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.

This period is generally known as the *age of absolutism*: a term indicating on one hand the releasing of legitimate sovereign and state powers from subordination to a superior authority,[1] in particular from the supreme authorities of the Empire and the Church, and on the other hand, full title to jurisdictional, legislative and administrative powers – not yet distinct one from the other, as this would only come with the modern doctrine of the division of powers – in the hands of the king himself, through his designated representatives.

This absolutist model created by leading theorists of law and politics (like Jean Bodin and others) in fact never materialised in full sovereign absolutism, even in those states where sovereign authority was strongest, such as Spain in the sixteenth century and France in the seventeenth and eighteenth centuries. The kings' powers were everywhere counterbalanced by institutions such as the supreme courts, the aristocracy, the Church and residual autonomies of medieval origin – in the same way as the enduring *ius commune* as a 'stateless' law – in effect curtailed sovereign absolutism. As to republics and non-monarchical states (Venice, Genoa, but also the United Provinces of the Netherlands), these were to know forms of regulation and exercise of power which were particularly relevant to modern state-building.

Nevertheless the impact of sovereign power on modern state-building should not be underestimated. It was to permanently change the medieval legal order [Halpérin, 2014, pp. 73–110]. The erosion of autonomies and the diminishing role of custom as a source of law made way for a political order founded on and guaranteed by the state power, in turn guaranteed by the strong authority of the sovereign with his officers and magistrates. The scourge of private wars and feuds all but disappeared. This was an extraordinary achievement, largely accomplished through the instruments of law. Of course wars did not end, but armed conflicts were to become a matter between states [Padoa-Schioppa, 1997].

An essential feature of this process was the closed circle of the aristocracy (*patriziato*) in sixteenth-century continental Europe, which was granted a particular legal status and whose members were to monopolise public offices and magistracies of the judicial courts. This development had a profound impact on public law, on the norms affecting economic activities and in particular on family law, through the spread of the regime of primogeniture and of *fidei commisum* with attendant strategies to preserve the patrician family's patrimony. Jurists' guilds tended to

[1] Sovereignty is called 'absolute' (*ab-solutus*), that is, free from external legal bounds.

restrict their access to the nobility and often simultaneously to become the exclusive training ground for the highest legal professions. The aristocracy was a major player in this phase of European history, with its extensive privileges – in taxation, in public offices and in society – and also with its activity in the cultural sphere, its splendours and pageantry.

We should not forget that during these centuries art, from architecture to painting, from music and theatre to master artisanry, was commissioned by three categories: the Church, sovereigns, and the aristocratic classes. From Leonardo to Michelangelo to Canaletto, from Titian to Van Dyck to Rembrandt, from Monteverdi to Bach to Haydn, the masterpieces of European art in the early modern period came about in this way. It was the permanent legacy of a world in which the power of princes and the riches of ecclesiastical bodies and the opulence of the aristocratic and rich merchant families (often in the course of time admitted to the nobility) dominated: they were the pillars of the social, political and legal order of the old regime.

Beginning in the second half of the sixteenth century Italy lost the pre-eminence – economic, legal, philosophical and artistic – which it had held in Europe for five centuries. At different times Spain, France, the Low Countries and Germany were to ascend to the leadership of European culture. The discovery and conquest of the Americas and the Indies was to have a profound influence also on European public law.

The severance of the Roman Church from as much as half of Christian Europe – in particular a large part of Germany, Scandinavia, England, Scotland, Switzerland and Holland, but also France with its internecine religious wars – had profound consequences in the religious sphere, but also in international relations, in internal politics and public and private law, not only in Europe, but also in the colonised territories. In turn, the Catholic Counter-Reformation resulted in significant changes in the law within countries that had remained faithful to the Church of Rome: Spain, Portugal, Italy and the Hapsburg dominions.

The system of the sources of law was to become even more complex. In addition to local laws of medieval origin – statutes and customs, almost always written, persisted into the eighteenth century – and in addition to the doctrines of the *ius commune* authors, which the great revolution of the printing press was to make widespread and easily available throughout Europe, were sovereign legislations and supreme court decisions. The still growing intricacies were only in part resolved with the rise of a legal identity within each state and the consequent gradual development of an *ius patrium*, still open to doctrines and

judicial decisions from other countries, largely used in legal practice because Latin was still the prevailing common language of law.

Legal doctrines were also to undergo profound changes in the early modern period, being variously interwoven with the intellectual backdrop and the political and social events of the time. The humanist legal doctrines, the innumerable works coming from practitioners and writers of treatises, the legal theories of the theologians of Spanish Scholasticism, the new models of modern natural law and other lines of development in legal thinking weave a rich tapestry of rules which opened new paths within the framework of the *ius commune* and which in the early modern era characterised the legal history of the European continent until the turning point in the second half of the eighteenth century.

In England, the dramatic events surrounding the Glorious Revolution (1649–1688) and the civil war led to a different arrangement between the monarchy and Parliament, one in which legislation and government were at the head of two distinctive powers which were in turn separate from jurisdiction. Thus the modern constitutional state came into being, a model which would make its entry into the history of continental Europe, in different forms and at different times, only a century later.

17

Churches and States in the Age of Absolutism

17.1 Protestant Reformation and the Law

The widespread religious upheaval produced by the Protestant Reformation and the Counter-Reformation of the sixteenth century had important effects in the legal sphere. Ecclesiastical bodies, canonical jurisdiction, the regime of ecclesiastical property and relationships with secular authority were all to be modified in the regions of the Reformation, as well as in the Catholic countries. It seems worth noting that a particular question, one of a legal-theological nature and not merely pastoral – the question of indulgences, a practice which had degenerated to the point that with money one might buy a remission of spiritual penance for a sin from the Church – constituted one of the primary reasons that culminated in Luther's and Calvin's reform.

A central aspect of the Protestant Reformation concerns the new dimensions and prospects of Christian spirituality; these changed from the earlier tradition, but they are also markedly different from each other, not only for the intellectual distance that separates Lutheranism from Calvinism, but also for the internal currents and plurality of particular Protestant denominations both on the continent and in England. Such new forms of spiritual life naturally had an impact on law: as is clear – although with discordant interpretations and aspects which are still debated[1] – regarding the impact Protestant ethics of different denominations have had impacts on the relation between individual morality and capitalistic enterprise, between wealth and work, between the faithful and their pastors, between hierarchy and individual autonomy, between public authority and freedom of religion and politics: all of which are relevant also in the legal sphere.

The topic is very important in understanding the institutions of absolutism, in that the modern state affirmed itself and put its new

[1] Analysed in the classic study by Max Weber (1904–1905; see Weber (1991) connecting Protestant ethics to the spirit of modern capitalism, up to the recent works by Witte (2002), Berman (2003), Böckenförde (2007), Landau (2010), Schmoeckel (2014).

powers to the test in competition and also in conflict with the churches in general and the different denominations that had arisen within them. In this conflict the boundary between the temporal and the spiritual, the political and religious, between law and theology, although often unclear in theory and confused in practice, now appeared under a new light. This was true of the states that proclaimed their allegiance to the Roman Church and the Pope, as well as the states that had converted to Protestantism.

Moreover, the divisions among religions themselves – beyond the conflict between Jesuits and Jansenists, between Lutherans and Calvinists and between Calvinists of different persuasions – was clearly tied to the political and dynastic events of that period: this was the case in England in the middle of the sixteenth century; in the political choices of Charles V and Philip II in Spain; in the conflict between Bourbons and Guise that led to the reign of Henry IV. After the repressions of the sixteenth century, in France the Edict of Nantes of 1598 allowed the unrestricted presence of Calvinist communities in the kingdom. Henry IV himself had belonged to the Huguenots, before converting to Catholicism in order to ascend to the throne: 'Paris is well worth a Mass' (*Paris vaut bien une messe*). The Edict of Nantes adopted a political and legal line of conduct promoted previously in the sixteenth century by Chancellor Michel de l'Hospital and later sanctioned with the fundamental treaty of the Peace of Westphalia (1648), which laid the foundations of a new set of international relations between European states [Böckenförde, 2007] which was to remain in force for centuries. It was based on the principle of non-interference between states, which brought the era of internecine religious wars to an end, although in France this line of conduct was to be brusquely interrupted by Louis XIV's revocation of the Edict of Nantes in 1685.

The question of the boundary between the religious and the secular acquired a different profile following the religious division of Europe.

The defection of England from the Church of Rome following the Pope's refusal to allow Henry VIII's divorce from Catherine of Aragon, from whom he had not obtained a male heir, was made possible by the cooperation between the king and Parliament. England's exemption from the ecclesiastical jurisdiction of Rome and the assignment of this important jurisdictional sector to the king (1533) was ratified in a law of thirty-nine chapters by the English Parliament, which in the same years was to recognise the 'absolute' character of sovereign power, although within the boundaries of natural and divine law. In turn, Parliament, by

such legislative interventions, was to strengthen its institutional role. Under Elisabeth I the Church of England became the state church of the kingdom.

Elisabeth had had to contend with opposition from the religious Puritan sect which held to the Calvinist idea of a pact between the king and his subjects modelled on that of God and the people of Israel. The conflict between the Episcopal views of the Stuarts, who favoured the perpetuation of a Church hierarchy under sovereign control, and the anti-hierarchical views of the Presbyterians in England and Scotland was to lead to the dramatic events of the civil war and the execution of Charles I in 1649. One should add here the farsighted, challenging and radically democratic arguments brought forth by the Levellers. In the seventeenth century, following the repressive policies imposed by the Stuarts and the Anglican Church, the religious communities inspired to various strands of Calvinism – Puritans, Presbyterians, Quakers and others – left the country in order to fulfil their religious ideals across the sea in America, with sweeping consequences in the political-constitutional realm.

The Protestant Reformation resulted in different theological, political and legal positions being taken with regard to secular authority. Luther was a strong advocate of the principle of the subject's strict obedience to the king, not unlike that expressed by Calvin. But other Protestant exponents, particularly among the Calvinists, were later to promote other principles open to recognising the limits of sovereign power.

In the Reform states the prince was endowed with coercive powers in religious duties as well, leaving the separation between the two spheres in doubt. As to law, the position held by the major Protestant exponents was not uniform. Unlike Luther, Philip Melanchthon argued that although the Decalogue – which reflects the rays of divine knowledge: *radii divinae sapientiae* – contained the basis of natural law, a more precise specification could be found in Roman law, whereas no particular significance was attributed to canon law [Schmoeckel, 2005, p. 239].

The emphasis placed on the question of the direct and exclusive tie between the individual and God naturally had consequences on the sphere of religious institutions, in particular on the internal structure of religious communities, as is clear, for example, from the models of the Presbyterian and Episcopal Churches in England, one being anti-hierarchical (which flourished in Scotland) and the other hierarchical. What separated Presbyterians from Episcopalians, as Samuel Johnson acutely observed with reference to their political-ecclesiastical views, was

more profound than what separated the Episcopalians and the Roman Catholics.[2]

The question remained for Protestants to determine the nature of the functions already held by bishops.

The Diet of Hapsburg (1555) closed the early phase of the Lutheran reform in Germany; it empowered the territorial princes to determine the faith – Catholic or Protestant – to which their subjects were bound,[3] as well as to intervene in ecclesiastical or religious matters (*ius reformandi*): the prince was declared bishop of the principality and was granted the legal role previously held by bishops, as well as duties of an educational and moral nature [Berman 2003]. With time, the princes' personal power was supplemented and then replaced by that exercised by *Consistories* (*Konsistorien*), made up of theologians and jurists who inherited the jurisdictional functions formerly held by bishops.

The Peace of Westphalia (1648) confirmed the division between Catholic and Protestant states on the basis of a fundamental right granted to princes in their own territories in religious matters (*ius territorii et superioritatis*). Simultaneously, subjects belonging to the other faiths inside the state were granted partially equal civil status.

Legal scholars were deeply concerned with the role of princes in secular and religious matters and developed a range of opinions on both a theoretical and a practical level. A great impact was exerted by the idea of a double body (*duplex persona*) of the prince as a temporal and religious authority, by imperial concession, according to some (J. J. and M. Stephani), or by divine right, according to others (T. Reinking, *De regimine saeculari et ecclesiastico*, 1619); the latter, following Lutheran ideas (J. Gerhard, 1610–1622), made a distinction among religious functions exercised by the king himself (*status politicus*) from those of the church bursars (*status oeconomicus*) and those entrusted to the church pastors (*status ecclesiasticus*). In turn, the theory of the *duplex persona* of the prince – shared by authoritative jurists, e.g., Benedikt Carpzov and Samuel Stryk – aimed at avoiding the dangerous combination of religious and civil power in the hands of the prince and considered the Episcopal role as having been irreversibly passed on to the Consistory [Conrad 1966, p. 296].

The solution suggested by Hugo Grotius and other thinkers of the natural law school was different. The premise was that a social contract

[2] J. Boswell, *Life of Johnson*, 26 October 1769 (London, 1957), p. 424.

[3] The Latin phrase 'whosoever's realm, his religion' ('*cuius regio eius religio*') stated that the subject had to adopt the religion of his country, which in turn was determined by that of his prince (Catholic or Protestant).

bound both individuals and the citizenry as a whole to the single public entity of the territorial state. This implied the prince's competence to regulate the relations between the state and the church by his own legal rules; in principle it also implied the equality between different religious persuasions in the state, although this was achieved only in the late eighteenth century with the Edicts of Tolerance. Another aspect of this development was the Church as juristic person (*collegia*), a concept which – in contrast with the medieval understanding of the autonomy of communities (*universitates*) – was connected to this profoundly different perspective, by which colleges and juristic persons derive their legitimacy through the state.

The rights of princes over religious matters, recognised in 1555 and 1648, were in effect in the Catholic regions of Germany. On this basis the territorial prince felt entitled to intervene in the secularisation of ecclesiastical property or in the creation of new bishoprics. Furthermore, following the model of the Gallican church in France, some states such as Catholic Bavaria required authorisation from the state ruler for all papal or Episcopal deliberations inside his territory (*ius placeti*, 1770). This also applied to Austria and Prussia.

17.2 The Church and the Catholic States

The Church of Rome's strongest reaction to the divide brought on by the Protestant Reformation was achieved by the Council of Trent. The Catholic bishops gathered on three occasions between 1545 and 1564 and defined a whole series of sacramental and liturgical questions which confirmed a sharp division from the Protestant church. Among them are the requirement of divine grace accompanied by human action for the salvation of the soul; the Church's recognition of tradition as an authoritative source together with Scriptures; papal power in the nomination of bishops; a rigorous regime of marriage as a public act, such as to prevent clandestine marriages, which often led to abuse and gave form to the canonical marriage valid to this day [Basdevant Gaudemet, 2014, pp. 361 s.; Musselli, 1992]. It was also established through the papal legate Cardinal Morone that decisions taken by the councils would acquire normative value for the Church only after the Pope's approval. Liturgy and education of the clergy were also reformed, giving rise to a religious revival that characterised Catholicism for about four centuries. A decisive contribution was that of new religious orders, firstly that of the Jesuits founded by the

Spaniard Ignacio de Loyola in 1526, which in the next two centuries would become a pillar of Roman Catholicism.

A theme of particular relevance in the history of relations between Church and state in Catholic countries regards the Spanish Inquisition. With the fall of the kingdom of Granada (the last Islamic foothold in the Iberian Peninsula) in the same year of the discovery of America (1492), the Spanish monarchy strongly enforced the policy of religious unification in the kingdom. In the years and decades following the expulsion of the Jews, recourse was sought to the judicial expedient of the Inquisition for the purpose of systematically eliminating residual traces of heresy, in the first place identifying and condemning those individuals who officially declared themselves Christians but privately retained their allegiance to the Islamic (*moriscos*) or the Jewish (*marranos*) religion. Suspect individuals were examined by inquisitors often of the Dominican order, chosen directly by the kings of Spain by papal dispensation; the cases were locally denounced or made in a public confession (*auto da fe'*) which assured some degree of impunity. If in the trial there was evidence of heresy, corroborated by witness or a confession often extracted by torture, this was followed by a more or less severe sentence, in cases deemed more serious, the burning at the stake. In two waves in the first years and in the middle of the sixteenth century capital punishments rose to various hundreds but drastically diminished in the next two centuries [Bennassar, 1994].

Although recent historiography has tended to interpret the Inquisition in less harsh terms than in the past, it remains a dramatic and deeply troubling chapter in European legal history: it confirms the persistence of religious intolerance as a principle deemed to be right, if not dutiful, on the part of the Church and the state. After the tragic repression of heresy in the thirteenth century, the declaredly religious instrument of the Inquisition (and therefore strongly supported by the Church) was in reality first and foremost a political device at the service of the monarchy. It was only possible for the king to intervene in crown territory through the inquisitional procedure which overrode the autonomies of the local magistracies and secular customs decreed in the *Fueros* and defended by the *Cortes*, an example being Aragon. It has become clear that in many cases the accusation of heresy and the recourse to inquisitional procedure was a pretext on the part of the kings of Spain to intervene through legal repression motivated by political expedience. As of the end of the fifteenth century the decisions of local inquisitors were regulated (through the appeal) by the Supreme Council of the Inquisition, the

head of which was in Rome, but which was effectively governed by the monarchy.

The Spanish inquisitorial procedure, an effective anti-heretical instrument, led the Pope to restructure the Roman inquisition in 1542 with the establishment of the Holy Office. From then on this judicial body became the principal instrument in the safeguarding of Catholic orthodoxy. Another powerful instrument was the publication of an official list of censored books (*Index librorum prohibitorum*), as well as the repression of any manifestation of allegiance to Protestantism.

One must add that intolerance and persecution of heresy were not the prerogative solely of the Catholic world; some Protestant churches and religious denominations (the Calvinists in Geneva and elsewhere, such as in the Netherlands) also brutally repressed the dissident faithful in their midst.

The relation with secular power was a concern not only for the intellectual world of the Reformation, but also for various streams of thought belonging to Catholicism which developed, disseminating a whole range of ideas and arguments on this topic. The history of the relation between the states untouched by the Reformation and the Church of Rome was no less tormented than that of Protestant Europe.

In the Spain of Philip II there were periods of great tension with Rome. Spain had retained (and even strengthened) not only the right to control the ingress of *papal bulls* into Spanish territories, including Italian territories under Spanish rule (right of *exequatur*), but also the sovereign right to nominate bishops and the highest ecclesiastical offices. Moreover, the powerful and dreaded Court of Inquisition – endowed with strong powers of enforcement even against bishops – was controlled by the Spanish sovereign and not by the Church of Rome.

On occasion, similar attempts provoked resistance in territories under Spanish rule, as, for example, when Philip II, with the pretext of protecting the Duchy from the dangers of heresy, attempted in 1563 to bring the Spanish Inquisition to Milan and was forcefully opposed by the aristocracy and the Ambrosian church of Milan. More often than not, the conflict was between the local ecclesiastical and secular authorities: again in Milan a few years later, when Cardinal Carlo Borromeo enforced an ancient custom by which the Church could make use of the secular arm to repress crimes against religion (blasphemy, usury, illicit marriage), the highest secular court, the Senate, raised forceful opposition in the name of the king's prerogative to govern the Duchy, which forbade not only the Church's use of state militia, but also the ecclesiastical

intrusion into proceedings against lay individuals. This provoked a legal controversy – one of many in sixteenth-century Italy – which saw the direct intervention of both the Pope and the king of Spain [Petronio, 1972].

The reformatory zeal of the Church resulting from the Council of Trent – which vigorously defended the autonomy of the Church and its legitimate jurisdiction over the faithful, the clergy and ecclesiastical property – inevitably contended with the expansionist tendencies of absolute monarchies, during a historical phase in which states aimed at acquiring direct control over territory, public functions, law and tax revenues. These opposing positions regularly fed into the publications of the time – accompanied by historical and legal argumentations. Ecclesiastical authors such as Mariana and Bellarmino were countered with a defence of the interest of the state by authors such as Jacopo Menochio, a jurist and high-ranking magistrate from Lombardy.

In France the relationship between Church and state was to assume particular characteristics, which were tied to events and traditions going as far back in time as the Carolingian age. A legislative text of Charles VII (the *Pragmatica sanctio* of 1438) unilaterally limited papal rights over vacant benefices and episcopal nominations in the French Church; among other things, it stated the superiority of the Ecumenical Councils over papal authority, in line with the arguments asserted in the Council of Basle. However, the 1516 Concordat of Bologna reaffirmed an entente with Rome founded on the French king's recognition of the Pope's supreme authority over the Church; in turn, the Pope gave the king of France the right to present his own candidates for vacant episcopal and monastic seats: in this way, the nomination of the most important ecclesiastical offices in France was almost exclusively in the hands of the king. Some legal writings promoted the prerogatives of the French Church, declaring and specifying the many aspects of the freedom of the Gallican Church from Rome [Pierre Pithou, 1594].

This freedom in practice translated into a great number of secular powers over the Church: every council decree, every papal bull had to be approved by the king, who in this way exercised his authority over the Church's possessions and ecclesiastical discipline. These powers were effectively protected by the legal instrument of the appeal to the Paris Parliament (*appel comme d'abus*). The appeal could be presented against ecclesiastical prevarication in matters generally to do with benefices, discipline and religion in general, even on the subject of the Eucharist and penance. Parliament – which could therefore suspend an ecclesiastical

sentence and in some cases felt entitled to act as an ecclesiastical court, as some of its members belonged to the clergy – exercised coercive power even over the clergy and the Church's possessions.

Further conflict arose in the second half of the seventeenth century. In 1673 Louis XIV declared the extension to the entire kingdom of the traditional right of the king to receive the revenues from vacant ecclesiastical benefices (temporal *régale*), as well as the right to nominate the officers of the benefices when episcopal seats were vacant (spiritual *régale*). A *Declaration of the clergy of France* (1682), inspired by Bossuet and soon ratified as law by the king, confirmed these positions. In line with the theory of the Council's superiority over the Pope, it asserted the absolute sovereignty of the king of France, corroborated the inexistence of any rights and powers of the Pope in case of the king's deposition and, finally, confirmed the loyalty of the clergy to the monarchy. Such theses were repeatedly endorsed by the Paris Parliament, at times even contrasting the king's more conciliatory positions towards the Church of Rome [Sueur 1994]. The firm opposition of Pope Innocent XI, who refused to nominate bishops presented by the king, leaving many dioceses vacant, led Louis XIV to seek an accord with Rome: in 1693 the *Declaration* was nullified and the French clergy was urged to comply. A few years later the king forbade the Paris Parliament from getting involved in purely spiritual questions.

A new chapter in state–Church relations would open only in the second half of the eighteenth century, when the state's demand for broader powers and new rights over the Church acquired crucial importance, in the context of the doctrines and policies brought forward by the continental Enlightenment, the Hapsburg regimes and the French Revolution.

17.3 Theories of Sovereignty

Nicolò Machiavelli (*Il Principe*, 1516) was the first to put forth a seminal theory of politics based on the notions of virtue, fortune and necessity, where virtue (*virtù*) was not a moral quality, but the capacity to seize opportunities arising in the moment in order to further government opportunities (*fortuna*) emerging between the weft and weave of objective constraints of real situations (*necessità*). This was at the source of the doctrine of politics' autonomy *versus* law, ethics and theology; this was also the source of the idea of 'reason of state' conceived as an objective criteria – as distinct from moral and legal values – in order to identify

necessary or advantageous actions for the benefit of state power in the context of internal or international relations. Furthermore, Machiavelli's thesis did not imply options for a specific form of state or government. Machiavelli's realistic approach – which summarised the structure of political power with the adage '*giustizia ed armi*' – placed justice, despite having lapsed after the departure of the last among the gods that left the Earth, at the pinnacle of human virtue.[4]

The theory of sovereignty found a precise definition within the French monarchy that more than any other would have impersonated absolutism in seventeenth-century Europe. In Jean Bodin's treatise (1576)[5] sovereignty is defined as absolute power (the sovereign is not subject to any authority and is free to legislate, as well as to abrogate laws) and indivisible power (as it pertains to the single person of the king). These notions are illustrated with colourful imagery and metaphors taken from the natural world: the king is uniquely sovereign in the same way as the sun is unique in the universe and the queen bee among insects (Bodin); his power is as undivided as the perfect circle of the crown [Loyseau, 1608][6] and is as indivisible as the point in geometry [Le Bret, 1632].[7]

Even the theories most clearly inspired by absolutism included some limits to sovereignty: the question of the limits of state power became a crucial one in this period. At least three kinds of limits may be identified stemming from different theories: the limits derived from ethical-religious precepts to which the king was bound; the limits derived from the multiplication of functions and offices within the state – supreme courts with legislative functions, bodies representing political orders and social classes with institutional roles in legislation and in the highest government decisions – leading to the theory of the separation and balance of power that will be developed by Locke and later by Montesquieu; and the limits derived from the idea of a social contract inspired by democratic principles variously interpreted but founded on the principle of the control of public power from below.

The authors mentioned earlier, who proclaimed the uniqueness and strength of sovereign powers vocally, nonetheless never failed to stress the inviolability of divine and natural law, even on the part of the king, who otherwise would be guilty of divine *lèse majesté* [Bodin, 1576]. His power was given him exclusively for the common good [Bossuet, 1709]:

[4] Quaglioni, 2004, pp. 110–113.
[5] Jean Bodin, *Les six livres de la République* (1576); cf. Descimon, DGOJ, 2008, p. 68.
[6] Charles Loyseau, *Le traité des seigneuries* (1608).
[7] Card. Le Bret, *De la souvereaineté* (1632).

ethical and religious limits could not be infringed, as they were rooted in deeply held beliefs of medieval origin. However, how these principles might possibly be violated was not even mentioned, nor were concrete remedies or earthly punishments considered, let alone enforced, in case of such violations on the part of the king.

More severe were the limitations to sovereignty placed by those who defended a view of political power based on pact (*monarchomaques*). This occurred within the context of the Protestant Reformation of Calvinist persuasion, which shifted away from the original stance in support of established authority [Villey 1975, pp. 281–285], and was also voiced by some Catholic authors.

Calvin's successor in Geneva, Theodor Beza, believed that magistrates or (failing that) the people could legitimately resist a tyrannical king, as the principle of obedience to the sovereign was invalidated if he engaged in immoral or illicit acts (1575).[8] In various forms other authors were to propound legal-political theories of a contractual nature founded on a religious pact. The ancient biblical Abrahamitic covenant between God and his people – views differed on whether this was exclusively with the chosen or with everyone – led to a second pact or covenant between the people and their king, by virtue of which a ruthless and tyrannical king could legitimately be dethroned: this was the thesis expounded in the writings of the French Calvinist Huguenots (1579).[9]

It seems worth noting that all these theories – to a large degree inspired by the internecine religious wars of the sixteenth century – did not question sovereign authority itself, or the concentration of powers in the hands of the king, but rather the arbitrary use of royal authority, that is, the abuse of sovereign power. Only a few voices of the more radical religious currents (such as the Anabaptists) questioned the authority and legitimate power of the state, which the reformed churches had openly accepted also on the basis of the Pauline principle[10] that 'all power comes from God'. On this point Luther was very resolute in declaring the inviolable obligation of subjects' obedience to their king [Villey, 1986, p. 261]. Also Calvin, speaking in another context, declared that it was correct from the point of view of religion to acknowledge the actual status of property, as it was the purpose of law to safeguard that structure

[8] *De iure magistratuum in subtitos et officio subditorum erga magistratus* (1575).
[9] *Vindiciae contra tyrannos* (1579).
[10] Ep. ad Romanos 13.1: '*non est enim potestas nisi a Deo*'. We cannot discuss the question here of the relationship between this assertion and Christ's firm rejection of worldly power (Matthew 4.8–10).

[Villey, 1986, p. 286]. But the theories of social covenant mentioned in any case established the premises for the later understanding of political power in contractual terms, the momentous idea of which was the original sovereignty of the people.

The transformations that led to the modern absolute state directly or indirectly had a profound impact on the idea of justice. On one hand, we find a general inclination to formalise and legalise the religious sphere of sin with a minute and precise casuistry – particularly in the hands of Jesuits, and notable also in the works of a jurist turned priest and later proclaimed saint, Alfonso de' Liguori (1696–1787) – on the other, we observe a process moving in the opposite direction which sanctified the law, elevating it to the status of moral precept.[11] This is a double process that was to have a powerful impact on the evolution of law in the modern age and came to be embodied in legal positivism.

The doctrinal debate on political institutions was particularly lively and comprehensive in seventeenth-century England, in connection with the political events that led to the constitutional turn. In one of the clearest statements on the subject, James Harrington likened the derivation of political power to the structure of property.[12] In the same years a small group of military men and civilians known as the Levellers was the outspoken proponent of more radical views. The Levellers suggested a constitutional manifesto[13] which granted the right to elect 400 representatives by universal suffrage: 'The right to vote for all men over 21' (art. 1). Moreover, the nullity of all future laws which were against the principles of the constitution was established. In the Putney debates (Putney, 1647), which took place in a singular and unusual council made up equally of officers and soldiers, the principle of popular sovereignty was explicitly approved. To those who advocated limiting the right to vote to property owners, some of the more radical exponents (John and William Rainsborough) objected by saying that 'there is no mention in the law of God nor in the law of nature nor in the law of nations that states that a Lord should choose 20 deputies, a gentleman only two and a poor man none'. The purpose of government 'is not to preserve commodities but people'.[14]

[11] See on this P. Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto* (2000), pp. 325–455.

[12] 'Empire follows the nature of property,' Harrington, *Oceana*, 1654, on which see Bobbio, 1969, p. 45.

[13] *The agreement of the people*, 1647–1649.

[14] Putney, *alle radici della democrazia moderna* (1647), M. Revelli (ed.), 1997, pp. 75 and 91.

The movement of the Levellers was short-lived, but the relevance of these positions cannot be underestimated, since the idea of democracy in its coherent formulation, included in universal suffrage, was to become a reality in Europe two centuries later.

17.4 The Powers of the King

The building of the modern state developed through an apparently contradictory procedure: on one hand the strengthening and expansion of the functions of the king, and on the other the disengagement of sovereign actions and rights from the person of the king and his will. This second aspect manifested itself in various ways: firstly, through a process of *specialisation*, leading to the creation of councils, offices and magistracies, each of which was endowed with its own sphere of competence; furthermore, some powers and responsibilities originally inherent to the person of the king and directly exercised by him were to be diminished. This process is clearly illustrated in France where, for example, beginning in the early modern period a distinction was made between crown goods and state public *domain* and in the attribution of public debt to the state rather than to the king, as well as in the perpetuation of their office for public servants (*officiers*) nominated by the king at the time of royal succession, finally in the validity of royal ordinances beyond the life of the sovereign who had implemented them.

Where absolutism took its fullest form, the spectrum of effective sovereign competencies was to be greatly increased. The king acted as a legislator emanating general norms, often unbound by the necessity for consultation; he was at liberty to grant privileges even overriding laws and customs; he could freely nominate and dispense with ministers and secretaries of state as well as central and local officers; he had absolute command of the army and military operations; he was not bound to consultation in declaring war or in signing international treatises; he established the amount and the time of taxation (limited, as we shall see, depending on where and when); he could call back all judicial decisions; he pronounced on appeals directed to him by his subjects on controversies or other questions; he emitted provisions to do with personal freedom; he exercised the power of granting the remission or commutation of punishments; he could order or forbid the application (*exequatur*) of papal bulls in his dominions; he designated the candidates for vacant bishoprics (in Spain and France), just to mention some of his main prerogatives.

There were also states in which the king's power had a very different structure from the one just described. Such a one was Germany, where in accordance with the dispositions in the Golden Bull (1356), the king was designated by a college of seven (later ten) lay and ecclesiastical great electors (*Kurfürsten*) and acquired the right and title of emperor together with the royal title. Although the process of nomination followed lines established in a hereditary dynastic descent, succession was not automatic. Moreover, the emperor-king was under oath to observe rules and limits (*Wahlkapitulationen*) established by agreement with the College that had nominated him and with other princes of the kingdom, in accordance with the order-based (nobility, clergy, cities) social structure (*Stände*) of Germany. The consequence of this was that from the beginning of the sixteenth century the autonomous powers of the king – those exercised without having to take into account the will of the *Stände* – were considerably diminished.

To what extent were the king's acts on matters of his competence the outcome of his own personal and direct decision? The answer is tied to the changeable historical and institutional contingencies of the single states and also, to a large extent, to the personality of single kings.

The reign of Philip II (1556–1598) during the Spanish *Siglo de oro*, for example, was characterised by this monarch's direct control of a huge number of decisions. He led an almost monastic life working for more than ten hours a day in the monastery of the Escorial, where he personally dealt with and annotated thousands of dossiers reaching him from every part of his immense dominions – 'a pen and ink' kind of government – with the help of only a few secretaries to whom no formal powers were delegated.

The long reign of Louis XIV (1643–1715) undoubtedly marks the peak of regal power in Europe. Though it has been demonstrated that the well-known expression '*l'Etat c'est moi*' though attributed to him was one he never uttered, nor does it correspond to the historical reality of a state with complex and varied institutional structures, he would and did concentrate on himself maximum powers. Among other things he carefully avoided formally attributing primacy to any of his ministers: as far back as 1661 the king had expressed a firm objective of 'most of all not to nominate anyone as prime minister'.[15] Though in reality – as had already happened with Richelieu in the reign of Louis XIII – both Mazarin and

[15] '*Sur toutes choses ne pas prendre premier ministre*', *Mémoires de Louis XIV*, year 1661 Paris 2001, p. 44.

Colbert were effectively to have such a role, which they performed with consummate skill.

The full power of absolute sovereigns was, however, never exercised in isolation. The history of institutions in the early modern state is also that of the evolution and development of organs of government established as a direct service to the king. From medieval times onwards there was in fact a variously configured royal council made up of grandees of the kingdom, both secular and ecclesiastical, as well as of some of the king's confidants. But the development of sovereign powers and the broadening of public functions led to significant transformations.

Early on in medieval France the Paris Parliament and the Chamber of Accounts (*Chambre des comptes*) had separated from the King's Council (*Conseil du Roi*), the former dealing with judicial disputes and the latter with financial administration. In the course of the early modern period the King's Council was to undergo a twofold transformation, a progressive specialisation in its function and a reorganisation of its component parts, which was to be more or less elitist at the king's discretion and depending on the delicacy or the political importance of the question being examined.

As to strictly political questions, from the beginning of the sixteenth century the kings of France were to favour a more restricted Council requiring a convocation *ad personam* by the king on each occasion. In this reduced form the Council dealt with the more sensitive and important matters of state in internal, international and military policy. Moreover, the *Conseil d'en Haut* had the decisive power to deliberate on the *arrêts en commandement*, which were veritable laws and immediately effective and which did not require registration by the Paris Parliament or other sovereign courts. For issues of internal policy, from the middle of the seventeenth century, but especially with Louis XV, the Council took another form as the *Conseil des Dépêches*, reserved to ministers and some state councillors.

17.5 Representative Assemblies

In Spain the tradition of the medieval assemblies (*Cortes*) had been maintained, which – in the reigns of Castile, Leon, Aragon, Catalonia, Valencia and Navarra – included members of the nobility, of the clergy and of the citizenry. The *Cortes* performed functions of importance: acceptance of the king's oath on ascendance to the throne, deliberation on extraordinary funds requested by the king and the ratification of laws

and resolutions on particular issues. They met at the king's convocation around every three years and in the modern age even less frequently.

The institutional weight of the *Cortes* was gradually diminishing as both its fundamental functions had undergone substantial modification. The approval of extraordinary taxes and duties had become less frequent because of the enormous resources of American gold at the king's disposal. As to the right of the *Cortes* to ratify laws, this remained unchanged, but sovereigns were on occasion to reclaim the power to override the vote of the assembly. In the course of the early modern age the presence of the king in the assembly became more sporadic. Only in Aragon and Catalonia – where beginning in 1203 King Peter III had dutifully convened them annually – were the *Cortes* to maintain an important presence in the legislative procedure.

In Germanic countries the modes in which representative bodies participated in government reflect the complexity of institutional structures. At the highest level the Germanic Principalities of the Empire (the emperor was also the king of Germany) had a right to call to assembly (*Reichstag*), which was made up of *Stände*, who represented the major and minor nobility, the clergy and cities of the empire. Theirs was the task of voting on and interpreting imperial laws (such as Charles V's oath on election in 1519 and the Peace of Westphalia of 1648), as well as to make decisions on new taxes, military conflict, alliances and peace treatises[16] [Böckenförde, 1974]. In all these matters the emperor and king of Germany had the power to propose but – though no decision could be made without his approval – the consent of the assembly of the *Stände* was in any case required.

We find a similar representative organisation within the numerous territorial principalities in Germany. The assembly (*Landtag*) was divided into separate colleges (*Kurien*) of nobles, clergy and representatives of the cities within the *Land*; only a few of the territories (among which were the Tyrol, Voralberg, Frisia and Schweiz) allowed the rural class to be independently represented. The more important political, economic and legal questions of the principality were dealt with by the *Landtag* – particularly all questions of a fiscal nature and of legislative innovation – which required the approval of the three colleges of the *Landtag* to become law.

The representative assembly of the kingdom of Poland was also endowed with particular features. The Polish-Lithuanian legislature

[16] Peace of Westphalia, 1648, art. VIII.

(*Sejm*), which had previously acted as a representative assembly whose decisions were based on the majority rule, in 1642 was to adopt the rule of *liberum veto*, giving every member of the assembly the right to block decisions in case of dissent. Veto power was removed only at the end of the eighteenth century.

The English Parliament of the sixteenth century inherited a bicameral form from the Middle Ages in which the House of Lords – made up of representatives of the high aristocracy, the bishops and the major abbots – was joined by the House of Commons, made up of commoners who represented the thirty-seven counties (each by two members), as well as cities and boroughs. The House of Commons had 298 members at the beginning of King Henry VIII's reign, increasing by more than 100 between the sixteenth and seventeenth centuries. Counties, boroughs and cities elected (with the often decisive intervention of the sheriff, appointed by the king) their representatives, who were chosen from among the knights and landowners of the middle class, which also supplied the members of juries and justices of the peace, and which was sufficiently wealthy and whose rights were well established enough not to depend directly on the monarch. The right to vote was reserved to freeholders with an income of at least forty shillings, whereas it was denied to copyholders even should their income be higher. This distinction became 'capricious' [Maitland, 1950, p. 240] as devaluation was to lower the entry level of property owners wishing to access electoral rights.

In the sixteenth century – during the Tudor monarchy and particularly during Elisabeth I's reign (1558–1603) – Members of Parliament acquired the privilege of freedom of speech and immunity from arrest, which could not have taken place without the prior approval of Parliament itself. Sovereigns were to oppose these prerogatives on a number of occasions.

As to legislative power, the monarchy did not question another of Parliament's prerogatives of medieval origin, of enacting laws – in 1593 the chancellor could still state, with Elisabeth's undoubted approval, that the function of Parliament was essentially that of saying yes or no to proposed laws – but it was equally accepted that the king could introduce amendments without necessarily having to resubmit them to the two Houses. Most importantly, the sovereign retained the exclusive power of summoning and dissolving Parliament, thus conditioning its role and authority, as the non-convocation or sudden dissolving of Parliament in times of difficulty or criticism towards sovereign policies essentially deprived the two Houses of all power.

These limitations were definitively overcome only at the end of the seventeenth century, after a long and bitter season of clashes and conflict between the Stuart monarchy and Parliament. The crown's need for additional revenue, due to military expenses in Ireland and elsewhere, forced James I to introduce new taxes and additional duties with decisions approved by the Courts of Justice (the Exchequer in Bate's case of 1606 and Shipman's case of 1637) without asking for previous consent from Parliament, also granting the government the right to arrest single citizens by virtue of a declared 'emergency power' (Darnel's case of 1627).

The monarchy's attempt to prevail on the ecclesiastical question – among other things imposing the Episcopal catechism wanted by Bishop Laud and backed by the king – provoked the armed intervention of Presbyterian Scotland and the English civil war (1640–1642). In the brief span of two years that followed the dramatic turning point of 1640, Parliament – which had not been convened by the king for eleven years – by an almost unanimous vote approved a series of proposed laws which profoundly altered the relationship between institutions and the monarchy [Zagorin, 1959]: among these were the right of Parliament to convene itself (Triannial Acts, 1641), the abolition of special courts, the illegality of taxes or duties introduced without parliamentary consent and the legitimate right to intervene in matters of ecclesiastical policy. The war with Scotland and the internal conflict eventually led to the republican government of Oliver Cromwell, the conviction and execution of Charles I (1649), the restoration of the monarchy with Charles II Stuart (1660) and, finally, the ousting of James II and the accession to the throne of Charles II's daughter Maria with her husband, William of Orange, in 1688: the year of what would be referred to as 'the Glorious Revolution'.

It was only with the definitive removal of the Stuarts that Parliament obtained the explicit and definitive conferral – with the consent of the monarchy – of some fundamental prerogatives, for the most part contained in the Bill of Rights of 1689[17]: the right to convene itself, the decisive and inalienable right of approving laws, as well as taxes and levying funds (with the associated power of verifying their destination and use), the ban on the king's suspension of laws, freedom of speech and safeguard from arbitrary arrest, guaranteed by Parliament's exclusive jurisdiction over its own Members. Furthermore, the result of the long conflict between Parliament and the monarchy had another significant

[17] Text in www.constitution.org/eng/eng_bor.htm.

effect [Holmes, 1997]: the primacy of legislation and of Parliament emerged victorious, firstly over the legislative claims of the king – who nevertheless retained the power of co-decision on legislation through promulgation, so much so that legislative sovereignty was qualified as belonging to the 'King in Parliament' [Dicey, 1956] – and secondly over Coke's doctrine, stated at the beginning of the century, that common law judges had the legitimate right to declare as void a statute that contravened the fundamental principles of English law [Gough, 1955].

From this moment on the basic distinction between *legislative, executive* and *judicial* powers became effective in the English system, as expressed and not accidentally, in the same year by John Locke (*Two treatises on government*, 1690) and redrafted half a century later on the continent by Montesquieu (*Ésprit des lois*, 1748). It marks the end of absolutism and the rise of modern constitutionalism.

17.6 Colonial Law

Any history of European law cannot fail to include at least a brief account of the laws put into effect by the European states in the colonial empires and dominions created outside Europe after the 1492 discovery of America. In fact, 'European law outside Europe' is still a relatively unexplored subject. Given the great variation in models and contexts resulting from the profound differences both in the legal orders of the dominating powers and the very nature of extra-European civilisations, any generalisation would be misleading. Only recently has historiography begun work aimed at a historic-ideological understanding of colonisation, in which the idea of 'dominion' pure and simple goes hand in hand with elements tied to religion, civilisation and integration between the dominators and the dominated.[18]

First of all, we shall examine the law in Latin America,[19] which in some respects is of great significance also from the point of view of continental European legal history.

The first thing is the question of the legal title of the conquest. Beginning with Columbus' discovery and the ferocious military operations of Cortes and other conquistadores – rendered unstoppable by the promise of gold, which was avidly sought by the Spanish crown to cover

[18] See *L'Europa e gli altri. Il diritto coloniale tra Otto e Novecento*, QF 33/34 (2004/2005), particularly the methodological essays by P. Costa, D. Ramada Curto and B. Clavero.

[19] *Derecho y administración* 2002; Cassi, 2004; Nuzzo 2004.

its huge military expenses (and ultimately to prove disastrous) – the territorial subjugation of the islands and the 'Indian' mainland was at first justified by linking it with papal bulls of Alexander VI. On the part of the Holy See and in view of the spread of Christianity, the papal bulls provided Isabella and Ferdinand with a legal title for the new dominions, not only of a spiritual and religious nature, but also in the secular sphere, following a key doctrine of medieval origin. The political role of the Holy See in the conquest of Latin America was manifest also in the establishment of the borders between Spanish and Portuguese possessions, formalised in 1493 (Bull *Inter coetera* of Alexander VI) and confirmed in the next year with the treatise of Tordesillas. Brazil was assigned to Portugal and adopted the language of the conquerors.

Other legal doctrines were later to be formulated which aimed at providing a legal basis for the American conquest. According to Juan de Sepúlveda,[20] it was lawful to subjugate the *indios* and preach the Gospel so as to eradicate their customs which were 'against nature', such as cannibalism. This argument provided the cause of a 'just war', based on the Roman *ius gentium* and other ancient laws of warfare[21] that justified the right to enslave the conquered population and take possession of the products of the territory (*ius predae*). In this way also the extraction of gold was legally legitimised, through the slave labour of the *indios*, of course.

This argument was attacked by the Dominican friar Bartolomé de Las Casas (1474–1566),[22] who had more direct knowledge of the reality of the Spanish conquest. He argued that the Christian religion could not be imposed on the *indios*, but only preached, leaving them the freedom of accepting it or not. He wrote that in any case the *indios* should not be enslaved, because war motivated by the intent of forced conversion could not be deemed as 'just'.

At odds with this position was Francisco de Vitoria, one of the great theologians of the School of Salamanca (see later). Though refuting the righteousness of the title by papal concession, he nevertheless believed in the right of communication and freedom of commerce between peoples, which paved the way to access new territories; a right which the *indios*

[20] J. de Sepulveda, *Dialogus qui inscribitur Democrates secundus de iustis belli causis* (1544), Madrid 1984, on which see Birocchi 2002 pp. 81–116, and Cassi 2004, p. 297.

[21] A passage from Aristotle usually quoted stated that populations existed which by nature were destined to slavery, Aristotle, *Politics*, I. 4.

[22] B. de Las Casas, *Historia de las Indias* (1559); and Id., *Brevissima relación de la destrucción de las Indias* (Seville, 1552), on which see Clavero, 2002.

violated with their bellicose manifestations of hostility towards the Europeans, therefore legitimating a 'just' war, although he too opposed the *indios'* enslavement.[23]

The legal regime applied to the new territories involved the division of the *indios* population between the colonisers (*repartimiento*), assigning a given number of natives to each of them and applying a particular legal regime, the *encomienda*: an institution which jurists were to analyse in detail (in particular Juan Solorzano Pereira, 1575–1655).[24] The *encomienda* cannot be compared either to the feudal tie or to medieval vassalage [Cassi 2004], but required the person and his family to pay a tax or provide labour for the colonisers. Jurisdiction over the *indios* was exercised by indigenous chiefs known as the *cachiques*, who had been chosen by the colonisers.

For a certain time Spanish law was to take into consideration the more open views expressed by Las Cases and Vitoria: Charles V's *Leyes Neuvas* forbade the enslavement of the *indios* and denied the right to inherit the *encomienda* (1542–1543). But two years later the right to inherit was granted. Therefore the legal status of the *indios* subject to the *encomienda* remained essentially one of servitude.

The normative framework of Spanish South America is necessarily complex, as in addition to the royal ordinances and pragmatics (few and not always observed) and numerous local colonial government decrees, significantly there were also clusters of customary law which would in time be formally recognised by Spain. Interesting attempts were made to unify into a single body the variety of sources of law applicable in the territories, one such was that of León Piñelo in the third decade of the seventeenth century [Ramada Curto, 2004–2005]. Only in 1680 was a text of general scope produced, the *Recopilaciòn de las Leyes de los Reinos de las Indias.*

The domination of Central and South America by Spain, the greatest sixteenth-century world power, had the particular feature of having been made possible by normative and doctrinal activities which directly concerned the world of law. If it is true that from a modern perspective the conquest and consequent annihilation of the pre-Colombian civilisation conjures up notions of barbaric violence, it is also true that the doubts (*dudas*) repeatedly expressed by a number of observers of the time, not

[23] F. Vitoria, *Relectio de Indis* (1539) (ed. Madrid, 1967), I. 2.

[24] J. Solorzano Pereira, *De Indiarum iure* (1629–1639) (ed. Madrid 1999–2001, 4 vols.), see Cassi, 2004, pp. 216–225.

only attests to ethical dilemmas which did not exist in other European conquests of that time and later, but actually led theologians and jurists of the time to elaborate arguments and distinctions on the subject of war and peace, religious freedom and personal status, which were later to be incorporated in the legal conception of European law of the modern age [Cassi, 2004].

Over time and space the role played by the law of the motherland in the colonies was to vary enormously. In cases where large groups of Europeans were transferred to the new territory, European models were largely imposed on the conquered population. The English settlement of the seventeenth-century North American colonies – which included small groups from England and Scotland intent on creating a 'new world' in which to make their Christian ideals of Protestant, Calvinist and Puritan origin a reality – developed on the basis of English law, although the American 'variation' was to produce a new and original version of common law. In Louisiana, which was colonised in the Napoleonic era, the French model, including its codification, was to be stably adopted.

In South America, as we have seen, it was Spanish law that was applied, although with features and institutions that were in part original. The same occurred in Brazil, where Portugal was to import its own legislative and cultural models: an influence which would have an impact on private law until the twentieth century.

Holland and the Low Countries enjoyed flourishing commercial activity during the seventeenth century – comparable to that of the aristocratic republics of Venice and Genoa in the late Middle Ages – leading to the conquest of the Malaccan Islands, Java, Indonesia and a part of the southern coast of India, as well as other territories in South-East Asia. The main instrument of colonial expansion was the Dutch East India Company, formed in 1602 with the merging of eight minor companies, its capital being subdivided into shares. The Company had seventeen directors nominated by six 'chambers' representing the different regions of Holland and it was to monopolise Dutch mercantile activity east of the Cape of Good Hope. A stable administration was created, the head office of which was in Jakarta on the island of Java. It governed the dominions with the power – granted by the government of the United Provinces of Holland – to stipulate treatises and declare war. In the seventeenth 'golden century' the Dutch reached unequalled supremacy in economy, in philosophy (Baruch Spinoza), in law (Hugo Grotius) and in the fine arts (from Van Dyck to Rembrandt to Vermeer), while later the combined rise of English naval and military power and the pockets of

rebellion in the colonies were to undermine the Dutch domination of Asia. In Africa the settlement of Dutch people in the seventeenth century promoted the adoption of a version of *ius commune*, known and practised also through a well-known compendium, the introduction to Dutch law (*Inleiding*) by Hugo Grotius (see Chapter 23.2). This legal system has persisted to this day, despite South African dominion having passed into English hands.

In instances of colonisation involving the more 'primitive' indigenous populations (without implying any value judgement, even less questioning the worth of their traditional customs), it was the law of the invader that was to prevail: this happened, for example, with the English in Australia. Whereas the colonisation of countries with cultures dating back to antiquity, such as India, was very different. Here as in other places, trade was the driving force of Western hegemony, but for centuries European countries didn't go so far as to claim territorial conquest. For this reason, local laws characterised by a rich plurality of customs and local powers were to endure.

In India the British East India Company was to play a key role. It had been founded in 1600 by royal charter, originally granting the company a fifteen-year monopoly over trade with East India, which was later to become permanent. The company was made up of 125 shareholders who nominated twenty-four directors. In the following years an envoy of the king of England, Sir Thomas Roe, was able to extract from the Mogul emperor, who dominated the territory of India, an exclusive agreement of trade with the company which contributed to its expanding wealth and power. Victories against French invaders, particularly that of Plassey (1757) over the sultan of Bengal, resulted in the company's effectively acquiring powers of warfare and government over large portions of the Indian territory which was brought under the control of the English crown by a law issued by King George III in 1773.[25] A governor general was appointed as administrator of the territories, where for the first time English judges were sent to handle part of the judicial controversies.

France was also to experiment with the model of a joint-stock company established by royal charter. In this instance state control was to prevail, in line with Colbert's mercantilism, which aimed at empowering the crown.

The models were therefore very different from each other. Holland and England were to grant full autonomy to the two East India Companies

[25] East India Company Act (13 Geo. III, c. 63).

until the eighteenth century, having allowed until then their monopoly over trade in their respective colonial zones.

The question of which law to apply in a conquered territory was universally relevant. Though the strict separation in the colonies between the indigenous and the European populations favoured the option of separate legal systems, allowing for partial retention of local and traditional customs as to the indigenous population, for the Europeans the law of their motherland was never fully applied. On one hand, the special nature of norms instituted for the colonies and the difficulty of recruiting professional judges[26] and on the other hand, the lack of adequate legal texts, but most of all the dominant role played by governors placed at the head of foreign territories, these being immensely powerful not only in the administrative but also in the judicial and legislative sectors, constituted a combination of factors that ensured that the law applied in Spanish, English and French[27] colonies was in fact very different from that of their respective motherlands.

17.7 The International Order

The genesis of the modern state and the parallel discovery of the New World and other continents radically transformed international relations and their respective legal doctrines. The rupture of European religious unity following the Protestant Reformation provoked some of the bitter conflicts between states of the sixteenth and seventeenth centuries, with the impetus to become veritable religious wars. The medieval framework of the *respublica christiana* was thus definitively crushed.

While Francisco Vitoria was to frame the conquest of the Americas theologically and legally within the conceptual framework of the 'just war', in the presence of a 'just cause' of Augustinian and Thomist origin, Alberico Gentili (1552–1608) – who had moved to England, became a professor at Oxford and was decidedly opposed to religious wars – was to propound a very different argument.[28] War was not to be considered as

[26] On colonial law and international law, see Nuzzo, 2012; on the different strategies in English and Spanish colonisation, see Aguilera Barchet, 2015, pp. 598–603; on the justices of the peace in the French colonies of the nineteenth century, see Durand, 2005.

[27] In 1685 France emanated a text known as *Code Noir*, which disciplined slavery in Martinique, Guadeloupe and other French colonial islands with specific norms; it was revised in the eighteenth century and abolished in 1848; the text has been re-edited and illustrated by Niort, 2012; see also Fioravanti, 2012.

[28] A. Gentili, *Commentatio de iure belli libri III* (1598), Naples, 1770.

based uniquely on a just cause, but rather in consideration of the nature of the enemy. Consequently a war between sovereign states could be considered just because it involved two just enemies (*iusti hostes*) in a regular and regulated conflict [Schmitt, 1991]. This view on one hand stressed the autonomy of the state versus the supreme authority of the Church and the Empire, and on the other made war something relative, separating it from ideological and religious roots. In this sense the Peace of Westphalia (1648) put an end to religious wars and marked an important milestone in the history of international law [Böckenförde, 1974]. The long season of feuds and private wars, indistinguishable from other wars [Brunner, 1983], thus came to an end: war would become a prerogative of the state and only of the state, whereas all other violent expression was seen as an infraction of the internal order.

The code of conduct regulating the relations between states are on one hand voiced and developed in the writings of theologians and jurists – Vitoria, Gentili, Grotius, Vattel and others (see Chapter 19.4) – and on the other in international law treatises. A body of rules emerged which was separated into two categories, the *ius ad bellum* concerning just war and its principles, and the *ius in bello* specifying the norms to be observed in the course of war, with reference to prisoners, ambassadors and general licit or illicit conduct in the course of the conflict [Stolleis, 2003].

Other significant principles operated tacitly and indirectly, for example in secret clauses within the treatises themselves. An example is the English 'amity line' that until the beginning of the eighteenth century protected the peace between states east of the longitude of the Azores islands, leaving territories beyond that ideal line to power struggles between states regulated by force.

18

Legal Humanism

18.1 Humanistic Jurisprudence

The first innovative approach legal science took in the early modern period was that taken by what was later called legal humanism, deriving from that current of humanism that had flourished in Italy in the fifteenth century [Rossi, 2015]. The discovery of ancient Greek and Roman texts, the passionate concern with the literary, poetic, historic and philosophical, as well as artistic culture of the ancient world, combined with the desire to get to its source and imitate as far as possible the formal perfection, had all characterised that enlightened period in the intellectual history of Italy and Europe. Unsurprisingly therefore, humanist scholars turned their attention to ancient legal texts with a renewed spirit: the admiration for antiquity and the preoccupation with understanding its essence combined with the wish to put aside the burdensome mass of medieval interpretation and doctrines.

A well-known episode involved Lorenzo Valla, a professor in Pavia in the Faculty of Arts, who in 1433 wrote that he preferred one page of Cicero to an entire series of works by Bartolus, whose verbose style and scholastic Latin seemed barbaric to the eyes of the learned humanist;[1] the remark was so vehemently attacked by students and professors of the nearby Faculty of Law as to force Valla to flee precipitously from Lombardy and seek refuge in Naples. It is, however, important to remember that Valla must be credited for having demonstrated the medieval origin of the document known as the *Donation of Constantine*, which was until that moment considered the authentic document instituting the pontifical state. Punctilious philology and the critical examination of sources were features associated early on with the humanist scholars.

[1] Lorenzo Valla, *Epistola contra Bartolum*, letter to Pier Candido Decembrio, in Laurentii Valle, *Epistole*, O. Besomi and M. Regoliosi (eds.) (Padua, 1984); on Valla, Rossi, in Enc. It. App. VIII/Diritto, p. 102.

A few decades later the poet Angelo Poliziano, member of the refined circle of Lorenzo the Magnificent in Florence – where the prized, most ancient manuscript of the *Pandectae*, written in the sixth and seventh centuries, had been transferred in 1406 by the Florentines immediately after the conquest of Pisa – was to dedicate himself to collating the ancient text, written in uncial script, with the current medieval version (known as *Vulgata*), meticulously identifying discordances for the purpose of producing a critical edition of what was the most important legal document of ancient Rome. Other authors, among whom was the Neapolitan Alessandro D'Alessandro, Catone Sacco from Pavia and Lodovico Bolognini from Bologna, followed this course in approaching Justinian texts with the same spirit and intellectual skills that characterised humanism.

In ways not yet fully explored, the new philological approach was to exercise its influence and fascination on a small group of high exponents of the legal and humanist world of the sixteenth century, with lasting and significant results.

18.2 The Legal Humanistic Method and Andrea Alciato

In the course of a few years, between the first and second decades of the sixteenth century, several innovative works by authors from different countries came to light. In 1508 the learned French humanist and Greek scholar Guillaume Budé (1467–1540) – founder of the Collège de France, ambassador and secretary to the king – published his *Adnotationes in Pandectas* in which he examined a number of passages from the *Digest* using humanist philological tools, arriving at its original meaning and thus re-establishing the correct version: a line he pursued also in the 1515 treatise *De Asse*, an in-depth historical analysis of legal problems pertaining to Roman coinage.

In the same year, 1515, Andrea Alciato (1492–1550)[2] from Milan published the *Adnotationes* to the last three books (*Tres libri*) of the *Codex*, on imperial administrative institutions, in which he applied many notions on ancient history based on his profound knowledge of Greek and Latin sources of late antiquity to the study of the last part of the Justinian Compilation. In 1518 he published the *Paradoxa*, the *Dispunctiones* and the *Praetermissa*,[3] works in which the rigour of his

[2] Abbondanza in DBI, vol. II, pp. 69–77; Belloni, in DBGI, I pp. 29–32.

[3] A. Alciato, *Opera*, (Lugduni, 1560), *Tractatus, Orationes* (. . .), vol. VI, fol. 4–188.

historical philological method was employed in the interpretation of innumerable texts of the *Corpus iuris* and to the correct version of passages in Greek. In addition to these, in 1530 Alciato published an important treatise on the *De verborum significatione* of the *Digest*,[4] inspired by the historical method of his commentary on the same *Digest* title of a few years earlier. In the meantime, he had become professor, first in Avignon, then at the university of Bourges in central France, where he gave life to a flourishing school from which some of the more eminent protagonists of legal humanism would emerge. Alciato must be considered the true founder of the school as he possessed at one time the gift of profound knowledge of classical sources, was versed in the philological method and as a consummate jurist, theorist and practitioner, was able not only to interpret the more technically complex passages of the Justinian Compilation, but also to formulate sizeable and highly respected legal advice (*consilia*).[5]

Again in 1518, the German jurist Ulrich Zasius (Zäsy) (1461–1535) – native of Constance, law professor at Freiburg (Breisgau) and author of the Freiburg legislative reforms – published a historical study of Roman legal science, the *Lucubrationes de origine iuris*, starting from the analysis of the well-known text by Pomponius (*Dig.* 1. 2. 2) which jurists had previously ignored. In the same year the first edition of the entire *Corpus iuris* without *glossa* was published in Paris.

The characteristics inherent to the method used in these works – and of many others following along the lines of this particular approach of legal science, published in the decades to follow – are twofold, first of all the criteria of researching the original form of the written text being examined (philological method), secondly the determination of its meaning in light of Greek and Latin sources (historical method).

Legal texts were not the only ones used to this end, but also historical, rhetorical, literary and poetic sources of the ancient world. In fact, to the legal texts known for centuries humanists added the Latin sources, which passionate and skilled scholars had recently rediscovered in European libraries, as well as ancient Greek works brought to Italy by those who had escaped from Constantinople when it fell to the Turks in 1453, and which by the end of the fifteenth century had been studied, translated and published. As a result, a text by Ulpian or Papinian could not only be purified, by the philological

[4] Alciato, *De verborum significatione*, in Alciato, *Opera*, *ed. cit. n., Vol. VI, fol. 283–316. The commentary on the same title is published in same Lyon edition in Vol. III/2, fols. 207–290.

[5] Alciati, *Responsa, libris nouem digesta* [...] (Basileae, 1605).

method, from additions or modifications which the Justinian jurists had made in the attempt of making it coherent with the law of their age, but which also rendered it intelligible and interpretable in its original context. The comparison with other texts by the same author and the reference to notions transmitted, for example from Livy or Tacitus or Quintilian or perhaps from a passage of a comedy by Plautus, made it possible to understand the original sense of many texts of the *Digest* and the *Codex*, correcting errors and misinterpretations often dating back centuries.

A frequent occurrence was that single terms and institutions recurrent in the *Corpus iuris* could not be understood, nor could they find an accurate definition within what had constituted the only source of analysis of medieval jurists. The shortfalls of the Justinian text have an explanation: many expressions and institutions in their time were so self-evident as not to require clarification, whereas other institutions had been modified or had even disappeared at the end of the Roman Empire and survived as mere historical relics no longer understood by the jurists of late antiquity. A great many texts which the Glossators, the Commentators and practitioners had for more than four centuries analysed and used was, through the humanists, for the first time subject of an interpretation founded on philology and history.

How legal humanism came into being and the doctrinal and practical implications of this new approach raise a range of difficult and fascinating questions [Maffei, 1955]. As to the origins, it is sufficient to remember the intimate connection between this new approach of legal science and humanism. It was first and foremost the passion for the textual sources of ancient culture – the classical and elegant literary forms, the varied and profound contents, rich with experience and humanity – encouraged by their Latin and Greek teachers (for the young Alciato, his humanist teachers Aulo Giano Parrasio and Demetrio Calcondila) that inspired endeavours which led the humanists to apply their extra-legal learning to law.

The love for the unmediated contact with ancient sources led to impatience with the multiple layers of interpretations, *glossae* and comments accumulated over centuries. The show of classical culture was not, however, an end to itself. The humanists, beginning with Alciato, went back to ancient legal and non-legal sources fully intending to re-direct interpretation and consequently the application of the sources of law. The examples are innumerable.[6]

[6] Only one example is given here. In the treatise *De verborum significatione* published in 1530 – perhaps the best-known work by Alciato – the author states that what matters in

The humanists were also fascinated by the aesthetic formal elegance of classical Latin, so distant from the medieval scholastic Latin they rejected and despised. In his well-known *Pantagruel* Rabelais, who was trained in law, was sarcastic about the writing style of the *ius commune* authors, branding it as vile, and the jurists as incapable of understanding the true sense of ancient legal texts.[7]

There is a close analogy with the work being carried out at the same time by scholars of biblical sources. Erasmus of Rotterdam, the great philologist and humanist, was much admired by his peers, other than for the elegant and ironic essay *The Praise of Folly*,[8] for his rigorous philological reconstruction of the Greek text of the Gospels. Erasmus was a friend and correspondent of Bonicace Amberbach from Basel (this city was one of the centres of European humanism), who in turn had been a student of Ulrich Zasius and Andrea Alciato. The intellectual approach is the same: that is, a commitment to the philological reconstruction of ancient texts which begins from the collation of manuscripts making use of other ancient sources, coupled with a free investigation on the meaning of texts quite unhampered by a reverential attitude to current interpretation, no matter if authoritative or traditionally accepted. Erasmus' influence on the humanists was to be profound [Kisch, 1960].

However, it would be misleading to perceive humanists as having a rebel nature or being set against institutions and constituted powers (nor was this, as we have seen, the Lutheran or Calvinist position). On the contrary, in France as elsewhere, some of them were destined to take on high public office and others to express sympathy with monarchical legal and political positions. Guillaume Budé, Antoine Favre in Savoy, Cornelis Bijnkershoek in eighteenth-century Holland and many others held high judicial offices in their own countries, and wrote learned dissertations on Roman texts inspired by humanist methods.

The humanist approach is also clear in those authors (such as Antoine de Laval) who exalt the more sober new judicial rhetoric founded on

determining the meaning of words is first of all their common usage, and that 'the proper meaning of words' derived from etymology or ancient sources is not final nor can it prevail over usage. To support this thesis, also very significant in its practical effects, Alciato quotes Cicero, Horace, Quintilian and the Hebrew alphabet; on this basis he contradicts some opinions held by Bartolus, Salicetus and other illustrious Commentators (Alciato, *De verborum significatione*, lib. 2, n. 27, in *Opera* (Lugduni, 1560), vol. VI, fol. 295 v).

[7] Rabelais, *Pantagruel*, II. 10 J. Boulenger (Paris, 1955), p. 216: Accursius, Bartolus, Baldus and other great names are derided as '*vieux mastins, qui jamais n'entendirent la moindre loy des Pandectes*,' also because of their ignorance of Greek.

[8] Erasmus, *Moriae encomium*, 1511.

philology, facts and solid reasoning rather than eloquence and metaphors [Fumaroli, 1980, p. 468].

The historical approach of the humanists explains why Chancellor Michel de l'Hospital – who had been student at Padua, later correspondent of Duaren and an assertive promoter of history in the interpretation of legal texts [Orestano, 1987, p. 198] – admired the legislative reforms propounded by François Hotman, notwithstanding the latter's opinions, expressed in *Francogallia* (1573), which were far from philo-absolutistic. Pierre Pithou (1539–1596), an erudite editor of post-classical legal texts, outlined Church and state relationships in a writing of 1594[9] that became the manifesto of Gallican liberty upheld by the monarchy.

18.3 The Historical-Philological Approach

The intellectual framework adopted by the humanist scholars led in different and even opposite directions, although all in some measure were present in its founders, beginning with Andrea Alciato. In fact, in the sixteenth century and beyond these different paths were to be pursued. In addition to the strictly philological investigation there was a line of research aimed at historising ancient law, another willing to rethink the theory and the system of the *ius commune*, and still another directed at a critical approach to the legal system of the day.

The first direction was the investigation of previously unknown ancient legal texts, but it was a rather disappointing quest, as the only work of Roman classical law to have survived antiquity, other than texts included in the *Digest*, was the *Institutions* of Gaius, which, preserved in palimpsest manuscript in the Capitular Library of Verona, would come to light only in the early nineteenth century. However, some important post-classical texts – among which were the Pauli *Sententiae*, the *Edict* of Theodoric, the *Collatio legum mosaicarum et romanarum* and the *Consultatio veteris cuiusdam iurisconsulti* – were rediscovered and edited by Pierre Pithou and other humanist scholars. But it was mostly the philological approach inaugurated in the fifteenth century by Valla and Poliziano that would develop in the sixteenth century. The first critical editions of the *Corpus iuris*, fruit of the examination of many manuscripts, were published without the Accursian *Glossa* so as to concentrate on the study solely of the ancient text. Besides this, the profound knowledge of the newly discovered historical, philosophical, literary and

[9] P. Pithou, *Ecclesiae gallicanae in schismate status* (Paris, 1594).

poetical works of Greek and Roman antiquity was essential in giving the humanists a better understanding of Roman law and a more correct interpretation of many passages of the Justinian *Corpus iuris*.

Following Budé and Alciato, the study of classical legal texts reached its culmination with the monumental work by Jacques Cujas (Cuiacius) (1522–1590).[10] This jurist, a student and then a professor at Bourges,[11] produced extensive and meaningful investigation on the work of classical jurists such as Papinian. With philological skill and also making use of palingenetic criteria, he placed fragments from the *Digest*, from which Justinian compilations had excised them, in their original order, in this way reconstituting the text in its original form for the purpose of better grasping its true meaning. A large number of post-classical and Justinian alterations to the texts indicated by Cujas (known as the interpolations introduced by Tribonian in order to 'update' the *Digest*) have been confirmed by modern Roman law scholars. In addition to which, Cujas philologically and historically analysed – invariably accompanied by penetrating legal analysis – some other important texts of late antiquity, such as the *Theodosian Code* and even the medieval *Libri feudorum*, for which he suggested an alternative systematic order.

Major exponents of this approach were Pierre Pithou, mentioned previously, and Denis and Jacques Godefroy (Gotofredus) from Switzerland, who respectively authored a critical edition of the Justinian *Corpus juris* and a meticulous and monumental commentary to the post-classical Theodosian Code,[12] to which reference is still made to this day. Jacques Godefroy[13] also edited the fragments of the *XII Tables*, for which he supplied a learned commentary; he was an erudite scholar as well as an active lawyer in the Paris Parliament.

It is significant that the philological and historical approach of the humanists was not limited to the critical study of ancient legal sources, but extended to include other sources and other periods in history: Pithou, for example, published an edition of the Carolingian Capitularies, the German Joannes Sichard studied not only the *Theodosian Codex*, but

[10] Winkel, in DHJF, pp. 220–222.

[11] Iacobi Cuiacii, *Opera omnia in decem tomos distributa* (. . .) *cura C.A. Fabroti* (Lutetiae Parisiorum, 1658). The *Opera omnia* was published again in Modena and Naples in the eighteenth century.

[12] *Codex Theodosianus cum perpetuis commentariis Jacobi Gothofredi* [. . .] (Lugduni, 1665), 6 vols. (ed. Leipzig, 1736–1743 repr. Hildesheim and New York, 1975).

[13] Jacobus Gotofredus, *Fragmenta XII Tabularum nunc primum tabulis restituta* [. . .] (Heidelberg, 1616).

also the laws of the Francs and the Swabians (as well as publishing the *Landrecht* of Württemberg); Aymar du Rivail worked on the *XII Tables*, but also on Germanic antiquities. In this sense, the humanists anticipated the study and reassessment of the Middle Ages, characteristic of the historical culture of the Romantic age two centuries later. No less important or less innovative was the application of rigorous philological methods to the study of medieval canon law: a line of inquiry in which the Spanish Antonio Agustin (1517–1586)[14] – who had received his doctorate in Bologna in 1541 – was to feature as an extraordinarily learned exponent and precursor of rigorous scientific studies, comparable only to work carried out in the nineteenth and twentieth centuries.

18.4 The Critical Approach

Directly tied to the new philological approach of the humanists towards legal history was also a new approach to the historical dimension of law. The attention paid to reconstructing the original text and meaning of classical legal texts – which they admired infinitely more than their post-classical evolution – led them to consider the sources in the *Corpus iuris* nothing less than monuments of the culture of antiquity, not unlike literary, historical, philosophical or poetic texts. This did not, however, imply a preconceived belief in the perennial and ubiquitous validity of Roman law. On the contrary, Budé was ironic about those who considered it a divine law descended from the gods rather than written by men: '*Leges non ab homine scriptas ac conceptas, sed de coelo delapsas esse credunt.*'[15] François Baudouin also felt that unquestioning adherence to rules of ancient law was nothing more than 'empty superstition'.[16]

The custom among humanists of recurrently quoting well-known and loved passages from classical authors – which then became universal in Europe, see Michel de Montaigne or Francis Bacon – did not imply their total submission to these, as the references were taken freely and each time chosen from the broad and multifaceted canvas of ancient culture. Platonism, stoicism, scepticism, and Epicureanism constituted very different cultural and ethical forms – very distinct, if not even opposed, to

[14] A. Agustín, *Iuris pontificii veteris epitome in tres partes diuisa De personibus, de rebus, & de iudicijs [. . .]* (Romae, 1611), 2 vols.

[15] Budaeus, *Adnotationes in Pandectas, Dig.* 1. 1. 1 (Venetiis, 1534), fol. 11v. On Budé, Krynen, in DHJF, p. 142.

[16] Franciscus Baldus, *Iustinianus sive de iure novo Commentaria*, Proemio (Basileae, 1560); on Baudouin, Wiffels, in DHJF, p. 51.

one another – to which single humanists might have adhered, but not without transforming them with their own ideas. In other words, the humanists felt free from the authority of traditional commentaries and interpretations, as well as of the authors of antiquity themselves, who, though highly admired, were not believed to be indisputable. In this sense it should be remembered how Aristotle's theories had become objects of criticism and were often compared to other philosophies, beginning with Platonism and those derived from stoicism.

This attitude explains why some of the major exponents of humanism expressly declared as unacceptable the unquestioning adoption in their own time, of the Justinian laws. François Duaren, for example, felt that those ancient norms which were inadequate for the times should be declared as such.[17] Jean Bodin, the theorist of absolutism – a pupil of Connan, in turn pupil of Alciato in Bourges – declared it absurd to hold Roman laws, which had undergone so many modifications even in antiquity, as universally valid.[18] François Connan went so far as to praise the Glossators because they had adapted Roman law to their customs.[19] This also explains how an exponent of the same school, François Hotman, could have – in a well-known work promoted by Chancellor Michel de l'Hospital, although only published posthumously[20] – called for the king of France to substitute Roman laws with a legislative intervention. This also explains how this could have happened in France, with a firmly established strong monarchic power, rather than in other regions of Europe such as Italy or Germany, where the *ius commune*, for a range of reasons, did not encounter an equally strong competition. This justifies the hostility of Italian universities towards the French style of teaching law (*modus gallicus iura docendi*).

The implication of an approach founded on thorough knowledge of history but equally free of constraint from ancient sources was momentous. The Justinian Compilation was disassembled and a distinction made between the discipline pertaining to classical law and the one pertaining to post-classical law. The crucial unity of the *Corpus juris* – which had constituted a veritable dogma for the Glossators and the

[17] Duarenus, *De ratione docendi discendique iuris* (1544), I, § 5. Cf. Descamps, DHJF, p. 481 s.

[18] '*Omitto quam sit absurdum ex Romanis legibus, quae pauolo momento mutabiles fuerunt, de universo iure statuere velle*': Bodin, *Methodus ad facilem historiae cognitionem* (1566), ed. Mesnard (Paris, 1951), p. 107.

[19] Connanus, *Commentarii iuris civilis* (Basileae, 1562), I, *praefatio*.

[20] F. Hotman, *Antitribonien* (1602, but written in 1567).

Commentators, and without which there would not have been the impetus to their creative effort – was therefore for the first time questioned, if not possibly shattered. If classical Roman law was not only different, but actually preferable to Justinian law, if Tribonian's manipulations were questionable (Hotman, *Antitribonien*), which norms should apply to current legal practice? The monolithic Compilation was coming apart, and it was difficult to establish ways in which it might be applied.

The implication was that elements of the historico-philological method applied to the study of Roman law, combined with elements of a cultural and political nature, led to the tendency, for the first time in four centuries of unquestioning adherence, of placing Roman law within the framework of its historical time.

18.5 The Systematic Approach

Another important element of the humanists' approach is of a systematic nature. It is connected to the new importance attributed to human sciences outside the circle of legal disciplines, beginning with philosophy, which they considered not only useful, but essential to the jurist; this thought had already been entertained by Alciato,[21] though on another occasion he had said that only history was the 'true philosophy'. Other exponents of the school were to express a similar outlook. It was an approach that was to find expression also in Rabelais, pupil of the jurist André Tiraqueau, with a caustic remark in which he declares jurists ignorant of philosophy as insane.[22]

A clear example of the humanist method and the role that it could play in the legal sphere is offered by François Connan (1508–1551; Pfister, in DHJF, p. 199) in his discussion on the structure of the contract.[23] According to the French jurist, the source of the binding nature of the contract (*causa*) lies in the *synallagma*: a Greek term used by Roman jurists, particularly Labeo, which Connan reinterpreted as supplying an etymology that puts emphasis on the idea of 'exchange'. The very exchange between parties constituted the common element in contracts,

[21] *Oratio* read in Avignon '*ad philosophiam venio, quae ita cum hac professione coniungitur ut altera sine altera esse nullo modo possit*, in Alciato, *Opera* (Ludguni, 1560), vol. VI, fol. 318r.

[22] Rabelais, *Pantagruel*, 2. 10.

[23] Connanus, *Commentarii iuris civilis* (Basileae, 1562), lib. V, cap. I, on which see Birocchi, 1997.

from whence their binding force came, rather than the form or the delivery or the ritual wording typical of the Roman law tradition of the *ius civile*, or the simple agreement which alone was insufficient as attested to by the Roman principle denying the enforceability of bare pacts (*nuda pacta*) [Petronio, 1990, p. 228]. This basic element is seen as deriving from the *ius gentium*, in turn based on *aequitas*, and must be placed in a context, seen in Aristotle by Connan, in which justice is understood as 'proportion' [Birocchi, 1997]. This shows how the philological element, evident in the etymological investigation, and their classical culture being extended to extra-legal sources, led the humanist jurist to conclusions of worth on both the theoretical and the concrete plane: the general notion of the *causa* of the contract clarified the essential elements of private law acts in general, and its effects were felt also in legal practice [Cortese, 2000, p. 406], although it must be said that Connan's vision was not readily taken up by later jurists [Zimmermann, 1990, p. 562].

This approach was to lead in several interconnected directions. There was a tendency to put aside the systematic framework of the *Codex* and the *Digest*, which was tied to the division of the *Edictum Perpetuum*, but neither satisfactorily clear nor accessible enough for exposition or teaching purposes: whereas Gaius' tripartite division of things, persons and actions (*personae, res, actiones*) adopted in Justinian's *Institutions* seemed more adept at constituting a framework for the systematic treatment of law. Many humanist works were in fact to adopt the format found in the *Institutions*: François Baudoin, François Connan, Hugues Doneau (Donellus) (1527–1591; Pfister, in DHJF, p. 256; Threau, DGOJ, p. 139), whose work had lasting fame,[24] were to build their systematic treatise on this basis.

Beyond France, this systematic trend touched also the German jurist Johann Schneidewein (Oinotomus) who wrote an analytical commentary on the Justinian *Institutions*[25] in which he makes repeated reference to the medieval *ius commune*, quoting from the great Commentators of the fourteenth century and the more recent treatises, particularly Italian ones. The same was also done by Joachim Mynsinger, who was judge in the *Reichskammergericht* as well as the author of an exposition of the

[24] Hugonis Donelli, *Commentariorum de iure civili libri viginti octo* (Francofurti, 1595–1597), 5 vols. Donelli's entire oeuvre was still published again in the third decade of the nineteenth century in Macerata and Rome.

[25] Oinotomus, *In quatuor institutionum (. . .) libros Commentarii* (Venetiis, 1606, and many other editions). The Strasbourg 1575 edition was reproduced in Frankfurt am Main, 2004 with an introduction by G. Wesener.

Institutions[26] in the form of *glossae* or annotations to single passages in the text, accompanied by brief comments in which his humanistic education and knowledge are evident, frequently quoting the classical Roman works from Cicero to the stoics. Many other authors were to share in this trend.

The theoretical framework of the humanists affirmed itself not only in the exposition of Roman law, but also in the systematisation of customary rules. It is important to note that major scholars and systematisers of the French *coutumes* came from the school of humanism: Charles Du Moulin was a great scholar of the Parisian *coutume*; and Antoine Loisel, a pupil of Cuiacius, was author of the *Institutions coutumières* of 1607, which he ordered in the same way as the *Institutions*, and of other important treatises on French law.

The systematic approach adopted by some exponents of the humanist school attempted to answer the need for clarity in exposition and analysis. The purpose was to make more precise, coherent and approachable the understanding of the complex norms of the *Corpus iuris*, which these authors did not consider obsolete in spite of the historical approach mentioned earlier. However, the result of the major systematic humanist works was greater and more incisive: originating as systematic and teaching-oriented expositions, they soon became – and remained for centuries – authoritative sources also in legal practice, cited in allegations, used in legal opinions and in judicial decisions: they had the role of quasi-normative texts in accordance with the structure of the sources of law of the period of the *ius commune*, in which the authority of reputable doctors had the weight of a true source of law.

18.6 The Theoretical Approach

There was a last approach taken by the humanists. Other authors – but often the same ones in other works and contexts – underlined the fact that the essential theoretical foundation of law had to be formulated in universal terms (this was the reason philosophical education was given such importance): examples are Duaren[27] and Bodin.[28] This was to lead Doneau to underline the tie between the legal norm and 'nature': the nature of things and the nature of man, which the prince cannot

[26] Joachim Mynsinger a Frundeck, *Apotelesma sive Corpus perfectum scholiorum ad quattuor libros institutionum iuris civilis* (Venetiis, 1606).

[27] Duarenus, *De ratione docendi*, § 33. [28] Bodin, *Methodus*, ed. Mesnard, p. 107.

contest.[29] According to Connan, nature constitutes the key to custom; consequently it was customary law shared by the majority of people, and not legislative law, which he identified as constituting natural law.[30]

In some authors this manifestly theoretical approach is connected to the new logic of Pierre de la Ramée (Ramism), an influential teacher of logic in Paris and fierce critic of Aristotle. It is also connected to a new methodological approach aimed at ordering the subject matter of law and the *Corpus juris* itself, no longer following medieval tradition, but according to systematic structures found in logic, in some instances built on a specific 'art of memory' aiding the retention of huge quantities of text and words [Brambilla, 2005].

Actually, in the same years in which the humanist legal culture was taking shape, other new systematic constructions and conceptual models distinct from traditional ones came to light: among others, Hugues Doneau embraced them. The Dutch Nicolas Evertszoon (Everardus, 1462–1532) – at first a professor then judge and president of the Royal Court of Malines – published in 1516 a treatise with a remarkable theoretical construct, in part inspired by humanist culture [Vervaart, 1994] which had great fame in Europe as an invaluable text for legal practitioners.[31] In the same year the German Johann Oldendorp (1487–1567) – student at Bologna and later professor at Greifswald, Marburg and other German universities and an active exponent of Lutheranism – printed a work in which dialectical learning was applied to law;[32] later an introduction to natural law, civil law and *ius gentium* appeared in which he called for royal intervention to cut back on and reorder the mass of legal sources.[33]

These works were widely circulated in Europe as they answered the need for jurists to become familiar with modes of argumentation and the use of commonplaces vital in giving shape to legal arguments. Equally well known and appreciated was another work connected to the humanist approach, the *Iuris civilis methodus* by Nikolaus Vigelius published

[29] Donellus, *Commentarii iuris civilis*, I. 1. 25.

[30] '*Consensus omnium gentium non institutis aut legibus, sed moribus sensim et tacite confirmata naturae lex existimatur*,' Connanus, *Commentarii iuris civilis*, I. 6.

[31] Everardus, *Topica iuris et modi argumentandi* (1518). On the relationship between topics and legal reasoning, see Viehweg, 1962.

[32] J. Oldendorp, *Rationes sive argumenta quibus in iure utimur* (1516).

[33] J. Oldendorp, *Iuris naturalis, gentium et civilis tractatus per modum introductionis cuiusdam elementariae* (1549). See also his Köln edition of *Variarum lectionum libri ad iuris civilis interpretationem. Introductio in studium iuris et aequitatis. Leges duodecim tabularum compositae. Actionum iuris civilis loci communes* [...] (Coloniae Agrippinae, 1575).

in 1561 [Mazzacane, 1971]. It is worth noting that Vigelius classified the body of Roman institutes and norms into categories of a philosophical dialectical nature; for example, he subdivided material into the ten Aristotelian predicates (among which, substance, accident, quantity, quality), and drew up a list of commonplaces (*topos, argumentum*), indicating the location in the *Digest* where they were employed: for example when reasoning was based on the relation between *genus* and *species*, or in the argument by analogy.[34]

For some Protestant jurists the effect of the religious context of their work was very evident, also in their relation with the sources of ancient law which they approached using humanist methods: for them law was only that of Christ, and categories of Roman law rules seen only as instruments, however valuable, for reshaping the legal system in an appropriate way [Bergh, 2002, p. 65]. Another strand of the works on legal method rooted in a different cultural context flourished in the sixteenth and seventeenth centuries on the subject of teaching law and methodology in general; among these are the works by Caccialupi, Gribaldi-Mopha, Nevizzano and Roero.

The incipit of the humanists' theoretical construct was the classification of persons, things and actions but beginning from another premise from that of classical jurists. While Gaius' tripartite distinction suggested that the materials collected in this classification were facts from which law arose, in the case of the sixteenth-century writers inspired by humanism, this fundamental structure became a general category which gave coherence and an autonomous foundation to law, separate from facts and circumstances, making law the object of pure speculation [Villey, 1986, p. 450]. This constitutes the historical connection between the theoretical approach of this strand of humanism and the approach of modern natural law, which began with Hugo Grotius and which may also be considered primarily a fruit of humanism.

Despite the broad spectrum of approaches stemming from the common root of humanism, this source nevertheless persisted as a key element in each of the different approaches considered earlier. This matrix would continue to operate in various contexts for three centuries beyond the sixteenth, with authors who in proposing new methods of teaching, promoting new ways of exercising the legal professions and ways to reform the law, made constant reference to it. This occurred, for example, in seventeenth-century Holland, in eighteenth-century

[34] N. Vigelius, *Dialectices libri III* (Basileae, 1597).

Naples and Tuscany, and at the beginning of the nineteenth century in Germany, and at other times and places. The incentive and model of re-examining the sources directly [Brague, 1992], free from the cultural and exegetical constraints exerted by tradition, would in legal culture, but also in the literary political religious one, stimulate ways to rethink the present and to imagine the future.

19

Practitioners and Professors

19.1 The Jurists of the *Mos Italicus*

The method the legal humanists introduced was not universally applauded. The hostility with which, beginning in the fifteenth century, both students and professors rejected the opinions of Lorenzo Valla was to continue in the course of the sixteenth century against those who fiercely criticised the style and substance of the traditional method, as, for example, Cuiacius with his acerbic remark accusing Commentators of being verbose on trivia and evasive on difficult questions (*in re angusta diffusi, in difficili muti*). Others were to make insulting epithets, accusing the traditional doctrine of imbecility and crass ignorance, not to mention Rabelais, a humanist educated in law, with his ironic and disparaging illustration of the *glossae* (Chapter 18.2).

Traditionalists also had their own arguments supporting the rejection of the humanist method. Without opposing the many textual and interpretive rectifications proposed by the humanists of particular texts in the Justinian Compilation, Matteo Gribaldi Mopha defended the traditional teaching method of the Commentators, which subdivided the examination of every fragment into separate phases undertaken in the analysis of the Roman text (*De metodo et ratione studendi*, Lyon, 1541), and mentioned in a well-known distich[1] which, however, omits the most significant operation of this teaching method, the discussion of the question of law for which the fragment might offer a solution. The jurist of the late sixteenth century Alberico Gentili (1552–1608), professor at Oxford and one of the founders of modern international law, defended the traditional method with acute observations (*De iuris interpretibus*, 1582): he

[1] The distich (*'praemitto, scindo, summo, casumque figuro, perlego, do causas, connoto et obiicio'*) in English reads as follows 'define the terms (*praemitto*), produce a summary (*summo*), explain the rule in the form of a specific case given as an example (*casum figuro*), read analytically (*perlego*), investigate the rational grounds (*do causas*), signal notable points (*connoto*) and indicate parallel and discordant texts (*obiicio*).' Note that this sequence is consonant with the Glossators' method.

questioned the utility of the humanist method in legal practice. If the first duty of the jurist, whether versed in doctrine or practice, consists in shaping a correct reasoning so as to place the civil or criminal case within the normative framework, then the philological and historic approach to Roman text is not only superfluous, but possibly counterproductive, according to Gentili. He saw it as mere ornament and unnecessary to those engaged in defending or making a decision in a case; not so was recourse to the commentaries, *consilia* and treatises, which on the contrary were indispensable in the real world of law, to those who were not simply displaying erudition. His disaffection was not entirely unfounded: as illustrated previously, there was an inherent risk in the historic method of rendering the law of the Compilation inapplicable once the classical element had been disassociated from the post-classical and Justinian nucleus.

This profound divergence in method translated into the contrast between the *mos italicus iura docendi* and the *mos gallicus*, the latter intended as the humanist school which had flourished in Bourges, whereas *mos italicus* had remained the pride of major Italian universities such as Pisa, Padua, Bologna and Pavia. Whereas, on returning to France after a period of teaching in Italy, Alciato had had to emphasise the philological and historical side of his teaching at the request of his students, who had come to Bourges precisely because they found this new approach fascinating (the historic reasons for which France with its absolute monarchy favoured the humanist approach has already been discussed). Italian students and professors rejected humanist learning and remained faithful to the method that was later called 'Bartolism', associated with the most authoritative figure among the Commentators, Bartolus.

Once having adopted Roman law, German universities were also to show resistance to the historic-philological method. Hugo Donellus, a Protestant who had immigrated to France for religious reasons, was contested by the students of Altdorf for this very reason. In Heidelberg the jurist from Vicenza Giulio Pace (Pacius, 1550–1635), who also emigrated for religious reasons, praised the acumen with which the great Commentators had undertaken questions ignored by legal texts, underlining that the humanists (with the exceptions of Alciato and Zasius) limited themselves to an admittedly very learned historical exegetical investigation, but left aside the practical aspects of law.[2]

[2] J. Pacius, *De iuris civilis difficultate ac docendi methodo* (1586), on which see Orestano, 1987, p. 92.

If we consider the sixteenth- and seventeenth-century works on teaching, doctrine and legal practice, it becomes clear that the majority of legal literature was distant from that of the humanists. It would be a mistake, however, to think that the humanist doctrine and method were entirely ignored in Italy. The examination of theoretical and practical works shows how highly prized the key elements and exegesis of the humanists were and how the texts of legal humanism, even coming from Protestant Europe, were used: for example the Piedmont jurist Roero[3] in the seventeenth century advised ambitious young jurists to complement their lessons of the Pavia masters not only with traditional texts, but also with the synoptic writings of foreign authors such as Oinotomus or Everardus. Teaching, however, continued to follow the traditional order of the *Libri legales*, that is, in the form of commentary, which had reached its apex with the great Commentators of the fourteenth and fifteenth centuries, regularly reissued in print, as were also their *consilia*.

In the early modern age the legal treaty (*tractatus*) was a literary genre which was to increase exponentially in legal monographs dedicated to specific juridical topics or institutes. The number of legal works published between the sixteenth and seventeenth centuries is in the order of thousands: this is noticeable to anyone entering an old European library in which the traditional systematic order of the works by discipline has been preserved. To these must be added the printed systematic collections of allegations, decisions and treatises that are often of monumental proportions. The great legal encyclopaedia published in Venice in 1584 titled *Tractatus Universi Iuris* reproduced in thirty large *in folio* volumes hundreds of treatises – chosen from among the more authoritative writings of the thirteenth to the sixteenth century – covering the entire spectrum of public, criminal, procedural, civil and commercial law [G. Colli, 1994].

Treatises dealt with all possible topics of public and private law, and could be very narrowly focused (a vast treatise might be dedicated to a single contract, a single crime or a kind of proof) and depending on the case more or less oriented towards either the legal practice of transaction and litigation or towards the legal doctrines. The practical purpose prevailed, as is clear, for example, in the well-known work by the jurist from Verona Bartolomeo Cipolla on the *cautelae* to be taken to avoid negative legal consequences.[4]

[3] A. Roero, *Lo scolare* (Turin, 1630), on which see Vismara, 1987, pp. 147–216.

[4] Bartolomeo Cipolla, *Tractatus cautelarum*, in id., *Varii tractatus* (Lugduni, 1552). The 258 *cautelae* listed by Cipolla begin with the one avoiding the death penalty for the son guilty of *lèse majesté* (the father is advised to take himself the son before the judge) and continues in

The vast number of works addressed to legal practice resulted in the authors being known as Pragmatics (*practici, pragmatici*) among their contemporaries. Of the numerous continental jurists of this age who were to greatly influence doctrine and judicial practice, mentioned will be made of only a few.

Among the more frequently cited works is the treatise on procedure *De ordine iudiciorum* (1540) by Roberto Maranta [Miletti, DBGI, II, p. 1269 s.], the epigone of a literary genre that had flowered centuries before, but that had to be constantly updated in keeping with the procedural reforms introduced by local legislation and discussed by the doctrine and in the treatises.[5] Also the work of the Spanish jurist Diego Covarrubias (1512–1577), professor at Salamanca then bishop in Rodrigo and Segovia, who attended the Council of Trent and was the president of the Royal Council of Castile, the highest magistracy in Spain. A humanist, he was sensitive to the new approach of the legal theologians of Salamanca, and his theoretical[6] and practical[7] works gained particular prestige in and outside of Spain. What characterises his legal reasoning is the care taken in relating concrete questions and legal rules to ethical-deontological criteria coherent with religious and theological precepts: for example, when he discusses the limits of the defendant to speak in his defence without lying.[8]

The varied landscape of French doctrine in these centuries includes, in addition to humanists of which we have spoken, other authoritative jurists dedicated to the analysis and commentary of customary texts –

every field of law, e.g., advising the private individual who wants to build a hospital but not have it under ecclesiastical jurisdiction, to avoid building an altar or a church in the building (n. 211). Every *cautela* is confirmed by opinions of doctors of the *ius commune* tradition.

[5] See, e.g., the emphasis placed by the author on the inquisitory procedure – which in the sixteenth century had largely supplanted the accusatory procedure – listing separately sixty-four crimes for which the judge can proceed of his own motion: R. Maranta, *Tractatus de ordine judiciorum* (Venetiis, 1557), pars VI, nn. 128–206.

[6] D. Covarrubias, *Variae resolutiones ex iure pontificio et caesareo* (Lugduni, 1557).

[7] D. Covarrubias, *Practicarum quaestionum liber unicus* (1556).

[8] '*An liceat iuste litiganti adversarium fallaciis dolisve impetere*'. The litigant can, if interrogated by the judge in an incorrect and unbecoming way, mislead the judge with ambiguous words, as long as he does not speak falsely; Covarrubias cites St. Augustin, St. Thomas and Domingo Soto, a Dominican from Salamanca. Also on the *positiones* (the formal questions of the interrogation) there is a margin for ambiguity: asked to answer yes or no to the question if he has received a sum as a loan, the defendant can licitly answer 'no' if the sum was received but returned or if it was not a loan, but another type of payment (Covarrubias, *Variae resolutiones ex iure pontificio*, 1. 2–3, pp. 24, 29).On the legal ethics of advocates of the legal and theological doctrine of the modern age, see Bianchi Riva, 2015.

for example, Charles Du Moulin, principal Commentator of the customs of Paris, the most important in the kingdom; or Antoine Loisel, who systematised the principles of customary law – and influential legislative texts of the monarchy, in particular the ordinances of Louis XIV. Extremely important was the work of Jean Bodin, *Les six livres de la République* (1576), one of the most influential texts on the theory of absolutism; among jurists of private law the treatises dedicated to family law, primogeniture, contracts and inheritance by Pierre Rebuffi (1487–1557)[9] had a wide circulation, as did the treaties of André Tiraqueau (1488–1558),[10] both authors founding their works on the civil and canon *ius commune*, but also being well aware of the customary dimension of private law in sixteenth-century France.

Jacopo Menochio (1532–1607; Valsecchi, DBGI, II, p. 1328), professor at Padua, later senator and high magistrate of Milan, was the author of two important treatises and commentaries on possession;[11] he collected, subdivided into topics and discussed hundreds of questions (*quaestiones*), in every branch of law, in which the legal rules or the doctrine had left discretion (*arbitrium*) to the judge.[12] Judicial discretion being broad, the author intended to rein it in to within more definite boundaries, based on arguments of the doctors of the *ius commune*.[13] A similar purpose may be perceived in his equally important book *De praesumptionibus* (Cologne, 1575) addressed to a topic – presumptions admitting contrary proof and *praesumptiones iuris et de jure*, that did not admit contrary proof – which was scattered in an infinite number of legal texts and for the purpose of legal practice required a pointed analysis within

[9] P. Rebuffi, *Tractatus varii* (Lugduni, 1581).

[10] A. Tiraquellus, *Opera omnia* (Venetiis, 1588–1589), 7 vols. See Giovanni Rossi, *Incunaboli*, 2007; on the idea of nobility, pp. 137–190; on primogeniture as a natural right, p. 52.

[11] J. Menochio, *De recuperanda, adipiscenda, et retinenda possessione* (1565–1571).

[12] J. Menochio, *De arbitrariis judicum quaestionibus* (Lugduni, 1569), in many editions.

[13] E.g. regarding the choices the judge had to make in evaluating proofs, Menochio produces a long list of criteria to establish what witnesses should be regarded as trustworthy, in case of contrasting depositions: the old man is preferable to the young man, the man preferable to the woman, the witness in favour of the accused more than the one against, and so on (J. Menochio, *De arbitrariis judicum quaestionibus. Adiecta est sexta centuria* (Mediolani, 1602), *casus* 526, pp. 59–64. Note that Menochio finds for each of the arguments listed passages by doctors corroborating them, usually leaving aside references to specific legal norms. Naturally, each argument could agree or disagree in a given case (e.g. the testimony of a female against the testimony of a young man). Despite the effort to circumscribe judicial discretion, *arbitirum* was in the nature of the system of the *ius commune*, because of the weight of learned opinions, so to make it difficult to circumscribe.

a systematic and coherent framework. Menochio was to dedicate his last work,[14] written also from personal experience as magistrate at the service of the monarchy, to meticulously defend the reasons of the state in a conflict between canon and secular jurisdictions in areas and of people pertaining to the Church; it was written in a historical phase when the Church of the Catholic Counter-Reformation – including Spain that had remained tied to the Church of Rome – was often at odds with the newly established monarchic states. Finally, he was to leave a huge collection of *consilia*[15] in thirteen volumes. His work was widely used and cited by the doctrine and legal practice of his time and later, addressed to practitioners but enhanced with precise knowledge also of a large amount of legal sources and statutory norms.

Francesco Mantica (1534–1614; Feci, DBGI, II, p. 1259), professor at Padua, later auditor in the prestigious Roman Rota and finally cardinal, owes his fame to two large treatises on the law of succession[16] and contracts,[17] with particular reference to clauses likely to generate doubts on interpreting the will of the parties. He sets out the subject matter by placing the myriad of questions into which it is divided into a systematic framework, developing them in accordance with the traditional scholastic method in which each statement was accompanied by a list of arguments either in favour or contrary [Birocchi, 2002, p. 241].

One other work to garner much favour which was widely used and cited were the *Practicae Conclusiones* (1605–1608) in eight volumes written by Domenico Toschi (Tuschius), also an ecclesiastic figure and cardinal: it consists of thousands of legal lemmas listed in alphabetical order which had the quality, very much appreciated by legal practitioners, of gathering and lucidly presenting the general consensus expressed by doctors and practitioners on disparate sectors and institutions of the law.

19.2 Criminal Law

The sixteenth-century development of criminal law doctrine was of a particular importance: on this matter the Glossators and Commentators had delved only on occasion, because the space dedicated to it in the

[14] J. Menochio, *De jurisdictione, imperio et potestate ecclesiastica* (1607, publ. Lugduni, 1695).
[15] J. Menochio, *Consilia sive responsa* (Venetiis, 1609), 13 vols.
[16] F. Mantica, *De coniecturiis ultimarum voluntatum* (1579).
[17] F. Mantica, *Vaticanae lucubrationes de tacitis et ambiguis conventionibus* (1609).

Justinian Compilation was very limited (a single book out of the twelve in the *Codex*, two books out of the fifty in the *Digest*) and also because the statutory legislation of cities and kingdoms had established criminal systems distinct from the Roman law model. Moreover, the shaping of the modern state had strengthened the punitive power in the hands of the monarch. Over time, from the late Middle Ages the types of crime included in the category of *lèse majesté* and subject to capital punishment had considerably increased. The power of private settlement on crimes committed and private peace accords between offended and offender had become rarer. Punishment and repression[18] were exercised by royal magistracies, giving the monarch or great magistracies broad powers for granting clemency.

In Italy[19] a work worthy of note is that of Egidio Bossi [di Renzo Villata, DBGI, I, p. 316], judge of the Senate, the higher court of the Duchy of Milan. He participated in the drafting of the new constitutions of the Duchy (1541) established by the Spanish emperor Charles V. The *Tractatus varii* published by Bossi in 1562 was a comprehensive presentation of criminal and procedural law, in which particular emphasis is given to local norms and the decisions of the Senate [Di Renzo Villata, 1996].

Author of a very authoritative treatise was Giulio Claro (1525–1575).[20] He was also a judge in the Senate of Milan, magistrate (*praetor*) of Cremona and later member of the Council of Italy in Madrid, a high consultative body of the Spanish monarchy for the more delicate political and legal issues. Book five of his book contained a concise treatment of criminal and procedural law in which the author pointed out essential notions and doctrinal theses for each crime, combined with a choice of maxims taken from the decisions of the supreme court of Lombardy. The conciseness and clarity but mostly the concreteness of Claro's work – in which he regularly underlines the decisive role played by judicial practice,[21] often distinct from both doctrinal positions and the dictates of normative sources [Massetto,

[18] Sbriccoli, 1974; id., 2009; *La giustizia criminale*, 2012.
[19] On criminal justice in Italy (sixteenth–eighteenth centuries), see Bellabarba, 2008.
[20] G. Claro, *Receptae sententiae* (Venetiis, 1568), in various reprints. Cf. Massetto, 1985; Massetto-Parini, DBGI, II, p. 552.
[21] It is typical of Claro, once having referred to one or more doctrinal opinions on the controversial questions, to cut short, saying, '*quidquid sit de iure, tamen hodie . . .* ' or '*de facto . . .* '; on the matter he refers the local custom or court decisions, preferring these to all other sources (Massetto, 1994).

1985 and 1994] – was the reason for the enormous circulation of this work, which counted many reprints.

A very different approach was taken by Tiberio Deciani from Udine, a professor in Padua and author of a treatise on criminal law (*Tractatus criminalis*, Venetiis, 1590) published posthumously, in which the author gave space to notions and norms from the recent and the remote past – including Egypt, ancient Greece and republican Rome – under the clear influence of the humanist method combined with the logico-systematic approach derived from Aristotelian categories still favoured in late scholastic teaching in sixteenth-century Padua. The work is a precursor to the modern framework in that it prefaces the discussion of crimes and punishments with a 'general section'.[22]

Another widely used treatise was that of Prospero Farinaccio[23] from Rome; this was a veritable encyclopaedia of criminal law and procedure in which he systematically collected and examined hundreds of authors on the subject, constituting an inexhaustible storehouse of arguments for legal practitioners.

The Belgian jurist Joos Damhouder (1507–1581) wrote the *Praxis rerum criminalium*, which came out in several editions and was broadly circulated in Europe, appreciated for its qualities of clarity and conciseness. Another important treatise was that of Benedikt Carpzov (1595–1666) on the criminal law of the *ius commune* and Saxony; a work which applied *inter alia* the categories of the great Italian criminal doctrine to the normative context of the *Constitutio Criminalis Carolina* (1532). This work was based on the author's judicial experience at the supreme court of Saxony and was an authoritative text also outside of Germany.

Finally, worth mentioning as very influential, is a jurist who was professor at Utrecht, Anthon Matthes (Matthaeus, 1601–1654). His treatise on criminal law, *De criminibus* (1644), is structured on the two books on criminal law in the *Digest* (*Dig.* 47 and 48) and shows a clear conceptual understanding, already displaying a sensitivity to the natural law rationalism, which had made its early mark just a few years earlier with Grotius. This work was to constitute a constant point of reference in European criminal doctrine until the end of the eighteenth century, and is still used today in South Africa, where the Roman-Dutch common law is in force.

[22] See Pifferi, 2006; see the various essays collected in *Tiberio Deciani*, 2004.
[23] P. Farinaccio, *Praxis et theorica criminalis* (Lugduni, 1589–1614), 4 vols.

19.3 Commercial Law

In the range of developments characterising these centuries, equal importance must be given to that of commercial law,[24] a new branch of law which had emerged in medieval Italian cities as custom, as we have seen, and which at the end of the fourteenth century had attracted the attention of the Commentators, first and foremost that of Baldus degli Ubaldi. But *Ius mercatorum* was to be approached in a systematic form only from the early sixteenth century [Petit, 1997]. The first to write a comprehensive treatise (*De mercatura seu mercatore*, 1553) was the advocate from Ancona, Bartolomeo Stracca. The treatise collected a vast body of questions concerning merchants, their status and the obligations and procedures of merchant courts; other topics – among which were exchange, insurance[25] and usury – were omitted from the treatise, which is otherwise not particularly original except for having for the first time given an autonomous configuration to this new branch of law.

At the beginning of the sixteenth century, the jurist Sigismondo Scaccia [Tarantino, DBGI, II, p. 1811] from Rome, based on his experience as judge in the Rota of Genoa, was to publish *De Commerciis et cambio* (1619) – systematically arranged in accordance with scholastic categories, listing rules and exceptions together with arguments for and against – which included many questions pertaining to bills of exchange [Piergiovanni, 1987]; for the delicate topic of usury (the interest on commercial contracts), his position reflected the persistent condemnation on the part of the Church. Some years later the Genoese Raffaele della Torre showed himself to be more insightful on the issues surrounding economics, and on the subject of promissory notes and bills of exchange dedicated a whole treatise *Tractatus de cambiis* (1641) in which the usefulness of bills of exchange was defended against the non-commercial loan: one of the many loopholes devised by jurists to avoid ecclesiastical prohibitions.

Other authors published collections of material from their professional life. Ansaldo degli Ansaldi [Piergiovanni, DBGI, I, p. 74] was a Florentine lawyer and later judge in the Rota of Rome and in 1689 he published the *Discursus legales de commercio et mercatura*, in which he carefully analysed 100 commercial law cases that had been discussed in

[24] Piergiovanni (ed.), *From lex mercatoria to commercial law*, 2005.
[25] The Portuguese Pedro de Santarém had made mention of insurance of maritime transport in 1488, although the treatise appeared many decades later as *Tractatus de assecurationibus*.

Tuscany in the preceding years. At the beginning of the eighteenth century, Lorenzo Maria Casaregi (1670–1737; Piergiovanni, DBGI, I, p. 475), at first lawyer in Genoa, then judge in the Siena and Florence Rota, published in 1707 a comprehensive collection titled *Discurus legales de commercio*, reprinted on more occasions with important additions: beginning with the examination of single cases, it embraced the whole subject matter of commercial legal relations; the work was widely circulated and held in great esteem also beyond Italy until the end of the eighteenth century.

A significant aspect of this branch of law is the close relationship between customary commercial law and the categories of the *ius commune*. Whether speaking of commercial partnerships (*commenda*) or bills of exchange, mercantile books or commercial capacity of minors, the authors consistently cited from the body of Roman laws and *ius commune* doctrines on companies and obligations, in order to analyse and supplement the rules of commerce and to solve the new questions arising from professional and legal practice. Nevertheless, it is clear that they were well aware of the particular features characterising the new discipline, which in many cases was distinct from the ancient one.

In the meantime, France had developed a solid legislative framework of commercial law with the two *ordonnances* of Louis XIV, one on commerce (1673) and the other on maritime law (1681), discussed later. Based on these, a doctrine was to develop that became known and used also outside France.

19.4 The School of Salamanca

The history of modern legal thought owes a great deal to a small group of scholars from the university of Salamanca in Spain, which was active in the sixteenth and the early seventeenth centuries: the golden age of Spanish culture. In the same way as Bologna in the thirteenth century, Orléans in the late thirteenth century, Bourges in the sixteenth century, Leiden in the eighteenth century and Berlin in the nineteenth century, for a time Salamanca became a pioneering university in Europe, thanks to a small group of innovative scholars in the field of theology and law. A rich set of doctrines was drawn up also by non-Spanish scholars, among others by the Jesuit Leonardus Lessius from Antwerp and by the Portuguese Aria Piñel in the early seventeenth century.

The distinguishing characteristic of the Spanish school – even allowing for the diversity of the positions taken by individual scholars[26] – is a common theological origin. They were in fact professors not of law, but of moral theology, mostly belonging to the learned order of Dominican preachers or the recently founded order of the Jesuits. They chose to place some key legal issues at the centre of their teaching and scholarly work. Moving most of the time from the commentary to parts of Aquinas' *Summa Theologica* on law,[27] the masters from Salamanca not only tackled topics of justice, law, natural law, divine law, personal status and the power of the prince and its limits, but went further to analytically examine many particular institutes from the normative order, among them property, hereditary succession, contracts and usury. They also made an important contribution to the doctrines of international law.[28] In furthering their project, and in line with their own education and role, they moved from theological premises and derived specific consequences on legal discipline and single institutes under scrutiny. Thoroughly knowledgeable not only of theology, but also of Roman law and the law of their time, their purpose was to explore the congruence of positive norms with the principles of natural and divine law.

The novelty of their approach might be described in the following terms. The theologians belonging to medieval Scholasticism, beginning with Aquinas, had not ignored the subject of law, but the masters from Salamanca examined the normative discipline in a more exhaustive and systematic way, studying each contract, each legal rule of both private and public law and linking them to basic theological principles. In the same years some humanists were also expressing a critical attitude towards Justinian norms, as we have seen, but the Spanish scholars proposed to set precise boundaries within which the statements of the *Corpus juris* could be deemed legitimate insofar as they conformed to principles and values of a higher level than that of positive law.

The first scholar to be considered is the Dominican Francisco Vitoria (1483?–1546), who was educated in Paris in the first years of the sixteenth century, schooled not only on the texts of Aquinas, but also on Latin texts

[26] See Decock, 2013; Duve in *Der Einfluss*, vol. I, 2009, pp. 389–408; on the relation between theology and law, see Jansen, 2013.

[27] Thomas Aquinas, *Summa Theologica* IIa–IIae, qq. 57–61: *de iure, de iustitia, de iniustitia, de iudicio*.

[28] Ziegler, 2007, pp. 129–136.

from Cicero to Seneca.[29] A professor of theology of great renown at Salamanca beginning in 1526, in his courses [Langella, 2007; Milazzo, 2012] he not only commented on Aquinas' *Summa*, but also examined the legal and theological issues arising from the recent conquest of the West Indies, as mentioned previously (Chapter 17.6). Although for Vitoria the Indios' refusal to accept commercial exchange and Christian preaching constituted the motive which legitimised a 'just war', he nevertheless expressed a belief that conversion should not be forced but free and that the indigenous Americans should be treated in the same way, as minors under guardianship, not as slaves [Cassi, 2004, p. 301].

The case for the freedom of the Indios found in those same years an extraordinary defender in Bartolomé de las Casas (1474–1566), also a Dominican monk, who, in his writings and the activities in which he engaged during his long life, fought to promote the freedom of the Indios, arguing on theological and legal grounds for the illegitimacy of their enslavement on the part of the conquerors and even attempted – with the consent of Charles V, but unsuccessfully – to found cities inhabited by 'free Indians' (*Plan para la reformación de las Indias*, 1515).

Another Dominican of Salamanca was Domingo Soto (1494–1560), who declared that the derivation of positive law from natural law was in two distinct forms: firstly through logical deduction coherently with the premise and therefore immutable (*per modum conclusionis*), secondly through specifications that took into account – for example, with regard to the amount of the punishment – concrete circumstances (*per viam determinationis*).[30] In this second instance natural law could be translated into positive norm in accordance with criteria which were not immutable in time and place, and thus in a sense placed within historical time.

This belief was shared by another of the great masters of Salamanca, the Jesuit Luis de Molina (1535–1600), also the author of a treatise, *De iustitia et iure*,[31] in which a great number of questions mostly of private law were tackled, making constant reference not only to Roman law and the *ius commune* doctrine (particularly that of Covarruvias) but also to

[29] Francisco de Vitoria, *De legibus*, ed. S. Langella and J. Barrientos Garcia, Salamanca 2010; id., *Political Writings*, ed. Pagden and Lawrence, Cambridge 1991; Id., *De Indis recenter inventis et De jure belli Hispanorum in barbaros: relectiones*, hrsg. von W. Schatzel, Tubingen 1952.

[30] Domingo Soto, *De iustitia et iure*, (Venetiis 1573), I, q. 5, a. 2.

[31] L. de Molina, *De iustitia et iure* (Venetiis, 1614).

Castilian law, Spanish royal laws and the laws and customs of Portugal,[32] where the author resided as a teacher at the university of Coimbra while writing the work. At the forefront are Aquinas and Aristotelian moral doctrine.

Molina's mark is also in his rationalist position on the relationship between moral values and divine will: good and evil – as expressed in the precepts of the Decalogue – are distinguishable (therefore to either promote or prohibit) in themselves,[33] not because God had declared them so and written them in the Tables of the law. This position was contested by the secular jurist Fernando Vazquez (1512–1569), who turned to Ockham's voluntarism and argued that good is what is commanded by God, not vice versa,[34] and consequently that the criteria for distinguishing good from evil does not reside in human reason, but rather in the indication of the divine will and its precepts; whereas a theologian by the same name, the Jesuit Gabriel Vazquez (1551–1604), expressly stated that 'many actions are evil in themselves, so much so that their evil precedes any judgment made by divine intellect'.[35]

Perhaps the figure who made the greatest impact on later jurists is another master from Salamanca, Francisco Suarez (1548–1617; cf. Schaub, in DGOJ, pp. 565–570). He was the author of works on marriage, but mostly of a vast treatise titled *De legibus*,[36] in which he attempted to construct a doctrine of law and society that consented to the justification for the institutions and the norms of natural law through rational principles and not only on the revelation. By developing themes already suggested by Vitoria and before him by other medieval theologians and jurists, Suarez came to believe that jurisdictional power, with attendant authority to repress crime, was inherent in the existence itself of a community, by virtue of natural reason, which does not require the premise of a pact with God or an authority conferred by Him, but solely by virtue of the will and the consensus of the community itself.[37] As to natural law, Suarez embraced and developed the arguments furthered by medieval canonists and theologians, attributing to the term *ius* a meaning that went beyond that of 'objective right', alluding to the individual exercising power over freedom and property, an evocation of the modern idea of 'subjective right'.

[32] On Portugal and its laws and royal powers, see Hespanha, 1994.

[33] L. de Molina, *De iustitia et iure*, I. I. 4. 1–5.

[34] F. Vazquez, *Controversiae illustres* (1563).

[35] G. Vazquez, *Commentaria in Primam Secundae Sancti Thomae*, d. 150. 3. 19.

[36] F. Suarez, *Tractatus de legibus ac deo legislatore* (Madrid, 1971–1981, 8 vols.).

[37] Suarez, *De legibus*, 3. 1. 1. 11; on which, see Tierney, 1997.

A complex problem, which medieval jurists and theologians had already tackled on several occasions, was taken up by Suarez. This concerned how to justify property as a natural right while unanimously accepting that originally all property was held in common. Suarez solved the question by declaring that this natural law idea of property held in common should be considered permissive and not compulsory, therefore making the peaceful appropriation of goods and lands by individuals, not only admissible, but protected by human law.[38] This argument demonstrated that some natural rights developed from human impulse, and were therefore invested by a dimension of time: this concept was barely hinted at, but is noteworthy as it would potentially lead natural law within a historical dimension.

An examination of the opinions expressed by the Scholastics clearly shows the ethical and religious element influencing their thinking, but the radical approach of some among them was contravened by a current of thought which was more sensitive to the economic and even social effects of the different solutions: for example, regarding the effect of the *metus* and error in contracts, the nullity of immoral conventions or whether it was possible to waive the clause that permitted rescinding or correcting a contract stipulated for less than half the value of the property bought or sold (*laesio enormis*).[39]

What makes the School of Salamanca original and new is the way it was able to approach and analyse legal questions, even single institutes and contracts, based on the Roman *ius commune* with which it was thoroughly familiar on one hand, but on the other through the filter of theological values and principles. After centuries of exegesis, for the first time Roman laws were examined against an external paradigm that could lead to refuting them on an intrinsic level: that is, in case of a discrepancy with the immutable precepts of the Revelation.

19.5 The Dutch Elegant School

Founded in 1575, the university of Leiden rapidly grew in the succeeding decades, also by virtue of the method of teaching which offered extra-curricular courses (*collegia*) [Ashmann, 2000]. In the course of the seventeenth century, it became a point of reference in legal culture not

[38] Suarez, *De legibus*, vol. 3. 2. 12. 1; vol. 4. 2. 14. 16; on which, see Tierney, 1997.

[39] Decock, 2013, pp. 437–472, 582–586; several other aspects of the contract freedom are examined.

only for the Low Countries, but for Europe as a whole. The conquest of freedom following the victorious war against Spanish dominion combined with an enormously successful commercial activity in eastern Asia and with an intense religious vitality in a land where Calvinism had found such fertile ground and Catholicism also survived, characterised by the humanism of such figures as Erasmus of Rotterdam. They are elements which converge – together with the flowering of the great pictorial arts up to Rembrandt – to make Flanders one of the most vital centres of civilisation of modern European culture.[40]

In this context, mention must be made of some professors of the Low Countries whose teaching clearly shows traces of a humanistic approach: it is no accident that Hugues Doneau (Donello) was called to teach in Leiden in the first years of the university's existence and had brought with him the method characterised earlier.

The humanistic approach combined with a practical orientation of a numerous group of Dutch teachers has come to be known as the Elegant Dutch School, a name suggestive of its concise and meticulous style, immune from the ponderous argumentations of the late doctrine of the *ius commune*. Among the nearly fifty names of professors between the sixteenth and eighteenth centuries, which a recent study has identified as belonging to the Dutch Elegant School [Bergh, 2002] some had Europe-wide fame. Other than Grotius (discussed later), a few at least must be mentioned.

Gerard Noodt (1647–1725) was professor first in his native Nimega and then in other universities until he was called to Leiden, where he taught for around forty years. His writings combine a strong critical and philological ability to interpret classical Roman law[41] with an approach inspired by the ideals and principles of tolerance and openness: in a notable rectorial address of 1706[42] he courageously defended the principle of separation between Church and state and that of freedom of religion, principles severely opposed at the time by both Protestants and Catholics.

[40] The prestige of the Leiden school was still such in the eighteenth century that when on an impulse Vittorio Amedeo II of Savoy wanted to modernise the teaching of law in Turin, he turned to the Dutch, although he did not succeed in getting any of them.

[41] Some of Noodt's textual and interpretive solutions on the *Digest* are still today considered correct (Bergh, 2002, 194). His scientific and didactic probity is a feature that induced him to occasionally announce to his students that he would not be explaining on obscure passage because it was not his habit to explain what he himself had not thoroughly understood (Bergh, 1988, p. 293).

[42] G. Noodt, *Opera omnia* (Lugduni Batavorum, 1724), vol. 1, p. 638.

No less learned in their interpretation of Roman sources and their knowledgeable use of them in both the teaching and the practice of law are a number of other Dutch scholars. Among these, Ulrich Huber (1636–1694) was judge and professor at Franeker [Lomonaco, 1990]. He was an expert humanist in the criticism of sources and originator of a teaching method leaving little space for learned philology. Anton Schulting (1659–1734) was a professor at Franeker and then Leiden and was referred to as 'the Dutch Cuiacius' for the great historic philological doctrine that he expounded in his analysis of Roman sources.[43]

The approach the scholars of the Elegant Dutch School took naturally ties in with that of the humanist school. However, the association is not with the systematic trend of Doneau (although he had taught at Leiden), but rather with the historic philological manner of Cujas. In the same way as Cujas, the Dutch turned to the ancient systematic arrangement, and did not hesitate to criticise Alciato's philological reconstructions and those of the early humanists; they were also sceptical of attributing absolute value to the Florentine manuscript of the *Digest* as opposed to the *Vulgata*.

19.6 *Usus Modernus Pandectarum*

In Leiden Arnold Vinnen (Vinnius, 1588–1657) was the author of a commentary on the *Institutions* (1642)[44] which was widely circulated in Europe for more than a century. In his work as in the work of other Dutch scholars, the humanist approach anchored to the systematic structure of the *Institutions* – an approach characterised by interpretation of the Roman text directly rather than discussion of the medieval doctrines of Bartolistic extraction on each text – is combined with great attention to local law, court procedure and custom. The tendency is to use ancient law only in as far as it is functional, on one hand indicating dispositions which are obsolete and which should be abrogated,[45] and on the other to consider as perfunctory (*subtilitates juris*) many specific dispositions of the *Corpus iuris* tied to the formalism of ancient procedure in the Roman texts.

[43] A. Schulting, *Jurisprudentia vetus antejustinianea* (Leiden, 1717). His *Notae ad Digesta seu Pandektas* were published only in 1804–1835, in 8 vols.

[44] A Vinnius, *In quattuor libros Institutionum imperialium Commentarius* (Venetiis, 1726, 2 vols.). The work publishes the text of the *Institutions* accompanied by brief *glossae* (*notae*) and lengthier comments which essentially draw parallels between passages in different parts of the *Corpus juris*. References to the *ius commune* doctrine are virtually absent.

[45] S. Groenewegen, *De legibus abrogandis* (1649).

The context as described explains why a chair was instituted at the university of Leiden in 1688 in *ius hodiernum* for another Dutch professor, Johann Voet (1647–1713), the author of a work on the *Pandectae*[46] which was reissued several times until the nineteenth century, in which a historic exegetical treatment is combined with frequent references to legal practice. An example of an accurate and concise treatment of local law had been supplied by Hugo Grotius, who was the founder of modern natural law, and as early as 1620 had written, as we have seen, an introduction of great renown to Dutch law (*Inleidinge tot de Hollandsche Rechtsgeleerheid*), conceived in the national language and inspired by the systematic method of Doneau and particularly of Pierre de la Ramée (Ramo), which Doneau and Althusius had already referred to and which Grotius knew well.[47]

Strictly connected to this approach taken by the Elegant Dutch School is the work of authors who during the seventeenth and eighteenth centuries were to adopt a teaching method in which appeared textual analysis of a humanistic bent, an intermingling of a systematic purpose and great attention to local law, although in different ways by different authors [Luig, 2006]. This theoretical-practical approach took its name, which was to become emblematic, of *Usus modernus pandectarum* from the title of a work published in 1690[48] by one of the best-known professors, the German Samuel Stryck (1640–1710), professor at Frankfurt on the Oder and later at Halle and author of numerous legal works.[49]

The *Usus modernus pandectarum* must however be distinguished from that of the Dutch Elegant School [Bergh, 2002, p. 66]. Although references and echoes of the philological investigations conducted by humanists and the Dutch Elegant School are present in the *Usus modernus pandectarum*, it is closer to authors such as Vinnius and Voet. Its purpose was to combine Justinian sources with the new requirements of legal practice; it turns away, therefore, from learned textual reconstruction and emphasises instead the statement of precise and coherent rules directly stemming from the ancient legal texts. The intent Voet voiced at the beginning of his comment on the *Pandectae* is characteristic: the merely

[46] J. Voet, *Commentarius ad Pandectas in quo praeter Romani iuris principia ac controversias illustriores, jus etiam hjodiernum ... excutiunur* (Venetiis, 1775, 2 vols.).

[47] Birocchi, 2002, p. 168; Haggenmacher, DGOJ, 2008, p. 217.

[48] S. Stryck, *Usus modernus pandectarum* (1690).

[49] In a late Florentine edition the works of Samuel Stryk and his son Johannes, also a jurist, are in 18 volumes: Stryk, *Opera omnia, tam tractatus, quam disputationes continentia*, [...] (*Florentiae*, 1837–1842).

antiquarian questions, the professor warns, will be hardly touched on,[50] and only for the purpose of giving jurists, so intent on studious legal questions, the respite of the view of a more soothing landscape offered by ancient legal sources. However, the content of the work does not exactly fulfil the promise: textual references are frequent as are citations of philological analysis by Cuiacius.

An essential aspect of the *Usus modernus* was that of emphasising Germanic tradition, current as well as in its medieval roots and customs. The work of the medical doctor and jurist Hermann Conring (1606–1681) *De origine iuris Germanici* (1643) played off, perhaps for the first time – but without the ideological element that would develop only later in a different cultural and political context – the nub of original German law against what is called 'foreign law' (*fremdes Recht*), which naturally included Roman *ius commune*. Georg Adam Struve (1619–1692), for a long period professor at Jena, was the author of a well-known work, published for the first time in 1670, which clearly reveals his authorial intention in the title (*Jurisprudentia Romano-Germanica forensis*).[51] One is justified in thinking that the use of elements drawn from the Germanic tradition, canon law or customs of more recent origin – in any case not coinciding with classic Roman law – was not merely the fruit of a doctrinal development by the authors of *Usus modernus* but rather that it corresponded to some real tendencies in the society of the time which they wanted to reinforce, towards more fluid and purposeful legal relationships: this seems likely, for example, in their way of dealing with topics such as third-party contracts, insurance, nude pacts, the safeguard of creditors in good faith and other rules [Luig, 1998b].

Despite some common elements, the distance in approach between the Dutch Elegant School and the masters of the *Usus modernus* is considerable. The Dutch (Noodt, Schulting and the others, each with a different shading) held that it was impossible to understand the strictly legal profiles of Roman laws without the instruments of philology and history, so that the 'elegant' method is not an ornament, but a necessary condition to understand the texts correctly. Moreover, several of the Dutch scholars no longer felt Roman law to be intangible: in some cases there was no hesitation to point out defects, *lacunae*, and veritable flaws [Bergh, 2002, pp. 63–70].

[50] J. Voet, *Commentarius ad pandectas* (Venetiis, 1775), I, *proemio*: '*Coetera, quae ad antiquitates spectant [. . .] summo tantum digito tetigerim [. . .].*'

[51] A. Struve, *Jurisprudentia Romano-Germanica forensis* (1670).

On the contrary, the authors of the *Usus modernus pandectarum* deliberately limited (as was seen with Voet) the use of philological study of ancient texts, their aim being to preserve the integrity of the Justinian *corpus*, to which they added elements of the Germanic tradition and of court decisions. But if the systematic structure is taken from ancient texts, in the first place the Justinian *Institutions*, conceptual categories were by then in large part stemming from the natural law approach propounded by Grotius and Pufendorf, paving the way to a peculiar mix of old and new, of preserving what already exists and rethinking methodologically this tradition, that was to be developed in a new era in legal science.

19.7 Giovanni Battista De Luca

Giovanni Battista De Luca (1613–1683) was born in Venosa in Basilicata and was a law graduate of the university of Naples – the liveliest centre for legal studies in Italy at the time – and may be considered the most noteworthy Italian jurist of the seventeenth century.[52] For most of his life De Luca was an advocate in Rome and only became a priest aged sixty, later being nominated cardinal. His fame is due principally to a huge work of fifteen volumes in which he collated documents of cases he had undertaken throughout decades of practice as advocate. The work was titled *Theatrum veritatis ac iustitiae*[53] and was a collection of thousands of 'cases', most of which involved questions on contracts, usury, feudal law, donations, wills, *fidei commissa* and tithes, that is the types of cases which were frequent for a legal practice in the ecclesiastical state. What is remarkable in his writings is the clearness of the arguments which had been contrived and written for individual legal cases for which he had acted as advocate and consultant.[54] Another interesting aspect of

[52] On De Luca, see Lauro, 1991; Mazzacane, in DBI; Birocchi, 2002, pp. 297–315; Birocchi and Fabbricatore, in DBGI, I, pp. 685–689; Napoli, DGOJ, pp. 113–120.

[53] Rome 1669–1673, with seven additional volumes, 1677. The work, in fifteen volumes, is structured by subject: *1. De Feudis; 2. De regalibus; 3. De iurisdictione; 4. De servitutibus, emphyteusi, locationibus; 5 De usuris, interesse et cambiis; 6. De dote; 7. De donationibus, emptione, contractibus; 8. De credito et debito; 9. De Testamentis; 10. De fideicommissis; 11. De legatis et successionibus ab intestato; 12. De beneficiis ecclesiasticis; 13 De iurepatronatu et pensionibus ecclesiasticis; 14. De regularibus et monialibus; 15. De iudiciis et praxi Curiae Romanae.* See the Venice edition published in 1706.

[54] Many cases are presented as *responsa*, i.e. *consilia* and opinions. In some cases De Luca gives his opinion to a client together with a close first examination and indication of the arguments that the adversary could possibly use, to then demonstrate their inconsistency

his approach is that of not accepting a legal maxim indiscriminately, however authoritative the source of the doctrine, but rather evaluating the applicability of given doctrinal opinions to specific cases: for example, regarding the often debated question on whether the document of a contract between parties is required merely as proof (*ad probationem*) and therefore replaceable by another proof, should it be missing, or because it validates the act (*ad substantiam*) and is therefore irreplaceable.[55]

Rather than accumulating legal opinions, De Luca deliberately favoured anchoring his arguments to intrinsically solid legal reasoning, and was not averse, when he deemed it useful, to refer to opinions of scholars outside the authorities currently cited in court, such as the theologians of the School of Salamanca. Though thoroughly versed in theories and doctrines, he despised the mere use of multiple citations, common among many practitioners of his time (the *vulgus pragmaticorum* whom he held in low esteem), but rather turned directly to the essence of the legal question. Clever arguments, for example, were not to conceal the existence of the fundamental relationship underlying surety (*fideiussio*),[56] or to ignore the fact that in a three-fold contract (*contractus trinus*)[57] the essential nature of the agreement between parties was that of usury, which, according to doctrinal opinion of the time was illicit.

Being very independent minded, De Luca was critical, among other things, of the institute of *fidei commissa* which the nobility widely used in order to maintain intact the heritage through time; he made the ironic observation that the only sure way to safeguard the proper management of a family's fortunes was to create a 'brain trust',[58] that is, transmitting the father's abilities to the son, not his earthly goods. As advocate of the Rota, De Luca also expressed criticism of ecclesiastical exemptions.

(see, e.g., *Theatrum*, vol. VIII, disc. 74, nn. 1–6). Of great interest is the frequent inclusion of the decision by the judges on the cases, which were not generally included in the collections of *consilia*.

55 See the case discussed in De Luca, *Theatrum*, VII/3 *de alienationibus*, disc.44.

56 De Luca, *Theatrum*, VIII, *De credito et debito*, disc. 74 (cf. Birocchi, 2002, p. 311s.).

57 The three-fold contract (*contractus trinus*) was contrived at the beginning of the sixteenth century by the theologian J. Eck; and resulted from joining three contracts: a contract of partnership, of insurance of the principal and of insurance against fluctuating returns, as to hide the interest on the loan then prohibited by the Church.

58 'So much so that for precaution brains should be put in trust (*fedecommesso sui cervelli*), all is vanity (. . .)': De Luca, *Il dottor volgare*, III. 10 (Cologne, 1740) vol. II, p. 12).

Significantly, De Luca undertook to publish a synopsis of his major work in the Italian language,[59] for the purpose of rendering legal language and law – in a summary of *ius commune*, doctrine and local law – familiar outside the legal sphere, for the benefit of a nonprofessional readership. Two other of his works were published in the Italian language, one on institutions (*Instituta*)[60] and the other on legal style,[61] both replete with acute and accurate points and valuable information on legal practice of the time.

59 De Luca, *Il dottor volgare, ovvero Il compendio di tutta la legge civile, canonica, feudale e municipale, nelle cose piú ricevute in pratica*, (1673) (Venice, 1740) 6 vols.

60 De Luca, *Instituta civile divisa in quattro libri con l'ordine de' titoli di quella di Giustiniano* (Venice, 1743).

61 De Luca, *Dello stile legale;* see the edition added to vol. XV of the *Theatrum veritatis et iustitiae* (Venetiis, 1716).