in AD 70 (Acts 15.6–29) – it was thought that the Holy Spirit expressed itself through the deliberations of the congregate bishops. Soon local synods were also to proliferate: in Asia Minor, in Africa, in Gaul, in Italy, in Spain [Gaudemet 1979]. In this way a fundamental source of canon law took form, made up of the canons of the Councils and the synods, subordinate only to the supreme source, the Sacred Scripture, fruit of the divine revelation.

We are right in thinking [Calasso 1954] that with these early council deliberations, a law of the Church was to come into existence which constitutes the basis of canon law: definitely not a secular or state law, but nevertheless equipped with norms and sanctions. Among sanctions, the earliest to be introduced were the exclusion of the sinner from the Eucharist and the more severe exclusion from the community of the faithful (*excommunicatio, anathema*). Many features of canon law are traceable to Roman laws which persisted in the centuries during which the Church was acquiring a configuration [Gaudemet 1985; Landau 1993]. The ties between the two laws would remain strong in the succeeding centuries.

The impressive political and institutional achievements of the Roman Empire did not go unnoticed by those who had already converted to the new religion. For this reason the statement by Rutilius Namantianus from Marseille in praise of Rome for having transformed the world into a single city is renowned,[15] while others considered the Empire a condition predisposed by Providence not only to create peace under a single law, but also and above all to promote the universal mission of the Apostles.[16]

[14] *Conciliorum Oecomenicorum Decreta*, ed. J. Alberigo et al., Basileae Friburgi Romae, 1962, pp. 1–79.

[15] '*orbem fecisti quod prius urbis erat*': *De reditu*, lib. I, vv. 65–66.

[16] Ambrose Bishop of Milan justified the creation of the Empire on the part of Augustus in the following words: '*ut recte per totum orbem apostoli mitterentur*' (*Explanatio Psalmorum*, XII. 45. 21, PL 14. col. 1198); and the Spaniard Prudentius believed the Empire to be the creation of God himself, who wanted religion to keep men's hearts united, and that a common law would make everyone Roman (*Contra Symmachum*, lib. II, vv. 586–604).

2.4 State and Church

By the beginning of the fourth century the relation between Christians and secular institutions had undergone a radical transformation. The Christian religion, after two centuries in which its followers were ferociously persecuted and the Church was considered an illicit organisation, within the span of less than a century went from being tolerated, to being recognised by Constantine in the year 313 with the Edict of Milan, and then granted privileges, particularly that of exemption from taxes.[17] In the year 380 Theodosius declared the Catholic religion to be the only religion recognised and admitted within the Empire.[18] Even prior to this, from Constantine onwards, Christian emperors felt it their legitimate right to intervene even in strictly religious and theological questions, to the point of taking the initiative of convening some of the councils, closely following the proceedings and actively trying to influence decisions.

The connection created between the Church and the Empire in the fourth century explains how particular and intricate connections were established in the administration of justice. Constantine allowed the litigants to choose (in a joint agreement) to be judged by the bishop rather than the lay judge and governor of the province;[19] episcopal sentences could not be appealed and were endowed with executive power[20] [Vismara 1995]; with regard to ecclesiastical matters the bishop was granted exclusive jurisdiction.[21] Furthermore, Justinian authorised appeals from provincial governors to the bishop, whose pronouncement could at that point only be re-examined by the Emperor.[22] Bishops were thus given an important civil function.

The writings and letters of the great Church Fathers who were also bishops – such as Augustine, Ambrose and later Gregory the Great – confirm the multiplicity of roles carried out in society to mitigate contrasts and guide the law in the direction of Christian values, while also observing the secular laws of which the bishops had thorough knowledge. It should also be noted that among the greatest Fathers of the Latin Church were those who had had legal training and (like Ambrose and Gregory) carried out high civil offices as functionaries of the Empire before being elected bishop.

[17] See, e.g., *Cod. Theod.* 16. 2. 2 (of 319); *Cod. Theod.* 16. 2. 40 = *Cod. Iust.* 1. 2. 5 (of 412).

[18] *Cod. Iust.* 1. 1. 1. [19] *Cod. Theod.* 1. 27. 1.

[20] *Cod. Theod.* 1. 27. 2 = *Cod. Iust.* 1. 4. 8 (of 408). [21] *Cod. Theod.* 16. 11. 1 (of 399).

[22] Nov. 86 of 539.

2.5 The Beginning of Separation

The problem was to arise of establishing clear boundaries between the authorities of the state and the Church in the religious, political and legal fields: a problem which during the age of persecution Christians had confronted by respecting the laws of Rome but following the evangelical precept denying the Emperor the tribute of a cult status which they reserved only for God, even at the cost of their lives: 'Christianity separated, so to speak, the citizen from the believer' [G. Falco 1963]. This distinction is of fundamental importance and has persisted throughout the history of Christianity to the present age. When the Emperors declared themselves to be followers of Christ, the relationship between the Church and secular power became much more complex and problematic even inside religious life itself.[23] In the middle of the fourth century, for example, the Emperor Constance could resolutely declare, 'what I dispose shall have the value of a canon of the Church.'[24] In the Byzantine East some direct interventions and controls of the Church by the Empire (Caesaropapism) was to persist for centuries.

It was the Western Church that was to trace the boundary line. One well-known event took place in the year 390: Ambrose, the bishop of Milan, dared refuse the Emperor readmission to the church, unless Theodosius professed himself a sinner for having ordered a gruesome reprisal in Thessalonica.[25] Ambrose had been a high official of the Empire before having been unexpectedly and by popular demand nominated to the bishopric. For him there was a clear distinction between the temporal sphere, in which the Emperor held no equal on earth, and the religious sphere, with respect to which the Emperor must consider himself no different from any other man, and therefore bound, like the rest of the faithful, to respect the precepts of the Gospel and the authority conferred to the Church by Christ.

A century later it was the bishop of Rome himself, Pope Gelasius I (492–496), who formulated a basic theory concerning secular and religious powers. He wrote that the kingdom and the priesthood, the Emperor and the Pope, constituted two 'distinct dignities', independent

[23] The real dangers of this support of secular power were very clear to some of the Church fathers: among these Hieronymus in the fourth century wrote that '*postquam [ecclesia] ad Christianos principes venerit, potentia quidem et divitiis maior, sed virtutibus minor facta est*' (Vita Malchi, 1, in PL 23, col. 55).

[24] Atanasius, *Historia Arianorum* 33 (of 358 ca.), in PG, 25. 731.

[25] Ambrose, *Epistolae*, 51 (PL 16. 1209–14); Paulinus, *Vita Ambrosii* 24 (PL 14. 38).

of each other, as both were instituted by God himself: one was to oversee the things of this world, the other to guide the community of the faithful to salvation through the Church; neither would interfere with the other.[26] In the West Gelasius' text would remain fundamental until well beyond the Middle Ages [Ullmann 1981].[27]

The principle of distinction, derived from a single seminal passage in the Gospel (Matthew 22.21: 'Therefore render to Caesar the things that are Caesar's, and to God the things that are God's.')[28], never disappeared from the traditional confines of Western tradition. During the entire span of the successive historical phases of relations between the Church and the state, from the Middle Ages to the modern and contemporary era, the question of the boundary between the two spheres in several common themes: from marriage to crime, from jurisdictional powers to financial constraints and privileges, from clerical statutes to political rights and duties, has continually resurfaced and been discussed in new terms, in concert with the evolution of political ideologies and civil and ecclesiastical institutions.

For quite different historical reasons a similar distinction between the religious and the secular is not to be found in the Jewish, Islamic or Eastern civilisations of China and Japan, not even, as mentioned previously, in Byzantium. The principle of distinction between the religious and the secular spheres can truly be considered a fundamental and specific characteristic of the European legal tradition.

2.6 The Benedictine Rule

The sphere of law was also to be enriched by the encounter between the archaic Germanic culture and the more seasoned and complex civilisation of the Late Empire and by the profound influence exerted by Christianity. The theological as well as political divisions which had existed within the new religion from the fourth century on – in particular

[26] In a letter of the year 494 to Atanasius, emperor of Constantinople, Gelasius wrote, '*duo quippe sunt, imperator auguste, quibus principaliter mundus hic regitur: auctoritas sacrata pontificum et regalis potestas*' (*Epistolae Romanorum Pontificum*, ed. Thiel, Brunsbergae 1867, vol. I, p. 350). And in the Tractatus 4. 11: '*Christus memor fragilitatis humanae [. . .] sic actionibus propriis dignitatibusque distinctis officia potestatis utriusque discrevit [. . .] ut et Christiani imperatores pro aeterna vita pontificibus indigerent, et pontifices pro temporalium cursu rerum imperialibus dispositionibus uterentur* [. . .]' (ed. Thiel, p. 568; PL 59. 102).

[27] This was also included in Gratian's *Decretum* of 1140 (D. 96 c. 10).

[28] Matthew 22.21; Mark 13.17; Luke 20.25.

between Arian Christianity and Catholic Christianity – continued for centuries also in the West, although the ties with the Catholic papacy were to prevail in Frankish Gaul, Visigoth Spain and Lombard Italy, and later also in Christianised Ireland and England.

Among the spiritual forces, monasticism was especially significant and acted like leavening on every level of society within the new Germanic kingdoms and throughout the Middle Ages. Originating in Egypt in the third century, monasticism spread to Western Europe through the incentive of monks coming from afar: from the Byzantine East, from Africa and from Ireland. In Italy a monk from Norcia called Benedict was to found a monastery in Cassino after the year 529. The Rule dictated by Benedict in the sixth century[29] was to assume a preeminent role throughout Europe, where an extraordinary number of Benedictine monasteries was founded in the successive centuries.

A remarkable aspect of the Benedictine rule is the precise instructions given for the organisation of monastic life. A severe discipline of prayer and work ('*ora et labora*')[30] marked the days and nights of the monks.[31] Manual labour went hand in hand with intellectual work, borne out by the great number of manuscripts transcribed by the monks. It is to the monasteries that we owe virtually all written testimony of antiquity which has come down to us: manuscripts of poetic, philosophical, historical and scientific texts of ancient Greece and Rome were, almost without exception, transcribed by monks and priests of the early and high Middle Ages and then preserved for centuries in the libraries of churches and monasteries in the East and the West.

The cardinal principles of the Benedictine Rule were the duties of obedience,[32] poverty – the monks could own nothing personally[33] – and chastity. The monastery was headed by an abbot nominated for life by the monks, based on personal qualities, not on age.[34] It was specified that the choice must be voted by the 'major and most solid part' (*maior et sanior pars*) of the community.[35] The authority of the abbot was to be exercised in

[29] S. Benedict, *Regula*, ed. R. Hanslik, Vindobonae, 1977. [30] S. Benedict, *Regula*, 48.
[31] S. Benedict, *Regula*, 8–20. [32] S. Benedict, *Regula*, 5; 68 (impossible commands); 71.
[33] S. Benedict, *Regula*, 33: '*ne quis presumat aliquid habere proprium, nullam omnino rem, neque codicem, neque tabulas [. . .]. Omnia omnium sint communia.*'
[34] S. Benedict, *Regula*, 64.2: '*merito et sapientiae doctrina eligatur [. . .], etiam si ultimus fuerit in ordine congregationis*'.
[35] S. Benedict, *Regula*, 64.1: '*in abbatis ordinatione illa semper consideretur ratio, ut hic constituatur quem sive omnis concors congregatio secundum timorem Dei, sive etiam pars quamvis parva congregationis saniore consilio elegerit*'. There was to be much discussion later about this formula, which became classic in medieval canon law (Ruffini, 1976).

the interest of the community.[36] The evangelical source is clear and expresses a new idea: the concept of power as service.[37]

2.7 Gregory the Great

Gregory, a Benedictine monk – also the first biographer of Benedict – was a Roman citizen from a patrician family, an imperial official who at barely thirty had risen to the important role of prefect in Rome (*praefectus urbi*), but was later to retire to monastic life in the year 575. Elected in 590 to the office of bishop of Rome, Pope Gregory I held the pontificate for fourteen years, diligently working as teacher of the clergy and guide of the Church, during a particularly difficult period in which the Lombards repeatedly attempted to seize the lands belonging to the Church. Pope Gregory left a set of pastoral and ethical works, mainly written in the preceding years, which were to be among the best-loved and most widely read medieval Western works. He also left a huge Register of Epistles (*Registrum*) of his papal service, containing more than 800 letters.[38]

Most cases reported in the *Registrum* were submitted by an administrator of the Church's possessions, a bishop or a subject involved in an ecclesiastical judgement concerning rights or property. The criteria adopted by the Pope, both in deciding on a case directly and by giving instructions to a delegate entrusted with the decision, may be summarised in the following basic principles:[39] the judge's duty was to scrupulously ascertain the facts of the case; consistent respect for the Roman law text (a field with which Gregory was well acquainted) was expected, except in cases where it was at variance with the *lex divina*; an unfailingly impartial and fair approach on the part of the Pope, an approach that often led to decisions contrary to the actual material interests of the Church; and the tendency to suggest and apply equity and *misericordia*, over and above the strict rules of civil law. The influence of these principles was huge, as is clear in the fact that no fewer than 250 texts of the *Registrum* were still present in Gratian's

It was interpreted as meaning that the presence among the monks of censurable subjects or ones who had sinned should not be counted in the computation of votes requested for a decision or an election (see also *Regula* 64.3–6).
[36] S. Benedict, *Regula*, 64.8: '*sciat [. . .] sibi oportere prodesse magis quam praeesse*'.
[37] Mark 9.35: '*si quis vult primus esse, erit omnium novissimus et omnium minister.*'
[38] *Registrum Epistolarum*, ed. Ewald-Hartmann, in MGH *Epistolae* I, 2 vols., Berolini 1957; ed. Norberg, 2 vols., Turnholti 1982 (CCL, 140); cf. Detlev – Fuhrmann 2001, pp. 70–80.
[39] On this, see Padoa-Schioppa, 2010, pp. 581–610, whose analysis is summarised here.

Decretum of the twelfth century. Gregory was therefore a powerful legislator, albeit unwittingly so, as he could not have foreseen that his letters, each concerned with a specific case, were to become legal rules lasting for centuries.

Ministering to both the clergy and the faithful, both in his writing and in his letters, Gregory discussed and resolved a number of exegetical questions, but also issues of religious and ecclesiastical practice. Also in legal questions his judgement was self-assured and particularly conscientious in acquiring elements of proof before making a judgement. Respect was shown for the distinction between secular and religious spheres, so as to comply with both the *leges* and the *canones*. He made a concerted effort to lead the solution back to the dictates of the Holy Scriptures: it was from the sacred text that the ethical rule of conduct had to be extracted, as it contained the precepts given to man by God himself and from Christ to the Church. The method consisted in leading a doubtful question back to a text in the Scriptures, which had been suitably interpreted with contextual references to other passages and precepts:[40] this was the approach, for example, that Gregory took in answering a series of questions put to him by Augustine, who had been sent by the Pope to evangelise England.[41]

The method had begun with the vast work on the Holy Scripture of the great Fathers of the Eastern and Western churches, which Gregory had appropriated and followed. He did so only for questions of a pastoral and religious nature, while for purely legal questions he simply referred back to the laws and canons, without further specification.[42] As we shall see, this method was to be adopted and developed in the twelfth century as an essential instrument in the new legal science.

[40] In this sense the *Registrum epistolarum* 3.62 is explicit: a passage must be intended '*ex locis circumstantibus*'.

[41] One of the questions concerns the applicability of a rule from Leviticus considering a new mother impure for several weeks after giving birth. Augustine put a question to the Pope as to whether the Christian new mother could enter the Church right after the birth. He answered affirmatively, in a way that is contrary to the letter of Leviticus, recalling other passages from which it was to be understood that no one should be punished who is not at fault, and giving birth is not a fault: cf. the *Libellus responsionum ad Augustinum episcopum* (ed. in *Registrum epistolarum*, MGH Epistolae I, lib. XI, 56a vol. II, pp. 331–343). The *Libellus* is not part of the *Registrum*; however, it is to be considered authentic. Reference to and interpretation of passages from Scripture to indicate religiously correct conduct is frequent in the *Registrum*: see, e.g., *Registrum* II. 44; III. 52 (food and fasting).

[42] See, e.g., in *Registrum epistolarum* (ed. Norberg), I. 9; I. 41; I. 59; III. 55; IV. 43, with reference to secular law and conciliar canons.

2.8 Penitentials

Irish monasticism also played an important role during these centuries and not only on the religious front. Coming from Ireland, the followers of Saint Columban spread throughout the continent, founding numerous important monasteries, among which were those of Bobbio in Italy, Luxeuil in France and Saint Gall in Switzerland. Beginning in the sixth century, the Irish monks developed a particular literary form for the specific use of the clergy; these texts were called *Libri Poenitentiales*,[43] in which for every sin a corresponding punishment was listed: fasting, chastity, sexual abstinence, but also pecuniary sanctions, carefully calibrated according to the gravity of the sin committed. In the age of Penitentials, the individual and habitual secret confession before a priest had already been introduced and gradually replaced the original form of public and solemn confession, admitted only once in a lifetime.

It is interesting to note that in the Irish Penitentials – the 'tariff rates' of punishments referred back to the Germanic models – the infliction of spiritual punishment and atonement addresses not simply the act committed, but the intention of the person committing the act.[44] Whereas in the Germanic custom both the feud (*Fehde*) and the amends were determined by the simple act itself – with no distinction between a fortuitous case, negligence and malice – in the Penitentials the subjective element (that is the intention of the person committing an illicit act) was considered relevant to the spiritual atonement. It is an approach that would later make its way into secular criminal law.

[43] *The Irish Penitentials*, ed. L. Bieler, Dublin 1975; *Die Bussordnungen der abendländischen Kirche*, Graz 1958. The oldest Penitentials are of Irish origin (e.g. that of Finnean from the sixth century), whereas others came from England: in the seventh century that of Cummean and Theodorus and in the eighth century those of Bede and Egbert.

[44] An Irish Penitential makes the following distinction with regard to homicide: '*si quis clericus homicidium fecerit [. . .], si autem subito occiderit et non ex odio* [. . .]' (*Penitentiale Vinneani*, 23–24, ed. Bieler, *The Irish Penitentials*, pp. 80–82).