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Legal Doctrine and the Legal Professions

20.1 The Role of Legal Doctrine and the Printing Press

Roman *ius commune* owed its extraordinary diffusion to the fact that it was exhaustive, versatile and authoritative, but also because of the quality of its rules. Its authority derived from the connection with the imperial authority stemming from the *Corpus iuris*; the imperial office was indeed to maintain considerable institutional and political weight – in Italy until the thirteenth century, in Germany and the imperial territories until the modern age – although it was progressively overwhelmed by the absolute states and in Germany by the early modern territorial principalities.

Polyvalence is an essential feature of the vast collection of texts incorporated in the Justinian *Corpus iuris*: within it are in fact norms of an expressly absolutistic kind – one might quote the maxim of the *Digest* on the legislative powers of the prince: '*quod principi placuit legis habet vigorem*' – but also clusters of norms and rules safeguarding the individual as such, as long as he is free and not in a servile state: among the most important and lasting legacies of Roman law are the rules on property (*dominium*), testamentary freedom, the concept of consensual marriage based on *maritalis affectio* of the partners, the equality between sons and daughters in legitimate succession. Roman law could be used equally by cities or sovereigns, rural communities and corporations, single subjects and unprotected women. Justinian norms offered effective legal remedies and safeguards for all these private and public matters, certainly not for the absolute state alone. A major reason for its lasting success may be attributed to its multifaceted nature.

Indeed it was the very aporias and contradictions contained in the Compilation that offered endless prospects to legal practitioners, with practical suggestions and useful arguments to employ in their arguments. Moreover, the centuries of stratified interpretations, theories, methods, schemata, theoretical and practical ideas offered a wide spectrum of legal instruments to lawyers and judges, which were incomparably more

flexible and effective than those available to jurists who had stopped short at the application of traditional customs. These are the grounds for the enormous success of professional jurists educated on the texts of the Roman *ius commune.*

It is at this point that the role of doctrine enters the picture. The persistence of the *ius commune* in the early modern age is all the more relevant given the legal weight still attributed to doctrinal opinions as sources of law. A judge in his decision, an advocate in his defence and a consultant in his advice, in framing the legal questions involved in the given case could indeed cite opinions stated by doctors of the *ius commune* in their commentaries, treatises or *consilia.* Moreover, this link to doctrinal opinion was not tied to time or place: an allegation written in the seventeenth century could refer to an Accursian *glossa*, a commentary by Baldus, a *consilium* of Jason del Majno, that is, to opinions stated even three or four centuries earlier. Naturally the opinions of contemporary jurists were also constantly referred to.

The late fifteenth century saw a turning point in the work and methods doctors used as a result of a technological breakthrough: the introduction of the printing press. With increasing speed presses were publishing the best-known ancient and authoritative legal works read in the universities and used in legal practice. Among them were the *Corpus iuris* with the Accursian *Glossa*, the commentaries and collections of *consilia* of the major civil and canon law Commentators of the fourteenth and early fifteenth centuries, as well as a number of treatises, opinions and legal works by scholars of the time. Printing hundreds of copies of a work obviously took less time and expense than producing a manuscript, despite the efficient organisation and skill developed by the *stationarii.* For this reason, works whose survival was until then in the hands of a patient scribe were now issued with great ease, perhaps only to satisfy the ambition of a jurist desiring to see his work published. There are around 2,000 titles of legal works published in the late fifteenth century (known as *incunabula* and often of an elegant appearance), and this number multiplied in the course of the sixteenth century: books published in that century on law can be counted in the tens of thousands. Whereas in the first period after the introduction of the printing press there are a number of publishing houses in both important and less important centres such as Trino (near Vercelli), in the course of the second half of the sixteenth century a few – first and foremost Lyon and Venice – established their supremacy as centres of international legal publishing: the book market was Europe-wide, as the international legal

language was still Latin. Imposing editorial projects included the publication of huge volumes and collections, as in 1584 of the immense collection of the *Tractatus Universi Iuris* in thirty volumes. There were also many reprints or new editions, in large *in-folio* tomes, of the complete works of the major Commentators – Bartolus, Baldus degli Ubaldi, Johannes d' Andrea, Abas Panormitanus, Tartagni and many others – not to mention the five tomes of the *Corpus iuris civilis* with the Accursian *Glossa* – attesting to great editorial and entrepreneurial skills.

In the preceding age it was not rare for jurists not to be in a position to purchase the *Corpus iuris* with the Accursian *Glossa*, so that for their entire professional life they would use only the precious lecture notes they had taken at university: many such manuscripts of students from the fifteenth century in Bologna or Padua or Pavia have come down to us, today preserved perhaps in a German or French or Spanish library to which a local jurist, in his youth a student in Italy, had made a bequest. Following the introduction of the press, any advocate or judge could afford to have at his disposal a legal library, made up of dozens or sometimes hundreds of works by authors from the twelfth century onwards. Legal libraries of the seventeenth and eighteenth centuries that survived and are preserved today in European public libraries or monasteries often contain several thousand tomes, ordered by subject or author.

This growing availability of legal texts brought about some significant changes in the role of doctrine as a source of law. Faced with a legal question, the advocate or consultant in a judicial controversy could cite from a broad range of opinions allowing him a wide spectrum of legal arguments. Even the most apparently clear statements from legal texts had engendered limited or extensive interpretations from ancient or recent authors which, although often far from the letter or spirit of the text, might still be licitly cited in a case.

The fact is very characteristic that references to doctrinal arguments by advocates and consultants were not limited to interpretive texts of local laws or bodies of Justinian common law, but included also texts and authors from other cultural contexts. In the pages of Giovanni Battista De Luca it is not unusual to find, in support of a legal argument, reference to humanist authors writing on judicial practices in ancient Egypt or Plato's ideas on justice, or texts by the theologians of the School of Salamanca. Later on, the writings of the natural law authors of the seventeenth century, purposely not aimed at commenting on positive local or Roman laws, would become part of the range of texts that could be used in legal practice. In this sense the doctrine of the early modern *ius commune* had, so to say, an omnivorous nature: any idea might be cited, any argument might be employed in a case or a text, and after having been produced by scholars, practitioners and courts of justice, eventually acquired legal weight.

20.2 *Communis Opinio Doctorum*

All this provided the judges called on to decide on the litigants' allegations a broad margin of discretion. Certainty – the prediction of the legal consequences of an act or behaviour – was the natural victim.[1] But certainty is so fundamental a value that no legal order can disregard it.

This explains why, beginning from the fifteenth but mostly in the sixteenth century, instruments came into use to counter the complications and risks resulting from too much discretion and arbitrary practices exercised by lawyers and judges. These follow two different paths which ultimately converge: on one hand the authority recognised to the *communis opinio doctorum*, and on the other the weight and authority of decisions emitted by the supreme courts. The following are a few remarks regarding some essential features of the former instrument, whereas the latter, concerning the supreme courts, will be addressed further ahead (Chapter 21).

The *communis opinio doctorum* consisted in the identification of the legal questions on which, over time, a great number of jurists had expressed themselves in writing – in a commentary on legal books, in a treatise or in a *consilium*. When an agreement was found between all or the majority of jurists, including the more authoritative names, on a specific solution to the question under scrutiny, this was said to have a common opinion (*communis opinio*). From this statement derived the widely accepted consequence that, should the question arise in a case, the judges should adhere to it. More than that: according to some contemporary writers, in this case the common opinion should prevail even over the text of the law, as long as it was clear that the scholars knew this text.

[1] This does not imply that discretion was unlimited. A great connoisseur of the historical reality of the sixteenth century, Francesco Guicciardini, cautioned that 'the free will of the judge [...] does not render him a master,' but simply allows him to 'consider the circumstances and all the elements of the case', which the law may have not foreseen, thus expecting him to judge 'according [...] to his conscience' and not appealable by others but nevertheless subject to 'God's oversight' (Guicciardini, *Ricordi politici e civili*, CXIII, Florence 1929, p. 48). Note the appeal to the supreme value of religious precepts.

It is worth noting that this link with the *communis opinio* was never imposed by law, but imposed itself gradually in legal practice. The purpose was not declared, but was clearly that of providing some element of certainty to a system that had become, as we have said, highly uncertain. Neither the advocates nor the judges were therefore strictly obligated to follow the opinion, but the strong tendency to do so was for a very concrete reason: based on Roman texts the *ius commune* held that the judge was liable not only for fraud, but also for negligence if he made an error in the law. The judge who followed the *communis opinio* was therefore safe from any risk. This was the reason why some treatises were written on the subject; among them, one by Antonio Corazio (Coras)[2], reprinted many times, discusses the possibility of conflict between the opinions expressed by the same author, respectively in the classroom and in a legal opinion, in order to establish which was more trustworthy: the majority felt that legal opinion was more trustworthy because more pondered [Lombardi, 1967, pp. 148–160]. Systematic collections of *opiniones communes* also came to light, which saved the jurists the effort of lengthy research.[3] There were also texts which countered common opinions with other opinions equally common, such as that of Girolamo Caevallos.[4] The range of possible arguments to be held in the courts, which the *communis opinio* tended to circumscribe, thus began once more to increase.

Legal doctrine transmitted through these channels became even more influential: in being used to support legal argumentation and decisions, it routinely acquired legislative weight in questions on which the majority of doctors has expressed concordance. These were islets of certainty in a vast sea where disparity and dispersion of opinions and therefore uncertainty reigned; however, this dispersion in no way diminishes the actual magnitude of the role played by the opinions of doctors of the early modern period, unmatched in subsequent eras.

It is worth underlining that the certainty arising from a common opinion was not necessarily irreversible over time: in an age-old legal

[2] Antonius Corasius, *Tractatus de communi doctorum opinione*, 1574.

[3] *Communium opinionum syntagma* (Lyon, 1576), in many editions: a three-volume work collecting opinions deemed 'common' by twenty or so authors of the sixteenth century (among whom were Claro, Damhouder, Gribaldi Mofa, Ippolito Bonacossa and Antonio Coraso), listing in succession, alphabetically and separately for each author the specific subject of the opinion.

[4] Hier Caevallos, *Speculum aureum opinionum communium contra communes*, Venetiis 1604: as many as 800 questions are included.

system in which new layers of opinions were deposited over the old, the prevailing or common opinion of one era was not necessarily that of another over several centuries, also because jurists in their doctrinal work were not bound to hold to common opinion, but were free to debate and originate new opinions.

If we consider that the doctrines and opinions of jurists were expressed within the legal framework of the *ius commune* – that is, with reference to a system of sources that were supra-national, not state law – it is not unfair to use the expression 'republic of legal culture' to qualify a phase in the history of Europe during which, in a language common to all and in debate unencumbered by state constraints, the international community of scholars was to draw the outline along which each single legal order was to evolve.

Opinion as an autonomous source of law flourished mostly between the late fourteenth and the early sixteenth centuries, its role diminishing, though not altogether disappearing, as the decisions of the supreme courts acquired growing authority within individual states, acting as a constant reference point also for the minor courts.

In the seventeenth century De Luca's *Dottor volgare* attests to this historical evolution, giving a precise measure to the different sources of the *ius commune*. The greatest authority is ascribed to the decisions of supreme courts within a kingdom or principality (but by extension also outside it, in other kingdoms and principalities), though this applied to the specific legal point on which the decision was made, not to collateral arguments or *obiter dicta*. In second place are the 'decisive votes', that is the opinions or the *consilia* written '*pro veritate*' by authoritative doctors; these were followed, in descending order, by the opinions of the Commentators, by the 'modern' scholars educated in humanism (deemed suited to the education of jurists, but not adept at making legal decisions), by the *consilia* and lastly by the written pleadings of the attorneys.[5]

20.3 Legal Professions: Education and Practice

In the early modern period universities continued to play a key role in educating those who aspired to gain access to the legal professions. In addition to ancient universities and those founded in the fourteenth and fifteenth centuries, others were to be founded in Europe during this

[5] De Luca, *Il Dottor volgare*, Proemio, chap. VIII (see also Ascheri, 2003, p. 94 s.).

time. Particular universities at particular times, as we have noted, became centres for the diffusion of the new tendencies in legal science: this occurred in Bourges and Salamanca in the sixteenth century, in Leiden in the seventeenth, in Halle and Jena and elsewhere in the eighteenth. Beginning in the seventeenth century, many of the universities expanded the traditional curriculum to include public law, feudal law, natural law and for the first time also *ius patrium*, dealing with the specific laws of the country. In France, for example, a compulsory course on *droit français* was inaugurated in 1679 with the aim of emphasising the common features of the different *coutumes*; also in the Low Countries, Germany and Lombardy and elsewhere *ius patrium* became a subject of study that included local laws and customs as well as legal decisions. These tied in with the new tendencies in legal thinking and were indicative of the growing role played by state norms and the decisions of supreme courts.

However, everywhere in Europe the Roman texts remained by far the most important and gruelling training ground in the legal education of aspiring young jurists. These were studied in accordance with the traditional scheme, the backbone of which was the nine books of the *Codex* and the first twenty-four books of the *Digest*. Teaching methods were not uniform and did vary between single institutions and professors, who might favour the scholastic method of the late Commentators (*mos italicus*), whereas others adhered to the learned and fiercely philological method of the humanists (*mos gallicus*). From the second half of the seventeenth century some professors and universities began to introduce the doctrines of natural law in their courses.

For two centuries – from the end of the sixteenth century to the end of the eighteenth century – in some regions of Europe, among which was Italy, though still operative, university legal education was to undergo serious upheaval, due in part to the privileged status of the aristocracy, characteristic in this phase of history [Zorzoli, 1986]. As the more prestigious offices and positions were reserved to members of the aristocracy, the professional bodies and guilds (*collegia*) which had included in their statutes the limits on entry based on social class were the breeding ground from which candidates for the high magistracies were selected. The most powerful *collegia* succeeded in obtaining the right of directly bestowing the title of doctor. This occurred in Milan, in Naples and elsewhere. The restrictive measures typical in sixteenth-century Europe were active also with regard to jurists: the existing requirement of citizenship to be admitted to the Law Guild (Collegio dei Giudici e degli Avvocati) was generally extended, and often required the family's having

been resident of the city for as much as 100 years. The more important and prestigious professional guilds – for example, the Collegio dei Giureconsulti of Milan, from which the very powerful members of the Senate were selected – admitted only members of the aristocracy (*patriziato*). In Pavia, the young Jacopo Menochio, destined for a brilliant career as jurist and judge, was rejected by the local college of judges because he was unable to prove the nobility of his family, originally from Lucca. Also the college of law doctors (i.e. the university law school) – sometimes, but not always,[6] combined with that of judges – was kept alive in Europe, sometimes (particularly in Germany) with the legal functions of a court of appeal.

The *collegia* offered courses in law, which were elementary compared to the traditional and demanding university curriculum. Obtaining a doctoral degree following this route was somewhat easier, although more difficult or intricate cases continued to be assigned to highly qualified jurists, equipped with a university law degree.[7]

Venice had a particular system as there the *ius commune* was never adopted, although the very close university of Padova founded in 1222 – where *ius commune* was taught by the traditional method, also after 1405 when the town was conquered by Venice – was for centuries one of the principal centres for legal studies in Europe. In Venice itself, customary law as formalised in the statutes and in the pronouncements of city magistracies was the one in force. An important role was played by the consultants (*consultores in iure*) who were called in to give an opinion on numerous intricate political questions tied to law.[8] Among these was Paolo Sarpi (1552–1623), a monk in the Servite order, erudite author of works such as the great *Istoria del Concilio tridentino* and strong defender of the jurisdictional autonomy of Venice from the papal seat in ecclesiastical matters.

On the other hand legal training continued to represent a means of ascending the social ladder. Andrea Spinola from Genova, in the early seventeenth century, declared that if he found himself in a situation of penury (this did not apply to him), he would not hesitate to favour acting

[6] For Parma, Di Noto Marrella, 2001.

[7] The most qualified senior schools (often established by Jesuits and other religious orders) offered legal notions in the curriculum. The basic texts were Justinian's *Institutions* for civil law (the Roman *ius commune*) and manuals of canon and ecclesiastic institutes, summarising the principles and institutes of the *Corpu iuris canonici* for Catholic countries and those of the Protestant churches in countries of the Reformation (Brambilla, 2005).

[8] On the legal profession in Venice, see Gasparini, 2005.

as advocate rather than as judge, because although less prestigious it was more lucrative [Ferrante, 1989, p. 203]. The 1647 revolt in Naples led to the proposal of a reform which would favour the class of legal doctors to the aristocratic nobility; but it was rejected as 'scandalous' by the Council of Italy in Madrid [Rovito, 2003, p. 509]. Nevertheless at the end of the seventeenth century Francesco d'Andrea left to his grandchildren memoirs in which he said that in Naples, more than anywhere else in Italy, a legal career was the one that opened the doors to high offices and wealth, also for those of a lower-class extraction.[9] It was in any case a lengthy road to pursue, as the steps leading to the magistracies and high public offices tied to the knowledge of law were many. This also applied to the *letrados* ('literates', i.e. educated at a senior level, mostly jurists) active in the administrative and legal interstices of the Spanish dominions.

In France the system of purchasing a vacant office constituted a means for the monarchy to receive revenues in the allocation of public offices, through the payment to the royal treasury of large sums by the candidate. It was a widespread system in the early modern era (*vénalité des charges*), which, however, required the prior verification of the candidate's having received a solid legal education. For this reason a successful career as a royal civil *Officier* could involve several generations of the same family, culminating in the obtainment of offices in the supreme courts, which allowed the entry of the nobility. In fact, a great part of the nobility of the old regime – besides the nobility of ancient feudal origin – was made up of judges and high officers, constituting the 'robed nobility' (*noblesse de robe*): almost all of whom had a legal education.

An office acquired through payment – the sum variable, depending on the office's prestige and lucrative spin-offs – was permanent and in France from the beginning of the seventeenth century extended, making it inheritable, as seen previously (Chapter 17.5). It is, however, important to underline that the chief functions, whether in the magistracies or in the government, were assigned by the king to civil servants (*commissaires*) which could be ousted at any time: this was the case, for example, with the presidents of the Parliament of Paris and of other supreme courts of the kingdom. In general *commissaires* already held a permanent position as *officiers*, but the higher offices with which they were entrusted were, as mentioned earlier, not stable. This gave the sovereign full power to make decisions or vacate the most crucial positions whenever he wanted.

[9] Francesco d'Andrea, *Avvertimenti ai nipoti* (1698), ed. Ascione (Naples, 1990), pp. 141, 156.

20.4 Advocates

An important aspect of the organisation of legal professions was that it was at several levels. In Italy, on the top rung were the *collegia* of jurists of the nobility, whose functions – concerning decisions, consultations and defence – were the more important and lucrative. Of lesser prestige were the advocates holding a professional degree allowing them to act as the defence, but who were not patricians. Beneath these was a category of an even lesser degree, often referred to as *causidici* [Pagano, 2001], who had a representative role in judgement holding the ancient title of procurator and whose task was to ascertain and verify the facts inherent to the case, suggesting elements that might enter into the defence: these are the fact-finders(*fattisti*) spoken of by De Luca in a chapter in his *Dottor volgare*, where the varied roles of the legal professions are clearly outlined.[10] The *causidici* often formed a separate professional guild distinct from those of judges and advocates and sometimes combined with those of notaries.[11] In several cities and regions (as in Venice and elsewhere) also the category of solicitors (*sollecitatori*) can be found, who had a function similar to that of the *causidici*. Notaries were to maintain the professional organisation established in the Middle Ages, with the traditional procedure of co-optation with the register (*matricola*) periodically kept up to date on members of the guild, with its own statutes, the education of its prospective members provided within the corporation and distinct from the university or extra-university legal education of lawyers and judges. Finally there was the vast 'rabble' (so called by De Luca) of collaborators and practitioners, who assisted the various categories.

This broad spectrum of functions and categories within the legal professions, which were found in Italy from the sixteenth to the eighteenth century, is not very different from that of other states in Europe.

In France advocates were organised into broadly speaking autonomous 'orders'(*ordines*) similar to the medieval corporative model. The Paris order was organised so as to make it almost entirely independent of the state as of 1660 [Bell, 1994]: the advocates elected a number of delegates, whereas the president (*bâtonnier*) was nominated by the elder presidents and had key powers as to the admission to or rejection from the guild, although recourse to the assembly was possible and in the last instance to the Paris Parliament, before which the new advocates made an oath on entering the profession [Fitzsimmons, 1987]. In the provinces

[10] G. B. De Luca, *Il Dottor volgare*, book XV, 8–9 (ed. Florence, 1843), vol. IV, pp. 105–126.
[11] On notaries in Milan in the eighteenth century, Salvi 2012.

the autonomy of advocates with respect to the superior courts and sovereign power was generally much less. As of 1537, a degree became compulsory (legal licence) to access the profession, as did from 1679 the course on the new institution of 'French *ius commune*'.

Procurators/solicitors instead had the status of royal officials (*officiés*) and as such were nominated by the king and had access to the system whereby they could purchase an office. They too had a degree of autonomy. No specific degree was required to access the office [Halpérin, 1996].

In Germany the two categories of defence advocates and procuratores co-existed with functions being distinguished in the traditional way, although the position of procurator seems to have prevailed, inasmuch as they not only represented the party in the case, but presented their client's side of the case orally in court. For this reason in many German territories advocacy was the first step in the profession, leading to gaining the title and functions of a procurator.

The organisation of the profession of advocate on two levels became established in English common law, giving rise to the two branches of solicitors and barristers,[12] mentioned previously, which survives to this day. Recent research [Lemmings, 2000] has highlighted the regression in common law's role after the seventeenth-century English revolution, relative to parliamentary power and also to the royal government. Comparable tendencies have been observed in other European legal systems, in keeping with the increased role of the modern state [Halpérin, 2014, pp. 23–31]; in Prussia during the reign of Frederick II the profession of advocate was actually abolished in 1780, being replaced simply with assistants to the judge.

A very important aspect is the close interconnection between the functions and the role of defence, consultation and judicial decision. In Italy for centuries, long before the sixteenth century closure of the nobility, the College of judges and advocates constituted a single corporation, upheld by the same statutes and with no distinction between the two professions. Within the corporation, the town elected magistracies (*consoli, podestà*, etc.) selected the jurists entrusted with the drafting of the *consilium sapientis* which the judge simply transformed into the decision of the case. Moreover, the College could act as a court of appeal in certain cases: as, for example, in Verona for the cases of Cattaro in Dalmatia

[12] Between 1681 and 1820 the total number accessing the traditional Inns of Court was 6,017, that is, forty-two new members a year (Lemmings, 2000, p. 63).

[Carcerieri de Prati, 2001], whereas elsewhere these functions were carried out by another College, that of the doctors in law as distinct from the previous, or that of the professors of the local faculty of law: for example, in Jena but also in other universities in Italy, Holland and other countries.

The practice of asking for a legal opinion from the faculties of law became frequent in Germany. Not only the courts, but the parties themselves could ask for a *consilium*, often in trying to decide whether to pursue the case, or to establish a favourable line of reasoning in case of litigation [Falk, 2006].[13]

As to the techniques employed in these centuries by advocates and consultants in arguing a case, few descriptions have the vivacity or accuracy that characterises the pages of De Luca in his *Dottor volgare* and *Lo stile legale*: among other things, he distinguishes between different types of arguments useful respectively in oral and written argumentation, before different tribunals and judges – supreme courts, inferior courts, monocratic and collegial courts, also based on the different intellectual level of the judges – and in the various phases of the procedure, from the preliminary to the debate to the confidential discussion with the judge.[14]

An examination of the allegations and legal arguments, still largely unexplored, shows the variety of means employed and the flexibility of the oratorical skills. A single example in the last years of the old regime shows the ability and persuasiveness with which a lawyer from Bologna, Ignazio Magnani, was able in 1789, in the role of advocate of the poor (*avvocato dei poveri*), to exclude premeditation in a case involving a young man who had killed his fiancée after she had brusquely rejected him.[15]

In the early modern age the highest offices of the magistracy were assigned, by the king, to members of the College of jurists, which had inherited (e.g. in Lombardy) the functions of the medieval *Collegium iudicum*, but were now reserved to the members of the Lombard nobility [Vismara, 1958]. The virtual monopoly of legal offices – in decisions as well as defence – in the hands of the Colleges of jurists was maintained in the early modern period, although the king and his government were the ones to choose or at least organise the selection of the members of the great magistracies.

[13] On the Law Faculty of Heidelberg, see Schroeder, 2014.

[14] De Luca, *Dello stile legale*, in *Theatrum veritatis et iustitiae*, vol. XV (Venetiis, 1734), pp. 521–553.

[15] L. Magnani, *Collezione delle piúcelebri difese criminali* (Bologna, 1825), Luigi Sbilisca case.

In France the king's officials in the territory, the *baillis* and the *sénéchaux*, abandoned judicial functions as they were nobles with 'a short cape', that is trained in the military, whereas those judging in the name of the king were lieutenants, 'long-robed' nobles, that is, jurists with a legal education [Sueur, 1994, II, p. 516]. But local courts had inherited and maintained in the early modern era the active presence in court of advisors or assessors, mostly advocates or local notables, who cooperated in deciding on the case with those presiding in the court. At the beginning of the sixteenth century, some edicts transformed the role of advisor into an 'office' which could be purchased with the system of offices being for sale.

21

Court Decisions

21.1 Supreme Courts and Rotas

Increasingly over the course of early modern Europe, judicial procedure entered centre stage as a source of law. This referred to pronouncements and decisions of supreme courts in every state, that is, those judging bodies which often came to be known as supreme because their competency and decisions were of last resort, as they could not be overruled by either any other court or the sovereign himself.

Every state had its supreme court or courts [Petronio, 1997], and each had specific features and competencies. In Naples, for example, The Sacred Royal Council (Sacro Real Consiglio), served as the supreme court of the kingdom. In Italy there was also the Milan Senate, created by the French in 1499 and after 1535 inherited by the Spanish monarchy, a court which had derived from the fusion into a single court of the two Councils dating back to the era of the Visconti and Sforza, one of which had a specifically administrative function and the other a jurisdictional one. In the Duchy (later Reign) of Savoy the Piedmont and Savoy Senates, instituted by Emanuele Filiberto in 1580, and from the seventeenth century those of Pinerolo and Casale, also functioned as supreme courts. A body of their decisions affirmed its importance even outside the dominions of Savoy, mainly thanks to some printed collections.

The Roman Rota acted as a highly authoritative ecclesiastical court for all Christianity, but also as a civil court of the pontifical state in civil jurisdiction, although not of last instance. During the early sixteenth century in central Italy a number of supreme courts were instituted, known as *Rotae*, the judges of which were selected from among prestigious jurists who did not belong to the state for which they were chosen. These new courts were part inspired by the Roman Rota and in part by the supreme court of Aragon [Isaacs, 1993]. From 1502 the civil rota of Florence was compelled to motivate its decisions, as did the civil rota of Genoa, which soon acquired particular authority also outside of Italy

for the excellence of its decisions to do with commerce [Piergiovanni, 1987].

In France by the thirteenth century the Parliament of Paris, successor of the Curia Regis, had been reshaped as the supreme court of the kingdom. In later centuries, from the thirteenth and particularly in the fifteenth century, other supreme courts were added, whose decisions were final and usually not subject to appeal, one in each of the historical regions absorbed by the kingdom: this was the case in Provence, Languedoc, Brittany, Normandy, Dauphiné, Franche-Compté, Roussillon, Loraine and others. The Parliament of Paris kept its primacy not only as its jurisdiction covered about one third of the kingdom's territory, but also because it had the power of registering royal ordinances, a necessary condition for them to formally acquire the status of law.

In Germany, superior to the courts of territorial principalities, we find two supreme courts. One was the Imperial Court Tribunal (*Reichshofrat*) that was competent on imperial laws and prerogatives and was chaired by the emperor himself; the other was the Court Chamber of the Empire (*Reichskammergericht*), competent as court of last instance to appeals against civil decisions of local judges (except against the territorial courts of those principalities to which the emperor granted the 'privilege of not appealing') and as court of first instance for cases of particular political or public relevance, as major feudal questions or disputes brought by a city or a territorial principality.

The reform of 1495 modified the structure of the Reichskammergericht, with the nomination of learned judges, educated at university on the texts of Roman law and trained in methodologies current in legal teaching; this was initially required for half of them and later extended to all sixteen components of the court. They applied Roman *ius commune*, including the *glossae* and doctrine, particularly the *mos italicus*, whereas the customary law that the litigants wished to apply needed to be proven by them before the judge.

The authoritative decisions of the Reichskammergericht, although defective with reference to speed, procedures and capacity to settle delicate questions, had the key judiciary role within the empire [Diestelcamp, 1999].[1] Its decisions were circulated also outside Germany through works published by some of its judges, as, for example, Mynsinger von Frundeck

[1] In the 1770s Goethe worked in this court in Wetzlar for a period after his degree and later, in his memoirs (*Dichtung und Wahrheit* bk. 12), described it in a way which recent scholarship has confirmed (Diestelcamp, 1999, p. 274).

(d. 1588) and Andreas Gaill (d. 1587).[2] The reform was to effect a broad reception of the *ius commune* in the German territories, as its decisions influenced the lower courts, reluctant to see their own judgements overturned on appeal.

The Low Countries under Charles V were detached from the Duchy of Bourgogne and almost wholly separated from the empire by the creation of a new political and legal order that included seventeen provinces, among which were Flanders, Liège, Luxemburg, Artois, Lille, Douai, Brabant and the Holland provinces: a territory corresponding to today's Benelux and to some other provinces which later became part of north-eastern France. The institution of the Grand Conseil de Malines was created as a superior jurisdictional body in order to unify local laws and customs. The great diversity of local customs (more than 600 in number) which the emperor tried unsuccessfully to co-ordinate and unify with a pragmatic sanction of 1531[3]) found in the decisions of the Grand Conseil a framework mainly inspired by sources and doctrines of the *ius commune* [Wijffels, 1985], which some professors at Leuven and Leyden had taken to a high level, as seen earlier (Chapter 19.5).

The victorious battle for independence removed from the Spanish dominions seven northern provinces of the Low Countries after 1580, also because of the prevalence of their choice for Calvinism as opposed to the Catholicism of the southern provinces. The state of united provinces came into being: Holland, Zeeland, Groningen, Utrecht, Frisia, Geldern, Zutphen. The ties with the court of Malines also were severed and appeals against sentences of local judges in these provinces went to the superior court of Holland.

[2] Andreas Gaill [...] J. Mysinger, *Practicae observationes Imperialis Camerae [...], Coloniae Agrippinae*, 1583. The work sets out judicial procedure in a systematic form, adding two sections on contracts and successions. The frequent citations of the learned traditions of the *ius commune* of the time, particularly Italian, goes alongside the indication of the decisional approach of the Imperial Court. An interesting example is the common custom of entrusting only to the feudal lord the choice of the peers in a feudal judgement in Germany. Gaill declared that this was not only contrary to the *Libri feudorum*, but also irrational and unfair ('*contra aequitatem*'), in that it did not guarantee the vassal a fair trial. He also states that this was also the pronouncement of the Imperial Court which had decided that on this point the lord and the vassal should have the same rights: '*[Sie] sollen im gleichem Rechten gehalten werden*' (*Observationes*, bk. II, 34, p. 323). The work is in Latin but some quotes are in German.

[3] Text in Gilissen, 1979, p. 201.

21.2 Judges, Competencies, Court Procedures

European superior courts were not uniform with regard to their discipline, power and procedures. Yet some common elements are perceptible. First of all, a first general aspect ingrained in this phase of absolutism, the imposing growth of sovereign powers, is to a great extent made through royal jurisdictions, of which sovereign courts are typical expressions. The leading model was that of the 'jurisdictional state', in which sovereign powers are exercised through controls and decisions of a judicial nature, rather than through the exercise of administrative or legislative powers, which were to become dominant in a later phase.

As to the competencies of the superior courts, it is necessary to keep in mind that the modern distinction between functions of the state was unknown in the age of absolutism. This is confirmed by the fact that many supreme courts (not rotas, however) also had functions of a legislative nature. In several states – such as in France, in part of the Spanish kingdom and in the Duchy of Milan when the Senate was instituted – the laws of the king did not come into effect until they had been registered by the parliament or the Senate; the registration (*enregistrement, interinazione*) was an effective power, not a mere formality. It was not unusual for the king to have to defer to the amendments requested by the court or renounce having the *ordonnance* put into effect.[4] In France the advocate of the Paris Parliament, Etienne Pasquier – pupil of Cujas and key supporter of the Gallican view in favour of the monarchy and against the Jesuits – acclaimed the function of the Paris Parliament and of the Cour des Comptes defining these magistracies as the 'still' through which the source of the law (which was the king himself) should necessarily pass before becoming effective [Fumaroli, 1980, p. 430]. Also where such formal power of the supreme court was not established, the opposition from the royal court was often enough to halt the king or his ministers, as occurred in Naples at the beginning of the eighteenth century with regard to a decree (*prammatica*) wanted by Viceroy Althann [Luongo, 2001, p. 388].

Moreover, the orders emitted directly by the highest courts often had the authority of law, being effective in general and not limited to a single case, particularly with regard to procedure; regulatory decisions (*arrêts de règlements*) of the Paris Parliament could dictate binding rules on

[4] One instance among many: the reform of the French Ordonnance du commerce of 1673 – prepared by Chancellor Miromesnil in 1779 – which did not go through due to the hostility of the Paris Parliament.

issues which were not under royal, nor customary jurisdiction.[5] Several other functions exercised by the supreme courts had the nature of executive powers: in the administration of the career of minor judges, in the control over ecclesiastical benefices, in the management of the universities or in the granting dispensations on the prohibition of transferring or selling inherited goods on the basis of a *fidei commissum*. Court judges were often assigned governmental duties in cities or local communities, such as the magistrates (*pretori*) of Pavia or Cremona, chosen among the members of the Senate.

However the principal task of the supreme courts was jurisdictional. Often courts had exclusive jurisdiction over matters of particular political importance, for example, in questions to do with crown domain, or in feudal relationships, or cases to do with local communities, or in ecclesiastical benefices where the state had claims against the Church. In several states the supreme courts had to make a pronouncement whenever an inferior court was involved in a criminal case where the culprit risked capital punishment. Appeals in criminal cases were extremely restricted by law in these centuries; that explains why in such cases the decision on capital punishment was not left exclusively to the ordinary lower court judge. Supreme courts were also often competent to instruct the case and even to make decisions in procedures for granting pardons, which was a key sovereign function in the exercise of power of the absolute states.

For civil cases, decisions of last resort were generally up to the supreme courts only for more important cases. Often the courts had the power to summon, meaning that at their discretion they could directly take on a case, removing it from a lower court of first or second degree. The courts therefore had a vast and varied gamut of legal competencies, pursued with procedural rules that were not the same everywhere. The position of the rotas was different also because their decisions could generally be appealed before a local court made up of local jurists [Savelli, 1994].

Appointing the members of the supreme courts was generally the direct prerogative of the king, following different procedures: sometimes the choice was made by him exclusively, in other cases by selecting the new judge from a list of names proposed by the court itself or by the

[5] E.g. in 1551 a parliamentary pronouncement admitted, at the instigation of the great jurist Charles Du Moulin, the revocation of donation with the arrival of a son, a disposition which eventually entered into the Paris *coutume* drafted by the same Du Moulin.

territorial governor in which the court exercised jurisdiction. The system of 'venal' offices existing (as we have seen) in France, Spain and elsewhere from the sixteenth century onwards permitted candidates from sufficiently wealthy families to compete for the highest and most lucrative offices in the most prestigious magistracies; further, the admittance in France of hereditary status to many 'officials' often allowed the transmission of an office within the same family. The requisites for legal competence of the judges, however, remained essential.

The aristocratic closure in Europe which began in the sixteenth century, in several states limited the selection of members of the supreme courts to the nobility. Such was the case in Milan, as we have seen, whereas in places where there was not such a strict social requirement the exercise of the higher legal functions constituted a way of accessing the status of nobility, known as *noblesse de robe*.

In Naples access to the two highest courts, the Sacred Royal Council (*Sacro Regio Consiglio*) and the *Regia Camera della Sommaria* (whose competency was in fiscal matters) were open to families who did not belong to the nobility and were sometimes also of humble origins: as Francesco d'Andrea proudly underlined at the end of the seventeenth century, who elucidated the role of court lawyers and particularly advocates in the kingdom, comparing it with the different regimes in the aristocratic republics of Venice and Genoa.[6] Members of the rota, on the other hand, were normally selected from among prestigious 'foreign' jurists who were not citizens of the country where the rota was active[7] as we have seen.

Contrary to the rota system, the members of the supreme courts were mostly nominated for life [Savelli, 1994]. This gave members of the college a large measure of autonomy, even towards monarchical power. Therefore, in the absence of a division of power in the modern sense, the courts often counterbalanced the power of the monarch, who, as seen earlier, was 'absolute' only in theory. It is therefore correct to refer to a 'balance of power' which during some phases – for example, in France in the years of the Frond in the mid-seventeenth century, when for a few years the Paris Parliament imposed itself on the monarchy itself, before Louis XIV consolidated his powerful style of government – was inclined towards the magistracies. Though they were the voice of the nobility, in some measure they also represented broader interests than their social

[6] Francesco D'Andrea, *Avvertimenti ai nipoti* (chapter 20.3, note 9).

[7] E.g. Sigismondo Scaccia was a judge in the rota of Genua and Ansaldo Ansaldi of Florence.

status alone: this occurred, for example, in Italian territories under Spanish dominion [Petronio, 1972].

Trial procedures differed widely among courts. The Roman Rota, whose great authority also outside Italy was mentioned previously, from the fourteenth century onwards made provision for a written draft of an outline of the decision (*decisio*), with arguments of fact and of law, founded on the allegations of the litigant's lawyers but drafted by the auditor-rapporteur and based on the presentation of the controversial points (*dubia*). After the case was submitted to the college of rotal auditors and the individual vote given by each auditor was collected after the arguments of both parties had been heard separately, the text of the *decisio* was submitted to the parties for possible objections and, if necessary, modified. Only then was the sentence emitted, limited to the operative part of the judgement [Santangelo, 2001]. Beginning in 1563 the written publication of the *decisio* became obligatory and thus began an official record of decisions by the Roman Rota which acquired great authority. A similar procedure (though not everywhere identical) was adopted by other great Italian courts of the old regime. Provincial rotas of the ecclesiastical state existed in Avignon, Bologna, Ferrara, Perugia and Macerata [Gorla, 1993].

Whereas the sentences of the communal age did not provide a motivation, the rote more or less followed the Roman Rota's requirement of a motivation, although it was applied to the sentence rather than the preliminary outline of the decision (*decisio*) mentioned previously. However, other supreme courts of great prestige and authority made decisions without having to provide a motivation: this was the case, for example, of the Milan Senate,[8] which was widely known outside the Duchy for its criminal law decisions, mainly through the work of Giulio Claro [Massetto, 1989].

In the decision, the discretionary latitude of supreme courts was greater or lesser according to single case, but could be very wide indeed. The Paris Parliament and other supreme courts of the French kingdom, particularly those in the Midi, could openly shun the strict law in their decisions because they considered themselves, in the same way as the sovereign, 'not bound to observe the law' (*legibus soluti*, as famously stated in the *Digest*); only with the Ordinance for the Reform of Justice of

[8] Giulio Claro, member of the Milan Senate, attests to this court being held simply to pronounce absolution or sentencing: '*non dicitur nisi "viso processu condemnamus", vel "absolvimus", et sententia valet et tenet*': Claro, *Receptae Sententiae*, pars. V, § Finalis. q.93, vers. *fuit aliquando*.

1667 were such wide discretional powers abolished. The Milan Senate – which was described as judging with 'almost divine inspiration' and even '*tamquam Deus*' [Monti, 2003][9] – was given leave by the law to judge 'according to conscience', 'equably', 'considering only the factual truth' and (according to some jurists) even 'against the *ius commune*' and 'against the statutes'.[10] A similar discretion was given to the Sacred Royal Council (*Sacro Regio Consiglio*) of Naples [Miletti, 1995]. Even royal dispatches could sometimes be hidden on request from professional judges [Cernigliaro, 1983, II, p. 622]. It was the same for many other European supreme courts in Italy and Europe, from Piedmont to the Dauphiné and Aquitaine [Massetto, 1989]. But it could also happen that within a single kingdom a local court would give an interpretation of the law that was not that of the central court: this occurred in Sicily in the eighteenth century concerning the powers of disposal of feudal possessions on the part of the barons [De Martino, 1979, p. 177].

This meant that the supreme court could decide also on something that went beyond what the parties had requested, based on facts known to the court, as long as it was in the documentation;[11] moreover, the court could even overrule positive law, just as the king could, given that the court had the power to represent the king.[12] The quality and quantity of the penalty could vary, based on a free evaluation of the elements put forward for judgement, by virtue of the power granted to the supreme courts, which was qualified with the technical term *arbitrium* [Meccarelli, 1998]. Naturally the traditional methods of skilled argument were liberally employed.

Justice in the Ancien Régime revolved around the system of 'legal proof'. Judges were expected to follow predetermined rules of evidence, which were in part determined by Roman, canon and local laws – for

[9] This rather far-fetched association was justified by jurists inasmuch as the supreme court (Senate, Council and others) had received from the king the power to represent him, and so in the administration of justice it therefore had the same latitude of powers as the sovereign; medieval political and religious ideology attributed to the king a charisma and power of a divine nature, based on the passage in the Old Testament (Proverbs 21.1) according to which 'the heart of the king is in the hand of God'.

[10] See Ruginelli, *Tractatus de senatoribus* (Mediolani, 1697), § 1, gl. VI, ch. 28, nn. 275–276 (on which, see Monti, 2003, p. 163).

[11] '*Et super non petitis, de quibus constat in actis, iudicare valide possunt*': Calvino, *De aequitate*, III. 253, nn. 5–6 (Mediolani 1676), on which, see Monti, 2003, p. 123.

[12] '*Cum Senatus noster principem representat, non ligatur eius legibus et exemplis, nec statutis, cum lege positiva solutus sit*' (referring to the Milan Senate, Giuseppe Oldradi, *De litteris et mandatis principum* (Milan, 1630) *praeludium* I, n. 45, on this see Massetto, 1989, p. 1219).

example, the rule that full proof (*plena probatio*) of a fact required at least two witnesses in agreement – and in part determined by rules developed over time by *ius commune* jurists. There was therefore a complex set of rules that in criminal cases allowed clues (*indicia*) and partial proofs to add up to a full proof [Rosoni, 1995]. If in a criminal trial full proof was not attained, judges could not condemn the accused to the penalty determined by law. This led to the confession often being a decisive feature in order to reach a full proof. Based on clues, the judge could order the accused to undergo torture [Langbein, 1977]. If the confession was confirmed even after torture had ceased, the prescribed penalty was inflicted. If full proof was not arrived at, the *ius commune* allowed the judge to inflict a penalty of his own discretion (*poena extraordinaria*), obviously a lighter one than the statutory one would have been [Alessi, 2001]. Furthermore, beginning in the age of the Commentators (particularly with the canonist Johannes d'Andrea) the practice had become customary – in cases where the evidence and presumption of guilt were not sufficient but neither were they altogether lacking – to pronounce a judgement which was neither to condemn nor to absolve, but rather permanently suspended the case until ascertainable evidence should emerge at a future date (*absolution ab instantia*).[13]

The system was antithetical to the modern system of proof. Judges were not free to evaluate proofs as there were strict rules they had to respect, but on the other hand they were not tied to the modern legality principle by which there can be no crime and no punishment without a pre-existing penal law (*nullum crimen, nulla poena sine lege*). They therefore had broad discretion in inflicting penalties.

Note that such broad discretion with respect to normative rules empowered courts to override some norms of the *ius commune*, sometimes in innovative ways. This was indeed the case with some of the supreme courts also with regard to the legal proofs.[14]

21.3 Collected Decisions

The transcription of decisions made as of 1254 by the Paris Parliament had given rise to Record Rolls, the earliest of which date back to the late

[13] Schmoeckel, 2000, pp. 360–409.

[14] Some supreme courts, one being that of the Roussillon, making use of their discretion and the right to judge *secundum conscientiam* and equitably, had gone beyond the system of legal proof by the end of the Ancien Régime, avoiding having to resort to judicial torture to obtain proof (Durand, 1993).

thirteenth century (the *Olim*; see earlier); in the fourteenth century Guillaume du Breuil collected other decisions in a work which was to be reissued several times during the sixteenth century,[15] and Jean Le Coq (Johannes Galli, d. 1400) produced a work in which a number of judicial cases decided on by the Paris Parliament were presented in form of questions, with the arguments of both parties followed by the decision.[16] For two centuries France also took appeals from those Flemish territories that were under French rule.[17]

Other widely circulated collections of Paris Parliament decisions were edited between the sixteenth and the eighteenth centuries by jurists such as Papon, Louet, Brodeau and Rousseau de la Combe. There were also collections of decisions of the Parliament of Grenoble in the Dauphiné edited by Guy Pape (1490),[18] the decisions of the chapel of the archdioceses of Toulouse (1493),[19] those of the Bordeaux Parliament edited by Nicholas Bohier[20] and others, widely used also outside of France.

The decisions of the rota in the city of Genoa on commercial questions, edited by Marco Antonio Belloni,[21] were known by jurists and cited in the doctrine all over Europe not only because of the commercial importance of the town itself – the most powerful and richest banking centre of the world between the sixteenth and seventeenth centuries, as attested to by the magnificent *palazzi* and the portraits of the more eminent citizens painted by the greatest artists of the time, from Rubens to Van Dyck – but even more so for the quality of the decisions. The Roman Rota also produced collections of decisions (in the sense outlined), beginning with the fourteenth-century ones of Thomas Fastolf, Bernard du Bosquet[22] and Gilles Bellemère[23] (Santangelo, 2001), and continuing

[15] G. Du Breuil, *Stilus Supraemae Curiae Parlamenti Parisiensi atque Tholosani* [...], Paris, 1530.

[16] Johannes Galli, *Quaestiones*, edited by Marguerite Boulet-Sautel, Paris, 1944.

[17] See the excellent modern edition of these cases, for the period between 1320 and 1521, edited by R.C. van Caenegem, *Les arrets et juges du Parlement de Paris sur appels flamands conservés dans les registres du Parlement*, Bruxelles 1966–1977, in two volumes.

[18] Guy Pape, *decisiones Parlamenti Delphinatus* [...] (Lugduni, 1577).

[19] *Decisiones materiarum quotidianarum [...] in Capella sedis archiepiscopalis Tholose [...]* (Lugduni, 1527).

[20] Nicholas Bohier (Boerius), *Decisiones Burdegalenses* [...] (Lugduni, 1579).

[21] *Decisiones Rotae Genuensis de mercatura*, Genuae 1581, reprinted until the end of the eighteenth century.

[22] Rota Romana, *Decisiones quae hactenus extant* (Lugduni, 1567): in which are reproduced the *Antiquiores*, the *Antiquae*, the *Novae* and those of Thomas Fastolf (Santangelo, 2001), pp. 61–76.

[23] Aeg. Bellamera, *Decisiones* (Lugduni, 1556).

with the *Recentiores* edited by jurists of note such as Prospero Farinaccio, which were all widely circulated and used in particular for matters of civil procedure, ecclesiastical benefices, usury and marriage. In addition there were the collected decisions of the Sacred Royal Council of Naples edited by Matteo D'Afflitto (1448–1528)[24] [Vallone, 1988], by Vincenzo de Franchis (1580–1609)[25] and other judges and jurists, these too widely used by Spanish, French and German legal practitioners and authors, as well as by those of other Italian states [Miletti, 1998].[26]

In this as well as other matters it was renowned jurists and judges who collected and sometimes supplemented legal decisions and published well-received collections. For example, in the Duchy of Savoy, the judge Antoine Favre – educated in the humanist school and author of important textual analysis[27] – in 1606 gathered in the systematic order of the Justinian Code a vast collection of decisions of the Savoy Senate of which he was an authoritative member.[28] The same is true of Ottavio Cacherano[29] and Antonino Tesauro[30] for the Piedmont Senate; Carlo Tapia collected the decisions of the Sacred Royal Council of Naples and other Italian supreme courts.[31] Giulio Claro was the author of the well-known compendium on criminal law mentioned previously, in which he cited a number of decisions of the Milan Senate of which he was a judge: the fame of Claro's work was to give these decisions a Europe-wide authority although they were never collected. The Neapolitan Giacomo Antonio Marta edited a *Compilatio totius iuris controversi* in 1620,[32] in which he gathered in summary form the decisions on difficult legal questions of more than fifty courts in Italy and outside in the German empire, Lipsia, the Dauphiné, Toulouse, Portugal and Aragon, as well as the Roman Rota.

[24] M. de Afflictis, *Decisiones Sacri regii Consilii Neapolitani, per Matthaeum de Afflictis [...] collectae* (Venetiis, 1596).

[25] V. de Franchis, *Additiones aureae, et annotationes solemnes ad tres partes decisionum Sacri Regij Consilij Neapolitani a D. Vincentio De Franchis [...] editarum* (Venetiis, 1616).

[26] A rich sampling of this collections of decisions is in Ascheri, 1989, pp. 212–235.

[27] Antoine Favre (Fabro), *Coniecturarun iuris civilis libri sex* (Lugduni, 1596–1599; id., *De erroribus pragmaticorum* (Francofurti, 1598).

[28] Antoine Favre (Fabro), *Codex Fabrianus definitionum forensium* (Ginevra, 1640).

[29] O. Cacherano, *Decisiones sacri Senatus Pedemontani* (Venetiis, 1570).

[30] G. A. Tesauro (Thesaurus), *Quaestionum forensium libri quatuor* (Augustae Taurinorum, 1656).

[31] *Decisiones Sacri Neapolitani Concilii*, 1629; *Decisiones Supremi Italiae Senatus*, 1626.

[32] Marta *neapolitanus, Compilatio totius iuris controversi* (Venetiis, 1620) in six tomes, respectively, on civil decisions, criminal decisions, contracts, feuds, succession and benefices. Within each of these sections, the subject matter is ordered alphabetically.

The authors of collections of *decisiones* were generally jurists who were active in a court, the selected decisions for the most part being those in which they had participated mostly as *rapporteurs* and as such had written the argument on which the College based its decision on the controversy. This is the way the collections came to be of Guy Pape of the Dauphiné, of Nicholas Bohier for Bordeaux, of Matteo d'Afflitto and Vincenzo de Franchis for Naples, of Andreas Gayl for the German Imperial Chamber Court, of Jean Le Coq for the Paris Parliament and others. In producing the collection, the doctrinal opinions and the line of reasoning could be revised and sometimes modified with respect to the original decisions.

The value of these collections – and the reason for their widespread use also outside the state where the court functioned – was not their nature of decisional precedent, but rather in the excellence of the arguments and opinions, enhanced by originating from courts of great authority. At the end of the seventeenth century the *Bibliotheca legalis* of Fontana[33] contained an index of no fewer than 800 decisions, half of which came from Italian collections [Ascheri, 1989].

The Roman Rota considered still valid the judicial precedents contained in collections of *antiquae*, fourteenth-century decisions which only a qualified majority could challenge [Ascheri, 1989, p. 105]. In Naples too the decisions of the Sacro Real Consiglio were accepted without question, and the approach that considered the jurisprudential line consolidated by previous decisions (*stylus iudicandi*) as binding for the judges in the kingdom, for some going so far as to nullify a contrary decision, was upheld by authors such as Matteo d'Afflitto [Vallone, 1988]. On occasion – for example, in Tuscany and at the Roman Rota – the principle of precedent as binding prevailed: two (or three) analogous decisions by supreme courts in separate cases constituted a precedent which could be binding for the same court itself [Ascheri, 1989, p. 99]. In the Savoy kingdom the eighteenth-century constitutions of Vittorio Amadeo II gave the decisions of the Senate explicit and formal value as source of law, subordinate to royal law and statutes but superior to the *ius commune*.

The decisions of the supreme courts had a partially unifying effect for the law effectively practised within each legal order [Gorla, 1977]. This certainty was an essential function of the supreme courts of the early

[33] A. Fontana, *Amphitheatrum legale, seu Bibliotheca legalis amplissima* (Parmae, 1688), ed. an. Turin, 1961, 3 vols.

modern age. Also outside the state where they originated, the decisions of some great courts were often to have a parallel or even superior *vis-à-vis* the doctrinal theories and opinions of the great jurists and authors of legal treatises.

It is difficult to determine the internal quality of justice administered during these centuries, also because of the extreme variation in legal regimes and jurisdictions. Together with demonstrations of respect (tinged with fear) for the power of the great courts and their final decisions, there were ironical and critical expressions which could be fierce. A good example is Rabelais' incomparable portrait of the judge deciding cases on the spur of the moment by tossing a die to determine which of the litigants was right,[34] or deciding *a priori* to 'burn the papers' and proceeding without advocates.[35] Equally alluding to the defects of the law at the time [Massetto, 2006] is the description made by Cervantes in his Don Quixote of law as administered by Sancho Panza, governor for a moment of a faraway island:[36] with clear approval on the part of the litigants, common sense and speed replace the tortuousness of traditional procedure.

But this kind of behaviour, which clearly reflects the critical views held by Rabelais and Cervantes on the justice in their kingdoms, is imagined for minor characters, of a comical nature as if to exorcise the subversive element. Even if caustic, until the late eighteenth century criticism does not translate into a plan or prospect of basically reforming a deep-rooted legal system of many centuries.

[34] Rabelais, *Pantagruel*, p. 3, chs. 39–40 (ed. Boulenger, Paris, 1955, p. 468).
[35] '*Prémièrement*' – Pantagruel demands – '*faictez moi brusler tous ces papiers*': Rabelais, *Pantagruel*, p. 2, ch. 10 (p. 216).
[36] Cervantes, *Don Quixote*, II, chap. 45 (publ. in 1614).

22

Local Laws and Royal Legislation

22.1 Local Laws

In the first three centuries of the early modern period, until the end of the eighteenth century, local and particular laws remained a fundamental component of the system of sources of law in the whole of continental Europe.

As to particular laws, one need only recall their characteristic, which is to provide a specific discipline for regulating the law of a given order or social class. Feudal nobility, urban nobility, the military, the merchant and trade classes, craftsmen, yeomen and sailors – not to mention the secular and regular ecclesiastical orders, which were subject to canon law and the Church forum – each had its own rules as to personal statutes, liabilities, rights and sanctions. Feudal, commercial, military and agrarian law all constituted specific legal normative bodies, to a large extent customary and originating in the late Middle Ages. They were in force until the end of the eighteenth century, for the most part not tied to the political geography of the continent and often crossing the borders of the individual states: an example is the alpine customs on the management of woodland and pastures, another are the uniform maritime customs.

In Germany, along with norms of imperial law which were in effect throughout the territory, the laws of the territorial principalities which had been codified in the sixteenth century and the *ius commune* whose reception will be addressed later, were the city statutes which survived particularly in some imperial cities, which were not subject to the authority of the territorial principalities but directly to the empire and therefore classified as 'free' towns. Between the fifteenth and sixteenth centuries the medieval legislation of these cities was mostly substituted by newly drafted statutes, sometimes at the behest of a single learned jurist, sometimes at the behest of jurists who were active city administrators. Often the Roman *ius commune* amply supplemented the pre-existing layer of customary law, but there was no uniformity in this.

Among the cities which acquired a new statute, we just mention a few examples. Nuremberg with the 1479 reforms was the first to systematically integrate customary law with the *ius commune*; Worms with the 1499 reform was to give greater weight to the Roman *ius commune*; Frankfurt on the Main was to undergo a revision of court procedure in 1509 and a new reform published in 1578, mostly the work of the judge Johann Fichard; in 1520 the city of Freiburg in Breisgau entrusted the task of rewriting the text of the statute to the great humanist and jurist Ulrich Zasius, who was successful in achieving a balance between local custom and a more scholarly approach. Elsewhere, as in Lübeck, the draft of the statute (1586) by Calixtus Schein was not open to receiving the Roman *ius commune* and deliberately held to local custom; the same can be said of Hamburg in the reform of 1497 and its further revision in 1603. Other cities, such as Hapsburg or Cologne, kept the medieval statute with only partial reforms.

In the provincial Italian territories under Spanish dominion, some legislative texts form a coherent whole. For example in the Duchy of Milan, subject to the Spanish crown between 1535 and 1713, the *Constitutiones* of 1541 established the competencies of the magistracies, the system of penal sanctions and some cornerstones of public and private law. Many of its dispositions originated from the Visconti and Sforza eras and the brief period of French dominion (1499–1512) during which the Duchy had taken on some characteristics of a modern state. But the Constitutions of Charles V were actually the result of a reformulation that was not just formal; they were the fundamental laws of Spanish Lombardy for more than two centuries, their application taking priority over all other legal sources and continually publicised and analysed through exegesis and commentaries.

The kingdom of Naples, also under Spanish rule, was characterised by an intricate dialectic between sovereign authority and the powerful feudal class [Cernigliaro, 1983] and had no similar fundamental legislative text, also because the 1231 *Liber augustalis* of Frederick II, supplemented with Angevin chapters, Aragonese pragmatics and successive royal decrees, had constantly retained its efficacy. The vast compilation[1] of the first decades of the seventeenth century by the Neapolitan judge Carlo Tapia, regent in the Italian Council of Madrid, with which – making use of legal treaties and commentaries but chiefly of the decisions of the high courts of the kingdom – he wanted to order the myriad of dispositions in force,

[1] *Ius Regi Neapolitani*, 1605–1643, 6 vols.

distinguishing them from those that had been abrogated, never officially took hold.

As to the republics, it is important to remember the fundamental legislative reform in Genoa, which in 1576[2] established a political and constitutional framework which was highly valued by several foreign observers and remained in existence for two centuries, until the Napoleonic conquest of Liguria. The reform of 1576 presents heterogeneous aspects: if on one hand an intelligent and ruthless observer criticised the production of a clutch of norms which were arbitrarily applied as a matter of convenience,[3] on the other hand it is well to consider the effectiveness with which it placed limits on the Doge's and the *Signoria*'s power, which was jealously guarded by the magistrates of the *Sindacatori* [Ferrante, 1995], and did so in forms that in a sense may be regarded as modern, if compared to the institutions of other monarchies of the time. However, such limits did not extend beyond the city itself and only in the late eighteenth century was there an attempt (which failed) to extend the syndic's control to the coast, so as to unify the legal regime in the territory of the republic [Savelli, 2006, p. 294], which had implicitly renounced the ambition of becoming a state after the sale of Corsica to France in 1768.

In France local laws present very specific characteristics, tied to the history of the country and the active role of a strong monarchy. The distinction between the southern regions (*Pays de droit écrit*) and those of the centre and north (*Pays de droit coutumier*), dating back to the Middle Ages, was maintained during the early modern period until the Revolution. In the south of France, between the twelfth and fourteenth centuries a number of regions and cities had recorded their customs in writing in the form of statutes, similar to those of the Italian commune; however, in these regions the Roman-Justinian law maintained its effectiveness as a subsidiary source supplementing local laws, recognised as general custom (not law) by Philip the Fair in 1312 and again by Henry IV in 1609.

The northern regions of the kingdom applied and developed their customs (*coutumes*) inspired by Frankish law (mainly Lex Salica and non-written customs). But in the subsequent centuries these were transformed by different events and developments taking place in each

[2] *Leges novae, Genuae, apud* Marcum Bellonum, 1576.

[3] Andrea Spinola in his unpublished *Ricordi* (*Memoirs*) wrote at the beginning of the seventeenth century: in Genova 'there are mountains of ordinances [. . .]. I see that they are brought out when and how someone likes and that they are left sleeping if that is more convenient' (text in Savelli, 2006, p. 264).

locality. In the thirteenth and fourteenth centuries, some learned jurists such as Beaumanoir, Boutaric and others had written admirable works containing these customs. The need for an official draft of all customs in the reign was felt only during the fifteenth century: not only as a matter of certainty, but because the monarchy intended to exercise its control also in this matter.

The order to draw up in writing all the customs in the kingdom was given by Charles VII with the ordinance of Montils-les-Tours of 1454, but had only partial results: only Touraine, Anjou and a few other regions began the process, whereas Bourgogne, which was not yet under French monarchical rule, codified its customs in 1459. The decisive impetus to codify customs came in 1499, with Charles VIII, when a procedure was established that was to be followed from then on. With patent letters the king ordered the *bailli* or the *sénéchal* to draft the customs of a given locality. This was done by the local judges with the assistance of practitioners; royal commissioners chosen from the supreme court responsible for the region examined and revised the text, even introducing different rules often inspired by Roman law. This second version was then subjected to scrutiny by the local assembly made up of members of the clergy, nobility and commoners, who discussed any amendments and then voted on the whole text. Only the articles approved by all three bodies were accepted; in such a case the text was deemed 'approved', whereas where the consensus had not been unanimous it was known as 'reserved'; finally the *coutume* was published and from that moment on came into effect.

This procedure – in which the autonomies and the central will of the monarchy were more or less in balance – led in the course of several decades to the approval of the written text of hundreds of customs. A fundamental role in the centralised review described was played by two presidents of the Paris Parliament, Pierre Lizet (1482–1554) and Christofle de Thou (1508–1582), the latter being an erudite humanist who promoted the unity of the customs that he had examined as royal commissioner. Some customs held greater importance because of the quality of the writing or the size of the territory to which they referred (such as Normandy, Brittany, Poitou, Berry and others).

The *Coutume* of Paris was to acquire ascendancy over the rest. It was first published in 1510 and commented on with a critical analysis by one of the major jurists of the time, Charles Du Moulin (1500–1566),[4] who

[4] Caroli Molinaei, *Omnia quae extant opera* (*Parisiis*, 1681), 5 vols.

also underlined its lacunae and incongruities proposing a revised edition. This was drafted in 1580 and incorporated many rules derived from judgements of the Paris Parliament. From that moment the Paris *Coutume* became the most authoritative text of reference, to which recourse was made by decision makers to fill in lacunae or ambiguities in other customs. Many other *coutumes* were also revised in the second half of the sixteenth century, remaining unchanged thereafter until the end of the eighteenth century. Just before the Revolution in France there were around 400 local customs and sixty-five provincial or regional ones in place.

One consequence of the line promoted by the monarchy was of particular importance: the creative and flexible process of the development of customs came to an end in those sectors where the customs had been crystallised into text. Although it is true that France, as opposed to Flanders, never attributed the value of law to written custom – so that innovation in principle was not precluded, as long as they were approved as described previously – what had occurred in Italy with statutes of the communes and in Germany with the written draft of the *Landrechte*, was to happen in France as well from the sixteenth century onwards: that is, the coexistence of local laws and Roman *ius commune* was preserved, though in different ways and to a different degree, but the spontaneous evolution of customary systems which had for many centuries shaped civil and criminal law came to an end.

If on one hand the presence of such a broad gamut of written customs made it easier to verify and to apply them, on the other it created problems with interpretation of norms that were often similar but not identical, formulated in hundreds of different texts. Thus a wealth of commentaries on single customs came into being, such as those written by well-known jurists such as Réné Chopin for the customs of Paris and Anjou, by Pierre Pithou for Troyes and by Guy Coquille for Nivernais. On this basis an approach aimed at underlining the common aspects of the various written customs: after Du Moulin, another general outline was drafted by Coquille.[5] The most influential synopsis was written by Antoine Loisel,[6] in a book built around brief aphorisms summarising common principles. This approach was followed later by authors such as Claude Poquet,[7] Poullain du Parc[8] and in particular F. Bourjon, whose

[5] Coquille, *Institution au droit français*, 1607.
[6] Loisel, *Institutes coutumières*, 1607; cf. ed. Paris, 1935.
[7] Poquet, *Les règles du droit français*, 1730.
[8] Poullain du Parc, *Les Principes du droit français selon les maximes de Brétagne*, 1767–1771.

text[9] was to directly influence the Napoleonic codification. All this included editing and publishing of collections of the most important customs, beginning with the one published in 1576 by Pierre Guenoys to the *Nouveau Coutumier général* edited in Paris in 1724 in four volumes.

The tendency to highlight the common elements of customary law was enhanced by a 1679 edict of Louis XIV's with which it was ordered that in all faculties of law throughout the reign – in addition to traditional teaching of Roman law and canon law, still common at the time —a chair of '*droit français* 'should be established, aimed at illustrating the contents of royal ordinances and customs.

Other jurists of the same period produced summaries of a broader spectrum of legal sources, aimed at combining customary law and Roman *ius commune* within a single systematic framework. This was done, for example, by Claude Ferrière (1676) and Boutaric (1738), opening a way which in the late eighteenth century Robert Pothier would masterfully follow in his treatises on private law, with the intent of creating a 'French *ius commune*' including both principal strands of the legal tradition in the kingdom.

In the Low Countries, in addition to the extreme fragmentation of customs [de Schepper and Cauchies, 1997], the treatises of Hugo Grotius[10] offer a general picture which was long held in high regard.

Also in Switzerland the normative framework was revisited in the eighteenth century. But the differences are notable. Though there is an absence of the reception of the Roman *ius commune* in all of the cantons, the method for codifying law varies greatly from place to place. In Basil, the famous centre of high-ranking humanist scholars, the new edition of city statutes drafted in 1719 and edited by Johann Wettstein is inspired by the statutory model of 1614 of nearby Württenberg; it includes a sizeable number of elements of Roman law taken from the *Usus modernus pandectarum* of the German school, but in the hierarchy of sources still gives second place to customary law and only third place to *ius commune*. In Berne, Sigmund von Lerber in 1762, on behalf of the local nobility, reformed the city statute expunging the traces of Roman law of the previous seventeenth-century edition and at the same time accredited the role of legislation within the canton: an approach that would not succeed because of the tenacious grip held by local customs [Caroni, 2006].

[9] Bourjon, *Le droit commun de la France et la coutume de Paris réduits en principes*, 1747.
[10] H. Grotius, *Inleidinge tot de Hollandsche rechts-geleerdheid*, Arnheim 1939, 2 vols.; Latin translation: id., *Institutiones iuris hollandici*, Harlem, 1962.

22.2 Royal Legislation

22.2.1 Absolutism and Legislative Power

In the age of absolutism a legislative state activity developed which superseded particular and general normative sources: state dispositions which were emanated and binding for the entire kingdom. In principle this power was in the hands of the sovereign, but it was exercised through differentiated procedures in different states. In the process of approving laws, the role and specific will of the sovereign, of representative assemblies and of the supreme courts sometimes added up and other times cancelled each other out, when no alternative could be found.

Nevertheless, the role of royal legislation remained relatively marginal as entire sectors of law, beginning with private law, were mostly left to the discipline of traditional sources: local laws (customary and statutory) and the *ius commune* on the continent, and royal justice in England. It is therefore correct to underline, alongside the elements of rupture mentioned earlier, the continuity of a late medieval model that has been qualified as a 'jurisdictional state' which persisted throughout the age of absolutism, during which the power of the sovereign interwove with (and was limited by) that of the different social orders [Fioravanti, 2002].

The laws provided directly by the sovereigns of the early modern period – with (or without) the cooperation of the supreme magistracies or representative collegial bodies – include a broad spectrum of configurations. There were a number of legislative provisions which had a specific and circumscribed object. There were laws conceived in order to organise entire sectors of the legal regime. Finally, systematic collections of former laws, ancient and recent, also came to light ordered by sovereigns or in any case recognised by them, whereas in other cases the collections of private origin, although used in practice, never became official.

The modern state was to know many other normative provisions of different origin: decrees (*gride*), orders, chapters and pragmatics – the names are various – emanated by provincial governors or courts or high magistracies, as well as the representative assemblies in the states where they played a role. Many subjects had legitimate normative powers, all within constitutional systems that did not yet either theorise or practise the modern tripartite division of powers and functions. The provisions of a legislative nature decided on, and therefore binding, by the supreme courts are particularly significant in this phase as they were not only judicial, but also normative.

Moreover, in the early modern period many traditional normative sources of medieval original survived and were widely applied until the reforms of the eighteenth century: city and rural statutes, corporate statutes, written customs. But that was only possible on condition of formally receiving the express approval of the sovereign, which in principle meant these sources were led under the authority of the state. With its enormous apparatus of norms and doctrines, the *ius commune* in any case continued to tower over other normative sources.

22.2.2 Spain

In the late Middle Ages the *Cortes* of the kingdom of Castile (representing the three orders of the nobility, the clergy and the city burghers) gave life, with the approval of the king, to normative dispositions in the form of *lejes paccionadas* which could only be modified in the same form and with the approval of both; the *Cortes* were also called on to vote on laws proposed by the king himself. In the sixteenth century Charles V and Philip II succeeded in establishing their autonomy in legislative power, often taking the form of pragmatic sanctions (a word of late Roman imperial origin), for which the intervention of the *Cortes* was not required, despite their repeated attempts to reinstate this prerogative.

In other reigns of the Spanish monarchy – in particular in Aragon, Catalonia and Navarre – the *Cortes* were to retain the right to intervene in the process of approval of norms of law until the eighteenth century: this is evidence of the deep-seated attitude to the autonomies originating in the Middle Ages and is characteristic of early modern (and contemporary) Spain.

In the Italian territories under Spanish rule of the sixteenth and seventeenth centuries, more than one constitutional model co-existed in the process of shaping royal law. In the Duchy of Milan the procedure of registration (*interinazione*) – on the part of the Milan Senate – of the orders of the Spanish crown was required, thus maintaining the norms introduced during the years of the French dominion of Louis XII (1499–1512). In the reign of Naples the Castilian criteria allowed the king of Spain greater legislative power through the instrument of the pragmatics, whereas in Sicily (also under Spanish rule) the tradition was preserved of Parliament as co-author of laws (*capitoli*), inherited from the period of Aragonese dominion.

For Castile among the specific norms of royal origin, the *Toros* laws of 1505 should be remembered: these were eighty-two laws which dictated

important rules of private law, among which were the criteria for *fidei commissa*: a central topic in the legal order of the aristocracy of those countries. The *Toros* laws remained fundamental in Castilian law of the sixteenth and seventeenth centuries and were influential in many other territories under Spanish dominion outside Spain.

A new collection of laws supplementing that of the *Ordenamiento* of Montalvo of 1484 mentioned previously was encouraged from the beginning of the sixteenth century and prepared by a number of jurists. But it was only in 1567 that King Philip II was able to promulgate the *Nueva Recopilación*: a systematic collection divided into nine books subdivided into titles on laws and ordinances promulgated between 1484 and 1567, including the *Ordenamiento* of Montalvo and the *Toros* laws. Together with the *Partidas* which were in effect, the new collection constituted the basis of the law of Castile until the eighteenth century.

A further and final revision began at the end of the eighteenth century, with the decisive contribution of the jurist Lardizabal at first, followed by Juan de la Reguera Valdelomar, which ended with a supplement that took the name *Novisima Recopilaciòn* in twelve books, promulgated by Charles IV in 1805, but immediately bitterly criticised for its excessive load, having been issued at a time when the movement towards codification had gained ground in Europe [Tomas y Valiente, 1983, p. 398].

After the 1512 military conquest of Navarre by Ferdinand the Catholic, when the territory became part of the possessions of the crown of Castile, there was an attempt – in character with the centralising tendencies that some historians have described as 'Castilian decisionism' – to apply Castilian law as subsidiary to the general *Fuero* of Navarre. But this met with fierce resistance. A procedure was then reinstated, originated at the end of the fourteenth century in Castile: in the event of laws emanated by the king but not approved by the *Cortes*, the authorities to which the ordinances were addressed transmitted these to the local magistracies following the very particular formula to 'obey but not apply' (*obedézcase, pero no se cumpla*). Note that this formula, veined with irony, was repeatedly employed also in the West Indian territories conquered by Spain.

22.2.3 Portugal

Two legislative collections were particularly significant for Portugal in the early modern period.

The first consisted in the renewal of the Alphonsine ordinances of 1446 mentioned earlier, promoted by King Emanuel d'Aviz (1495–1521). The *Ordinaçõnes Manuelinas*, promulgated in a second definitive version in 1521, were not limited to reproducing previous texts, but made modifications wanted by the king and included royal laws dating back to before the 1446 collection. These include five books on administrative law, ecclesiastical law, judicial procedure and civil and criminal law. Successive law would be able to derogate from the *Ordinaçõnes* only if the Supreme Court of Lisbon included them in a specific book.[11]

A century later a new collection was approved which collected laws dated after 1521. This was promoted during a period which saw the personal union of the crowns between Portugal and Spain under Philip II (between 1580 and 1640), with the contribution of the jurist Jorge de Cabedo. The *Ordinaçõnes Filipinas* established that if not expressly abrogated, the previous ordinances remained in effect.

The order of the sources gave precedence to the three ordinances (*Alfonsina, Manuelina* and *Filipina*) and maintained canon and Roman *ius commune* in a subsidiary position together with the *ius commune* doctrine, the Accursian *Glossa* and the opinion of Bartolus. Where these sources were insufficient, it was required to turn to the king.

In 1769 the Law of Good Reason (*Lei da Bona Razão*) under King José I, promoted by the marquis of Palombal, introduced some significant reforms.

As far as civil law, in Portugal the *Ordinances* remained in effect until the introduction of the Civil Code of 1867. Lasting even longer and thus historically important was the application of the *Ordinances* in Brazil, even after it was no longer a Portuguese colony and independent from the government of Lisbon. The fourth book in civil law was replaced only in 1916 with the approval of the Brazilian Civil Code.

22.2.4 Germany

In the German territories the legislative power of the king was conditioned by the institutional structure of the social classes (*Stände*) dominated by the local princes, who expressed their will in the imperial diet (*Reichstag*). Some decisions of a legislative nature made in this way were eventually considered fundamental laws, their authority superseding all other sources of local, territorial and general laws in effect in the empire.

[11] Scholz, 1976, in Coing HB II.2, p. 286.

The most important ones were the Golden Bull of 1356, ruling the election of the king of Germany; the norms established with the Diet of Worms of 1495 on perpetual peace between the *Länder*, annual imperial diets and reform of the Imperial Chamber Court (*Reichskammergericht*); the dispositions of the Diet of Hapsburg of 1555 on religious peace between Protestant and Catholic regions (in each, the religious faith of the local prince had to take precedence: '*cuius regio eius religio*'); the clauses of the Peace of Westphalia of 1648 on the constitutional role of the imperial diet and on religious freedom; and other norms of a different nature, among which were the promises under oath of the newly elected kings of Germany at the time of coronation, made before the college of prince electors (*Wahlkapitulationen*).

The emperor-king of Germany himself could not therefore legislate, although the role of successor to the Roman Emperors of the late Empire attributed him full legislative power. He could emanate edicts, rescripts and mandates (i.e. specific provisions) as long as they did not conflict with the normative dispositions approved in the diets: this was the promise Charles V made in 1519, whereas the violation of this rule brought about the annulment of the imperial provision (so Francis I had to declare in 1745).

A second group of interventions was constituted by a coherent collection of laws aimed at systematically disciplining entire sectors of the legal regime. In Germany the most significant legislative reform was the *Carolina* of 1532 restructuring the entire criminal law system within the imperial territories. This was the result of a long preparation, the premise of which dated back to the institution of the new *Reichskammergericht* of 1495 and was driven by the need to renovate a harsh and primitive criminal system. The *Carolina* of 1532 was influenced by the reform introduced in 1507 in the prince-bishopric of Bamberg, where a decisive role was played by a jurist, not a professor, with vast practical legal experience and open to new ideas, Johann von Schwarzenberg (1463–1528). He was to make ample use of the Italian doctrine of criminal law of the late Middle Ages.

The German project of codification of criminal law was repeatedly discussed and reviewed on occasion of the imperial diets of the years 1521 and 1532, with the customary procedure giving ample space to the social orders (*Stände*) and the territorial principalities. The opposition of some of the more influential among them – Brandenburg, Palatine, Saxony, favourable as to criminal law maintaining the 'just and equal' uses of

ancient customs[12] – was superseded with the introduction of the 'saving clause' which consented to recourse to the new norms only as subsidiary to existing territorial laws (*Landrechte*). But little by little the authority of the *Carolina* affirmed itself throughout Germany, where it remained in effect until the eighteenth century, illustrated and commented on by jurists such as Justinus Gobler in 1562,[13] and later Johann Kress[14] and Johann Samuel Böhmer.[15]

The significance of the reforms introduced with the *Carolina* laws rested first of all in overcoming a harsh approach to criminal law, which might qualify as 'objective' in the sense that it didn't take into account the subjective purposes of the offender, and was moreover made worse by the fact that – added to the medieval system of pecuniary sanctions (*compositiones*), conceived as damages to be repaid – a severe system of corporal punishment had previously been adopted in Germany as well as in other places. The *Carolina* laws introduced the principle whereby the punishment of the culprit of a criminal act was subordinated to the role of his subjective intention, and on the degrees of *dolus* or *culpa*. The whole system of offences and specifically the qualifying of each offence was carefully reformulated, influenced by the developments in legal doctrine and legislation in fourteenth- and fifteenth-century Italy.

The integration of criminal norms at an imperial level, common to the entire Germanic territory, was achieved with the imperial police regulations (*Reichspolizeiordnungen*) of 1530, 1548 and 1570, discussed and approved by imperial diets with the cooperation of the *Stände*. This type of normative body, which was also adopted by the Germanic territorial principalities, disciplined the internal order based on a notion of 'police' which the doctrine and norms were elaborating at the time [Stolleis, 1988].

Another set of permanent legislative reforms in Germany, again in the sixteenth century, took place in the territorial principalities. The great variety of local customs, but mostly the reception of the Roman-Italian *ius commune*, made the princes aware of the need to include the more important norms of private, criminal and trial law in stable legislative texts, in part deliberately retaining the valid features of custom and in part accepting rules and outlines of the *ius commune*.

[12] '*rechtsmässigen und billigen Gebräuchen*' (Conrad, 1962–1966) II, p. 407.
[13] *Carolina-Kommenatare des 16. Jahrhunderts* von Justin Gobler, Georgius Remus und Nicolaus Vigelius, rist. Goldbach, 2000.
[14] *Commentatio succinta in Constitutionem Criminalem Caroli V, imperatoris*, 1721.
[15] *Meditationes in Constitutionem Criminalem Carolinam*, 1770.

In Bavaria, where territorial law was consolidated as of the beginning of the seventeenth century with one of the most comprehensive compilations in the Germanic territories,[16] in the mid-eighteenth century Duke Maximilian Joseph III appointed Chancellor von Kreittmayr to draw up a new collection of norms in the Duchy: this brought about a criminal code and[17] a trial code,[18] as well as a civil code,[19] that in some ways anticipated the codifications of the late eighteenth century [Tarello, 1976, p. 257]: the material is organised in a modern, systematic way and former laws were abrogated in favour of the institutes disciplined in a comprehensive form in the new codes. However, recourse to the *ius commune* is not excluded and natural law and the Enlightenment are absent, both of which would spread far and wide in Europe in subsequent years.

22.2.5 France

In France during the early modern period the ruling principle was 'what the king wants, the law wants'.[20] *Ordonnance* was the name given to laws that regulated one or more areas of law by means of general rules. This was a prerogative that in the course of the modern age came to belong to the king: cities had by then lost their statutory power, except for minor questions to do with administration and urban policing; from 1572 the territorial princes were forbidden to approve norms that contrasted with the ordinances of the king.

The legal form that created *ordonnances* was that of the 'patent letters', underwritten by the sovereign and stamped with the royal seal. But they did not come into effect until they were registered with the royal court – first of all the Paris Parliament – competent within the territory in which they would be applied. The court's verification was not only formal; if there were reasons to oppose it, these were voiced and the ordinance modified if not withdrawn altogether. The opposition from royal courts and the failure to register occurred on various occasions: for example when, against the wishes of the southern Parliaments, in the *Pays de droit écrit* an *ordonnance* wanted to abolish the Roman law tradition of the benefice granted by the Velleian *Senatusconsult* for women who were not assisted by a father or husband in a legal act (1606); or when in 1629 the

[16] *Landrecht Policey- Gerichts-Malefiz- und andere Ordnungen der Fürstentümer Obern und Nider Bayern*, München, 1616.
[17] *Codex juris Bavarici criminalis*, 1752. [18] *Codex juris Bavarici judiciarii*, 1753.
[19] *Codex Maximilianeus Bavaricus civilis*, 1756.
[20] As Loysel stated in 1607: '*qui veut le roy, si veut la loy*'.

monarchy attempted to have the principle approved – valid in England – whereby the king possessed direct dominion over the entire territory of the kingdom, also on allodial or non-feudal land.[21]

The opposition of the royal courts in accepting *ordonnances* they objected to was to generate – founded on the full power (*plena potestas*) of the king, in principle uncontested – recourse to other, less binding forms and procedures, where the will of the king might be exercised without obstacle. Beginning with the reign of Henry IV, the king was in fact to subject many decisions (*arrêts*) of a legislative nature to the Conseil du roi, where his will was law. Other legislative norms could be deliberated on as ordinances 'without address or seal', in particular in military questions over which the king had full power. By these routes royal legislative absolutism was often able to overcome resistance.

Although it was not rare for new laws to respond to requests from the *Etats généraux* (composed of representatives of the *noblesse, clergé, tiers Etat*), and although they in any case had to be registered by the parliament, the direct power of the king during the sixteenth century was to evolve on a broad scale. Some *ordonnances* – constructed in the manner of large receptacles of norms concerning institutes very different from each other – introduced important new rules.

Among the most significant are the ordinances that shortened the terms of prescription (1510) and the ordinance of Villers-Cotterêts of 1539[22] prepared by Chancellor Poyet, which disciplined many legal institutes: donations; the appeal of abuse against provisions of the ecclesiastical legislation deemed illegal; the inquisitory procedure of the criminal trial; the discipline of acts in the civil state. The ordinance imposed the French language, rather than Latin, for all notarial acts drafted in the French kingdom. No less important was the ordinance of Moulins of 1566,[23] by Michel de l'Hospital (1505–1573), who had studied in Padova where he then became professor. He was a supporter of a line of tolerance towards Protestants in the name of religious freedom, and was first called to govern finances and then the chancellery of France by Catherine de Medici and Francis II. The ordinance abolished municipal civil jurisdictions, introduced the judicial mortgage and established the requirement of drawing up all agreements involving more than 100 livres (art. 54), in this way establishing the superior value of written proof to that of testimony

[21] '*directe universelle*', *Code Michaud*, art. 383.
[22] *Ordonnance de Villers-Cotterêts* (1539), in Isambert, vol. 12, pp. 600–640.
[23] *Ordonnance de Moulins*, 1566, in Isambert, vol. 14, pp. 189–212.

(*lettres passent témoins*), a disposition which remained fundamental in the French legal regime until the modern codes.

Some attempts at systematising the wealth of royal ordinances were made between the end of the sixteenth century and the beginning of the seventeenth. King Henry III had the high judge and learned jurist Barnabé Brisson (1531–1591) assemble not only royal laws, but also local norms, though the work never acquired official value;[24] the same fate was the ordered re-working of Brisson twenty years later by the jurist Charondas Le Caron on the request of King Henry IV.[25] Nor did Louis XIII succeed, in 1629, in defeating the fierce opposition of the Paris Parliament which successfully opposed the approval of a text prepared by the keeper of the royal seals, Marillac, the purpose of which – on the instigation of the *Etats généraux* that had gathered in 1614 – was to order the principal dispositions of public law in a single text in which, among other things, the legislative power of the sovereign was highlighted.[26]

A sound legislation of a codified type affirmed itself in seventeenth-century France, the great ordinances of Louis XIV, which are real milestones in the history of modern legislation. The drive to produce these came from the great minister Colbert, who was persuaded that only a systematic work of legislative reform could give the monarchy the normative control until then effectively taken by the Courts of justice when discretionally interpreting the laws of the kingdom.[27] A commission directed by Colbert's uncle, Henri Pussort, began the work of reform to which the king added a group of jurists headed by an eminent judge, the president of the Paris Parliament, Lamoignon, who for his part had himself conceived of a project for a unified and systematic version of civil law.

Thus in 1667 the *Ordonnance civile*[28] appeared, primarily the work of Pussort, who redesigned the entire discipline of civil procedure in a comprehensive way, forbidding the parliament from pronouncing those discretional decisions (known as *arrêts en équité*) which often contrasted with positive norms. The process disciplined by the ordinance was essentially written, but simplified and streamlined by norms which

[24] It is known as the *Code du Roy Henri III* of 1587.

[25] *Code du Roy Henri III [. . .] augmenté par L. Charondas Le Caron.*

[26] The *Code Micheau*, in Isambert, vol. 16, pp. 223–342.

[27] *'il n'y a pas de petit conseiller [. . .] qui ne juge tous les jours contre le termes précis de l'ordonnance . . . et ainsi s'arroge la puissance législative'* (Colbert, *Mémoire sur la réformation de la justice*, 1665, in Colbert, *Lettres, instructions et mémoires*, ed. P. Clément, 1869).

[28] *Ordonnance civile*, 1667, in Isambert, vol. 18, pp. 103–180. See the text edited by N. Picardi, *Code Louis, I, Ordonnance civile* (Milan, 1996).

were made obligatory for all courts in the kingdom. Three years later, in 1670, the *Ordonnance criminelle*[29] clearly established the rules of the criminal law trial, centred on the inquisitorial principle. The judge had the task of instructing the case with full powers and in secret, in search of proof and particularly the confession of the culprit, obtainable also by means of torture: it was a harsh, repressive system, founded on the system of legal proof, with little concession to the rights of the defence, in vain promoted by Lamoignon, who also tried unsuccessfully to suppress the *iuramentum de veritate* [Erdigati, 2012, pp. 207–217].

The rule of obligatory appeal to the Paris Parliament was also introduced in case of sentencing to capital punishment; there was a limit of two levels of criminal judgement and there was strict control of the seigniorial jurisdictions. The ordinance system would be defeated only in the years of the Revolution.

Equally important was the *Ordonnance du Commerce* of 1673,[30] also initiated by Colbert but prepared by a learned Parisian merchant, Jacques Savary, who was able to combine a professional activity and that of a learned judge in commercial cases, as well as to set down the rules of commerce of his day (*Le Parfait Négociant*, 1675). Though the norms on commercial companies, on bills of exchange, on commercial books and bankruptcy are the restatement in a few concise articles of customary law originating in medieval Italy, already established throughout Europe, what was new was the significance attributed to them: for the first time the state enters directly into the field of the economy by using the instrument of royal legislation. This series of interventions was completed with the *Ordonnance de la Marine* of 1681,[31] which established with great technical know-how the legal rules of maritime trade according to the principles in practice (and set down in written form in the well-known Consulate of the Sea, mentioned previously).

In this way Louis XIV's legislation resulted in making the legal rules of commerce more uniform throughout the entire territory of the kingdom. This legislative text, as well as some of the best commentaries composed in the eighteenth century – such as those of Jousse on civil, commercial and criminal ordinances[32] and those of Emerigon and Valin on maritime

[29] *Ordonnance criminelle*, 1670, in Isambert, vol. 18, pp. 371–427. Cf. *Code Louis, II. Ordonnance criminelle*, edited by A. Laingui (Milan, 1996).

[30] *Ordonnance du Commerce* (1673), in Isambert, vol. 19, pp. 92–107.

[31] *Ordonnance de la Marine* (1681), in Isambert, vol. 19, pp. 282–366.

[32] D. Jousse, *Nouveau commentaire sur l'Ordonnance civile du mois d'avril 1667* (Paris, 1767); id., *Nouveau commentaire sur l'ordonnance du commerce du moi de mars 1673*

ordinance[33] – circulated widely and were influential also outside of France.

There has been discussion about whether these coherent bodies are comparable to the codes in the modern sense of the word. The systematic nature of the framework, the breadth of legal sectors covered, the clarity of the language in common use in the kingdom, the care with which contradictions are avoided and the combination of traditional and new rules would suggest a positive answer to that question. But there is a fundamental element of the modern codes still missing from them, and that is the exclusion of any other source applicable to the sectors covered by these laws: Colbert's ordinances – in the same way as all the royal laws in the age of absolutism – abrogate all other norms that contrast with the new discipline, but they do not exclude recourse to customs, the *ius commune* and to legal doctrines and opinions when local laws and customs or royal laws did not provide a rule, or when the necessity arises of interpreting terms and rules which are present in the same laws. In other words, the multi-level quality of the legal regime persisted.

This is also true with regard to the important ordinances of Chancellor D'Aguesseau (1668–1751; cf. Renoux-Zagamé, DHJF, p. 7), an eminent jurist,[34] for many decades chancellor of France during the reign of Louis XV. Concerning donations (1731), wills (1735) and *fidei commissary* substitutions (1747), he promoted carefully elaborated texts, drafted in an accurate and concise form close to articles of the modern codes, but of limited content both in the sense of the material included and in the fact that it was still possible to supplement it with other sources of law that could differ from those of the state, that is with the *ius commune* and with written customs still in effect in the kingdom. Nevertheless, the depth and acuteness with which the chancellor lucidly endeavoured to bring about a profound reformation of the legal discipline of private law, which was traditionally independent from normative interventions on the part of the monarchy, must be underlined. *Inter alia*, because it contrasted with the traditional customs of the nobility, the limit to two levels for *fide commissa*, meaning the

(Paris, 1761); id., *Nouveau commentaire sur l'ordonnance criminelle du mois d'août 1670* (Paris, 1763).

[33] B.-M. Emerigon, *Nouveau commentaire sur l'Ordonnace de la marine du mois d'août 1681*, Paris 1780; Valin, *Nouveau commentaire sur l'Ordonnance de la marine du mois d'août 1681* (La Rochelle, 1776).

[34] See complete edition: D'Aguesseau, *Oeuvres*, Paris 1761–1789, 13 vols.

possibility of transferring the estate to no more than a single second generation, is significant.

D'Aguesseau, although valuing the role of the supreme court's decisions, lamented their heterogeneousness; it was also for this reason that he felt the necessity for a normative reform that would take into account the Roman law tradition together with that of customs. Equally interesting was his idea of legislation through principles, based on a few general rules on single issues, without doing away with the diversity or specific features in the various historical regions of France.[35] The prudence of his approach, which proceeded step by step with the redesigning of single institutes, conscious of the manifest resistance of Parliament, was also characteristic of his style of government.[36]

22.2.6 Denmark and Norway

In contrast with what occurred in Sweden and Norway at the end of the Middle Ages, Denmark was to continue to apply three distinct local laws until the seventeenth century: an attempt to unify norms by King Christian II (1513–1523) was abrogated by his successor, Frederick I, although royal norms are present and published in the *Corpus Juris Danici*. With the election of King Christian III in 1559, the nobility was able to obtain numerous dispositions granting them privileges.

A turning point came with the unification of rural and city jurisdictions first in 1623 but most of all in 1660, when Frederick III introduced a new form of absolutistic government and eliminated many privileges of the nobility with the support of the clergy and the bourgeoisie. In these years the preparation began of a legislative text which would be valid for the entire kingdom, first in the hands of the jurist Peter Lassens, then Rasmus Vinding, the first being inclined to use the sources of Roman *ius commune*, whereas the second favoured the revision of local law, which then became the basis of the new legislation of the kingdom.

The *Danske Lov*, promulgated by King Christian V in 1683, disciplined the law in six books, on jurisdiction, the clergy, social classes, maritime law, private law and criminal law [Tamm, 1990, p. 128]. The new law applied to all subjects in Denmark, which were all considered equal. It eliminated the distinction between the rights of rural and city dwellers

[35] D'Aguesseau, *Mémoire sur les vues générale*, p. 205 s. Cf. Birocchi, p. 146 s.

[36] 'One of the first rules of politics is to undertake only that which is possible' was one of his maxims (Birocchi, 2002, p. 145).

as well as the privileges of the nobility. Moreover, by express disposition it was to constitute the exclusive source of law to which judges should refer in order to make their decisions [Wagner, in Coing HB, II. 2, p. 508]. The *Danske Lov* text, although repeatedly revised and supplemented, has remained essentially the same up to the modern age.

In Norway King Christian IV promoted a unified text in 1604 (*Norske Lov*), which without particular revision included preceding laws except for Church norms. The monarchic absolutism established in the course of the seventeenth century led to the reform of the kingdom's law. Beginning in 1683, the king thought to tie in with the Danish legislation of the time, though with some minor modifications adapted specifically to Norway. The *Norske Lov* of 1687, promulgated by King Christian V, is therefore a faithful replica of the Danish model that had preceded it by just four years. This text has also remained fundamental, so much so that to this day it constitutes a basic source of law in Norway.

22.2.7 Sweden

The attempts made to reform legislation in Sweden at the beginning of the seventeenth century failed: two different projects prepared by a legislative commission nominated in 1604 confronted each other without success – one was inspired by the interests and constitutional dominance of the nobility, the other aimed at affirming royal power [Wagner, in Coing HB.II, 2, p. 531] – with the result that the preceding Kristoffer territorial norms (*Landslag*) were reconfirmed, though supplemented with surprising references to Mosaic laws in some criminal law institutes.

After a series of attempts at legislative re-elaboration entrusted as of 1643 to the jurists Johann Olofsson Stiernhöök and Georg Stiernhielm, a new commission was instituted by King Charles XI in 1686. In a noteworthy introduction, probably written by the first of the two jurists, we find clearly expressed, perhaps for the first time, a programme which would become typical of sovereigns of the illuminated despotism and which would ultimately engender modern codifications, featuring clarity and comprehensiveness of the legislative dictate and reference to natural rights and foreign legislation. The commission prepared a series of laws and also codified maritime law. The work continued for thirty years with the invaluable contribution of Erik Lindsköld and Gustav Cronhielm, giving rise to a systematic text completed in 1717 but

approved only in 1734. The name it took was *Sverige Rikes Lag*, and it came into effect two years later.

It is subdivided into nine books – five of which are dedicated to private law, two to criminal law and two to trial law[37] – the *Sverige Rikes Lag* was in effect in Sweden for the entire eighteenth century. Gradually the contents were revised and substituted during the successive two centuries. In small part, it is still in effect.

22.2.8 Savoy

It was in the course of the eighteenth century that some Italian states initiated the actual revision and rationalisation of legislative sources. The most remarkable case for the first part of the century was that of the Duchy, later state, of Savoy – including Piedmont and Savoy[38] – where King Victor Amedeus II in 1723 promoted a legislative reform[39] not limited to reorganising the laws of his predecessors, but creating a new legal framework and system of sources.[40] The Piedmont constitutions were to be significantly modified in 1729 and again 1770 and they concerned the relationship between state and religion, the magistracies, legal procedure, criminal law and also some institutes of private law.

The discipline is typical of a state during the period of absolutism, with the attempt (only partially successful) both to circumscribe the judicial discretion of the courts in the legislative process and to limit their decisional discretion. Moreover, it aims at reaffirming a severe penal system with little attention to the right to defence. But there were also some innovative elements. They were the fruit of a consultation with jurists who were also foreign to Italy; an opinion was sought from three highly respected Dutch professors. The Piedmont constitutions introduced some limits to the perpetuation of *fidei commissa*. They also established a hierarchy of normative levels to which the judges had to adhere: first the constitutions themselves, second the statutes (as long as they had been approved by the king and remained in effect),

[37] The trial law section has been re-edited in the Latin version of the time, by A. Giuliani and N. Picardi, *Codex legum svecicarum* (1734), Holmiae 1743, pub. Milan 1996. Among the dispositions worthy of note is the expressed ability of women as witnesses in court, in contrast to the *ius commune* (*de probationivus*, §10, p. 363).

[38] To which Sardinia was added in 1720, although retaining its own distinct legal regime.

[39] A second edition of books III and IV, edited by G.S. Pene Vidari, is in *Savoy Constitutions 1723* (Milan, 2002).

[40] On which, see Viora, 1928; Micolo, 1984; Birocchi, 2002, pp. 335–350.

third the decisions of the royal courts, fourth the 'text of common law'.[41]

Note that along with the usual priority given to royal norms – the violation of which resulted in the irredeemable nullification of the sentence[42] – the importance attributed to the decisions of the supreme courts (*Senati*) and the newly imposed limit on the recourse to the *ius commune* to the mere text of the law, that is, excluding doctrine as a normative source, to the point that in their allegations and sentences advocates and judges were forbidden to quote doctrinal opinions.[43] This was a clear sign of the impending attrition of the traditional *ius commune* system. The constitutions received praise in the comments of European pre-Enlightenment observers and were taken as a model in the successive decades by other sovereigns intent on legislative reform.

This occurred in Tuscany, where in 1745 Grand Duke Francesco Stefano, husband of Maria Teresa of Austria, initiated an attempted reform which included a revision of the normative system. It was entrusted to the jurist Pompeo Neri, pupil of Averani and then himself professor in Pisa, who held the first chair of public law instituted in Italy. Neri's ideas, though conservative concerning the traditional social order which he deemed it imprudent to subvert, were innovative when it came to understanding the necessity for the reformulation and comprehensive revision of the jumble of local laws (for the Tuscan territory there were around 500 statutes still in effect), with the idea of merging them into a comprehensive corpus, although limited to norms which didn't coincide with Roman law, which remained fundamental; he purposely mentioned Roman law, not *ius commune* as a general source to draw from.[44] The mark of his teacher and the Dutch influence are both clear. However, the project was never implemented.

Worthy of note is also the legal organisation in Modena, through the interesting reform of the Supreme Council of Justice [Tavilla, 2000] and even more importantly in 1771 with the establishment of the Estense

[41] *Leggi e Constituzioni di Sua Maestà*, III. 22. 9 (1729 ed.), repeated in 1770 ed.

[42] *Leggi e Costituzioni*, III. 23. 3 (1729 ed.), repeated in the 1770 ed. The principle of annulling a sentence *contra ius* went back to Roman law, but significantly the *ius commune* accepted the principle of its validity after the passage of time established for the appeal, whereas the Piedmont constitutions established that a sentence that had violated the royal law would 'never' be validated.

[43] Birocchi, 2002, p. 343.

[44] Although he did underline – and this is significant – how Roman law should be used by incorporating it with local jurisprudential interpretations, though it might not coincide with those prevailing in other regions of Italy or Europe. Pompeo Neri, *Discorso primo*, Verga ed., p. 341 s.: a passage noted by Birocchi, 2002, p. 379.

Code:[45] a substantial legislative text notable not only for certain choices in content, but also because for the first time statutory legislations which had been maintained in the Duchy up to that time were expressly abrogated. Recourse to the *ius commune* as a subsidiary source with respect to the Duchy's legislation was, however, to remain.

[45] Donati, 1930; Tavilla, 2000; a recent edition of books I and IV, edited by C. E. Tavilla: *Codice estense* (Milan, 2001).

23

Natural Law

23.1 Natural Law in Early Modern Europe

Within the cultural framework of the seventeenth century the theory of natural law is noteworthy not only because of the philosophical significance of the ideas developed by its proponents, but also because of the impact it exerted on the further development of law. Although it cannot be called a school in the academic sense – as each author, besides some common elements, developed individually and expressed specific approaches and positions – the central role given to constructing a systematic and coherent doctrine was common to all. These theories aimed not only at justifying the philosophical basis of natural law, but also at ordering the bodies of normative rules of public and private law within a systematic framework. Their ambition, in the effort to build a natural law system, was to identify the principles of a law rooted in 'reason', reason being the very foundation of human 'nature'.

The modern natural law authors directly or indirectly made reference to the medieval precedents of the Scholastics and the elaborations of the work of the Spanish theologians of Salamanca mentioned previously. Despite these multiple roots, jurisprudence in the seventeenth century took a fundamental turn. From this moment on natural law became a visible presence in the sphere of law, and was to profoundly influence its development both in the theoretical treatment and in the work of all those who proposed new legal rules for the future. It was founded on a conception in which man was seen as a creature that united reason to instinctive needs, reason being, as we have said, an essential element of his nature: a secular approach which turns away from the medieval vision.

From this perspective, the emphasis placed on the rights of the individual, that is, those subjective and inalienable rights of the human being, constitutes the essence of the new natural law, and is a basic source of the rights to freedom claimed by the modern constitutions.

Although these authors did not all propound an identical understanding, they nevertheless all turned to a tripartite range of sources: the first, Roman law, was not dismissed (beginning with the legal and ethical precepts found in the *Digest* title I *De iustitia et iure*); the second, even among rationalists, was the fundamental ethical precepts of the Scriptures and of Christianity; the third was a constant reference to literary, poetical, historical and philosophical Greek and Roman ancient texts, as rediscovered and highlighted by the humanist school. Although these texts transmitted anything but uniform precepts, and there is no great uniformity of ideas in the writings of the modern natural lawyers, the humanist approach, the familiarity with ancient culture and the ease with which ancient texts are considered useful also in the legal sphere are a constant feature. The originality of each author rested therefore also (but not only, of course) in their individual choice among the different ideas present within the resources.

The need to define the scope of natural law came first of all from the new problems arising from a new historical context: the erosion of the unified and coherent idea of the international community under the supreme authorities of the Empire and the Church, combined with the rise of the modern European states; the conflict between sovereign states over maritime and extra-European territorial dominions; and the conflicts arising from the religious schism consequent to the Protestant Reform and the necessity to put an end to the fierce religious wars that it engendered [Oestreich, 2006].

This explains why some authors focused on defining the nature of the relationship between states and the limits of public power *vis-à-vis* the individual; they set out the rules of a legal order superior to positive law because it is founded on universal and rational laws. These rested on an autonomous theoretical basis, independent from the two institutions that unified the legal and political medieval world, the Empire and the Church.[1]

Common to many natural lawyers – although with variations among authors such as Grotius, Hobbes and Locke, discussed later – is the theory of a 'social contract', that is, a covenant concluded between individuals at an early stage of human history, a pact aimed at creating peaceful and secure conditions against war and violence, the safeguard of which is entrusted to a sovereign. While the social contract generally manifested

[1] On the relation between theological natural law and its secularisation in the modern era, see Todescan 1983–2001.

itself in the form of an agreement between individuals in a worldly society, in the formulation of other authors the contract was directly tied to religion. The pact between God and Abraham – of biblical origin, remembering the passage in Exodus in which Moses dares to confront God himself with the observance of the pact[2] – is considered a model for the covenant at the basis of political society.[3]

A common characteristic, variously developed in the natural law constructions, was therefore the belief that it was possible to identify a system of principles and laws whose objective value resided in conforming to human nature and reason, a body of rules conceived as valid at all times and everywhere, in the same way as human nature is held to be immutable over time. Such a vision beyond historical time is inseparable from this school and was shared by all natural lawyers.

The idea that natural law actually existed, in line with views mentioned earlier, was not, however, universally accepted. Pascal, for example, believed that law was on one hand custom and on the other command, and in both cases valid only because it was observed and imposed, not because of its contents, which varied so much over time that (as he noted in one of his *Pensées*) no rule could be said to exist – however 'natural' and intangible it had become in the course of history: including prohibiting lurid crimes such as patricide, infanticide or incest – that at one time or another had been not only admissible, but even considered a virtue.[4]

23.1.1 Grotius

The profound impact of Hugo Grotius (1583–1645)[5] is essentially tied, in the sphere of law, to the work *De iure belli ac pacis* [Haggenmacher, in DGOJ, pp. 217–223], written and published in 1625 in France, where the author had fled from a life sentence of imprisonment in Holland, his

[2] In Exodus 32.13, Moses implored: 'Remember Abraham, Isaac, and Israel, your servants, to whom you swore.'

[3] This theological approach of the covenant is particularly emphasised by Puritan Protestants. It is to be found in the constitutions of the American colonies – inhabited by religious exiles from England – long before the birth of the United States.

[4] '*Le larcin, l'inceste, le meurtre des enfants et des pères, tout a eu sa place entre les actions vertueuses [. . .]. De cette confusion arrive que l'un dit que l'essence de la justice est l'autorité du legislateur, l'autre la commodité du souverain, l'autre la coutume présente, et c'est le plus sûr: rien suivant la seule raison n'est juste de soi, tout branle avec le temps*' (Pascal, *Penseés*, 94, ed. C. Carena (Turin, 2004), pp. 52–54.

[5] There is an enormous bibliography on Grotius, to whom the journal *Grotiana* is also dedicated. See the biographical entry by R. Feenstra in *Juristen*, 2001, pp. 257–260.

country of origin, because of positions he held regarding the conflict between two Calvinist factions: Grotius, follower of Arminius, attributed salvation not only to predestination and grace, but also to actions, that is, the deliberate behaviour of the individual, so opposing the view held by the Gomarists, who were however to prevail and who fiercely preyed on their rivals. Thus Grotius' secular position on natural law did not signify the absence of a religious element in his thinking, both in life and as a source of law.

His work aimed to identify a set of general principles and rules based on reason, and thus shared by all human beings. This aim is clear – and explains its immediate and lasting fame – if we consider the historic condition of early seventeenth-century Europe, in which, as said, not only was a superior authority of a temporal nature (as the medieval Empire had been) no longer recognised, but neither was that of the Roman Pope as a spiritual authority as it had been before the religious Reformation.

Based on this premise, Grotius stated a principle he considered fundamental – at once ethical and legal and conforming to human nature and therefore to reason – which imposes keeping faith to agreements ('*pacta sunt servanda*').[6] All other rules derive from this, beginning with compensation for damages, restitution of fraudulently taken goods, serving penalties – proportionate to the gravity of the crime – as a consequence of criminal acts. These were behaviours which were objectively damaging to other individuals and society, rather than actions relevant only to 'the internal forum' of one's own conscience. Grotius' understanding is that the violation of a legal order and the legitimate ways in which it can be restored are shared by public, private, criminal and international law. This explains why his treatise featured a number of theories and systems also on matters of private law: on contracts (introducing the idea of the binding power of consent in a contract of sale as to the transfer of ownership),[7] on property (with the distinction between original and derivative acquisition)[8] and on many other institutes; while deeming them of great value, at times he also criticised Roman law rules.[9]

[6] Grotius, *De iure belli ac pacis* (Lugduni Batavorum 1919), Prolegomena, 15: '*cum iuris naturae sit stare pactis [. . .] ab hoc ipso fonte iura civilia fluxerunt.*'

[7] Grotius, *De iure belli ac pacis*, II. XI. 1–4. [8] Grotius, *De iure belli ac pacis*, II. V–VII.

[9] E.g. Grotius deemed contrary to the *aequitas naturalis*, but also to public utility, and therefore rejects – '*male Romanis legibus introductum*' – the Roman disposition (*Digest*, 14. 1. 1. 20 *licet autem*) which in the *actio exercitoria* made sailors (*exercitores*) jointly liable for an act committed by their master, the ship captain (*De iure belli ac pacis*, II. 11. 13), as this rule would discourage their going to sea.

De iure belli ac pacis expresses the idea that the fundamental element of natural law resides in the rational nature of mankind and not in God's will. Grotius' well-known statement – that natural law would be true and just even in the absurd hypothesis that God did not exist[10] – meant precisely this. This idea contradicted the voluntary approach, often shared by Protestants, which saw natural law as rooted in God's will rather than reason, which being the true nature of the individual, is also of divine origin (this is what Grotius himself believed, but from a different perspective).[11] The designation of this approach as jus-rationalism is therefore correct. It was to have an important development in the work of seventeenth- and eighteenth-century authors.

Grotius's thinking had its greatest impact on public international law. Beginning from the premise that 'in the Christian world wars are conducted with a shameful lack of restraint worthy of barbarians' almost as if 'a universal rule authorises crimes of every kind',[12] Grotius aimed at identifying 'one law common to all nations' so as to contain this boundless violence. The classical issue of the right to engage in war and the 'just war' (*bellum iustum*) – although the author begins by stating that 'war is very far from any principle of law'[13] – was conceived of in a different way. That is clear in his discussion about prisoners and spoils of war, the binding force of promise and trust (*fides*) between enemies, the reprisals and other topics. The careful examination of legal customs is accompanied by statements that modulate them in such a way as to make them less arbitrary and fearsome.[14]

Actually Grotius began from the premise featuring on one side the principles of reason that formed the foundation of 'natural law', on the other the principles of *ius gentium* which resulted from the sedimentation of behaviours – in international relations of war and peace – created

[10] Grotius, *De iure belli ac pacis*, Prolegomena, 11, p. 7: '*Haec quidam quae iam diximus, locum aliquem haberent etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana.*' The principles stated a few lines before (ibid., 8, p. 6) were basic to natural law: '*alieni abstinentia, et si quid alieni habeamus aut lucri inde fecerimus restitutio, promissorum implendorum obligatio, damni culpa dati reparatio, et poenae inter homines meritum.*'

[11] '*[. . .] quia ut talia principia in nobis existerent ipse [Deus] voluit*' (Grotius, ibid., 12). Both positions had been developed – but in a wholly different cultural and philosophical context – by the scholars of Salamanca, whom Grotius and other natural law authors consistently cited.

[12] Grotius, *De iure belli ac pacis*, Prolegomena.

[13] '*Bellum ab omni iure abesse longissime*' (Grotius, *De iure belli ac pacis*, Prolegomena, 3).

[14] On this, see *De iure belli ac pacis*, lib. III, chapters 4–16.

by custom, that is, by history. There were many ties between the two orders, as custom was the crystallisation of principles of reason, but in his view there was no common identity as such between them.[15]

Modern historiography [Decock, 2013; Feenstra, 1974; Tierney, 2002] has shown that several of Grotius' remarks and theories, including the intrinsic worth of natural law, were linked to ideas which were already present in Spanish Scholasticism, in particular that of Vitoria and Francisco Suarez. This might contravene the traditional view that sees Grotius as the father of natural and international law. However, the entire premise of his theoretical work is original and on many points he introduced new elements and seminal ideas. Moreover, he was able to reshape arguments already treated by the scholastic and medieval canonist tradition, enriching it with a different culture from that of medieval learning, as it was largely inspired by classical sources rediscovered by humanism. He was thus able to connect an important stream of medieval Christian thinking to the world of the Protestant secular culture in a form that had immediate and huge success. Finally it should not be overlooked that the history of ideas and their impact on reality largely depends on the context in which they come to light; a statement such as that from the Prolegomena declaring the autonomy of natural law from the Revelation was likely to have – and indeed had – a different kind of impact in a world in which from the sixteenth century on, a large part of culture had been secularised.

With regard to the thinking that flourished in the Low Countries one cannot fail to mention Baruch Spinoza (1632–1677). A number of fundamental principles are lucidly set down in his *Tractatus theologicus-politicus* (1670): the necessity of guaranteeing everyone absolute freedom of thought and religious belief; the aim of a state is to guarantee freedom; everyone must obey the law which is deliberated through decisions based on a majority.[16] In the posthumously published Tractatus (1677) this approach is developed outlining a political organisation in which the

[15] Grotius observes that *ius gentium* does not always coincide with natural law: e.g. whereas killing an enemy with poison or a sword makes no difference for natural law, for *ius gentium* (custom) only the second is admissible (Grotius, *De iure belli ac pacis*, III. 4. 9. 1; III. 4. 15. 1).

[16] The principles quoted earlier are expressed in the last chapter of the theological-political treatise. The following is a brief exerpt '*quandoquidem liberum hominum judicium varium admodum est, et unusquisque solus omnia scire putat, nec fieri potest, ut omnes aeque eadem sentiant, et uno ore loquantur, pacifice vivere non poterant, nisi unusquisque jure agendi ex solo decreto suae mentis cederet. Jure igitur agendi ex proprio decreto unusquisque tantum cessit, non autem ratiocinandi, et judicandi*' (Spinoza, *Tractatus theologicus*, XX).

democratic regime is upheld and defended because it is more effective in combining natural law founded on the power of strength with individual rights expressed in the rational rules of positive law, than the authoritarian regime [Ramon, DGOJ, pp. 558–564]. Spinoza's influence on successive thinkers and the eighteenth-century Enlightenment was to be profound.[17]

23.1.2 Hobbes

Close in time to Grotius but distant in his theoretical approach, Thomas Hobbes (1588–1679) was a key figure in modern legal and political thought. His two principal works were written in France, where he lived for a decade to avoid the risks arising from his position in support of the monarchy concerning the constitutional disputes, during a historical phase in which the English Parliament was becoming dominant – through the spread of bitter civil unrest culminating in the execution of Charles I – and acquiring a primary role in legislation.

In his *De cive* (1642) and particularly in his *Leviathan* (1651; Cayla, DGOJ, pp. 264–274), Hobbes vigorously laid the theoretical foundations of absolutism on new ground, following a method which he considered akin to that of the exact sciences. From an original natural condition in which mankind must fight to satisfy his primary needs and conquer space and power according to his own nature, the individual and the community are able to rise above the natural state only by unilaterally renouncing all autonomy and entrusting all powers – not only that of government and justice, but also legislative – to a single subject, the sovereign, who is therefore absolute. This theory clearly contradicts that of the 'social contract', as the sovereign does not take on any obligation and the subjects do not retain any rights.

This ensures peace, which is otherwise impossible because of the predestined original condition of 'war of every one against every one' (*bellum omnium contra omnes*). Only what is established by the sovereign has and must retain the authority of law against which no one can rebel, not even if reason says they are unjust. The individual's margin of autonomy is limited to those spheres in which authority could in any case not enter because irrelevant to the internal order of the state and for the maintenance of sovereign power. Even in the sphere of religion, the one to decide should be the sovereign.

[17] On this, see the exhaustive researches by Jonathan Israel, 2001, 2006, 2011.

These positions were in line with monarchic absolutism and contained many elements that would be revisited and developed in successive ages in other contexts that are far from the medieval mind-set, but equally far from the modern theories of legal absolutism of political power. Evidence of this is in Hobbes' view of legislative positivism, whereby he believed that to qualify as legal, norms must be established by political power, which makes them binding, unlike natural laws which are not formalised into positive law. His was the idea of law as legislative will and valid independently from its moral dimension (without denying the existence of the laws of nature which are, however, ineffective as they are not sanctioned).[18] Again he disfavoured custom as a source of law;[19] his version of the jurists' role was to consider them as privileged interpreters of law, in line with the positions held by Francis Bacon which contrasted, as we will see, with those of Coke on the supremacy of common law.[20] His also was the meaningful distinction between *lex* and *ius*,[21] which presaged the modern idea of objective and subjective right.

23.1.3 Locke

In contrast with Hobbes's idea of absolutism of the state and law were the ideas developed a few decades later by outstanding prominent English thinker John Locke (1632–1704). In youth inclined towards voluntarism, in later years – first of all in the well-known *Two treatises on government* [Raynaud, in DGOJ, pp. 358–366] published in 1690 but written ten years before – he embraced a rationalistic view of natural law, defined as 'fixed and eternal rules of conduct dictated by reason itself'[22] and 'clear and intelligible by all rational creatures'.[23] In a phase successive to the original state of nature – which for Locke, in contrast to Hobbes, was a state of peace and liberty, not of endemic violence – mankind had agreed, for the purpose of avoiding and defusing prevarications and iniquities, to entrust the powers of government and justice (social contract) to recognised authorities.

[18] Hobbes, *Dialogue* I, p. 401: 'It is not Wisdom, but Authority that makes a Law,' on which see Birocchi, 2002, p. 196.
[19] Hobbes, *Leviathan*, II. 26.
[20] This echoes the contrast between defenders of common law and those of equity, among which were Edward Coke and Francis Bacon, the latter to which Hobbes was tied.
[21] Hobbes, *De cive* XIV. 3: '*Multum interest inter legem et ius; lex enim vinculum, ius libertas est.*'
[22] Locke, *Essays on the Law of Nature*, VII, p. 198 (Fassò, 2001–2002, II, p. 197).
[23] Locke, *Two Treatises on Government*, II, 124.

The first and most fundamental power was that of legislation, which Locke felt should be entrusted to a representative body, separate from the strict power of government that belonged to the sovereign: it is the embryonic theory of the separation of powers, tied to the concurrent constitutional events in England – which the philosopher experienced firsthand, being forced to flee to France and Holland, from where he could return only after the fall of the Stuart monarchy – that in those very years were definitively affirming the constitutional and legislative role of the English Parliament with the 'revolution' of 1688.

According to Locke, the true source of legislative power, that is, true sovereignty, resided in the people; they trusted the representative body, but through the mechanism of the social contract they could, as it were, still hold the key. This fundamental assertion, at the basis of the modern concept of popular sovereignty, was not entirely new – it is rooted in ideas from the ancient and medieval world – but acquired a particular meaning in the historical context of England at that time. Importantly, a corollary that Locke derived from this idea was the legitimate power of the population to revoke the legislator's position in case he went beyond the limits set by natural law.[24] Violent conquest, usurpation or tyranny legitimatised the 'right of resistance': the violation of the fundamental inborn rights of man by the legitimate legislator triggered a kind of right to 'appeal to Heaven', equivalent to the legal dissolution of the constituted authority, and legitimised the right to resistance.[25] The fiduciary pact with the people could be said to have been broken in case legislative power attempted to 'make itself, or any part of the community, master, or arbitrary disposer of the lives, liberties, or fortunes of the people'.[26] In contrast with Grotius and Hobbes, private property constituted for Locke an innate and inviolable right, based on the work of the individual, as 'he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property'.[27]

These ideals were to have enormous impact as they gave sovereignty to the people, giving them a fundamental role in legislative power (though not unlimited) through their representatives, and separated it from executive power. Locke's ideas, together with his vivid and concise pronouncements on the right to life, liberty, property and resistance to oppression as fundamental and inalienable rights of man, would play

[24] Locke, *Two Treatises on Government*, II. 13.
[25] Locke, *Two Treatises on Government*, II. 20–21; 176; 242 [Fassò, 2001–2002, II, p. 210].
[26] Locke, *Two Treatises on Government*, II. 19. 221.
[27] Locke, *Two Treatises on Government*, II. V. 27.

a seminal role in later political and legal doctrines, as well as in all the modern declarations of rights.

23.1.4 Pufendorf

Among natural lawyers, the most widely read and cited author was the German Samuel Pufendorf (1632–1694).[28] A native of Saxony, he was to study philosophy and mathematics alongside law [Döring, 2012], thus acquiring a multidisciplinary education, not infrequent with the more gifted students in Germany. In 1661 he was called to hold the first chair in Europe of natural law at Heidelberg, forerunner of today's discipline of legal philosophy. A work in which he criticised the organisation of the Holy Roman Empire alienated the Elector of Palatinate and he was forced to leave Heidelberg. He moved to Sweden and from 1670 taught in Lund and Stockholm and published his most famous work, *De iure naturae ac gentium* (1672; cf. Halpérin, DGOJ, pp. 467–472), and not long after its *résumé* under the title of *De officio hominis et civis* (1673). In his youth he was initiated in Cartesianism and thus persuaded that law and human sciences in general could be modelled according to a conceptual structure which was no less rigorous, though different in its conceptual articulation, than that which physics was developing for the natural world. This was the source of the theory that separated physical entities, subject to the laws of motion and expressed in mathematical terms, from moral entities – as in people and in every small or large community all the way up to the state – that operate according to 'the modes that intelligent creatures apply . . . to direct and regulate the freedom of human voluntary actions'.[29]

For Pufendorf, as for Grotius, natural law is common to all men because it is founded on reason and is distinct from religion or theologies that are different in different peoples. What distinguishes Pufendorf is the idea that the essence of law consists in the authority of a superior that binds him to his subjects:[30] the will of God for the norms of natural law

[28] There are countless writings on this author, and as many as fifteen recent monographs. See, *inter alia*, Denzer, 1971; Laurent, 1982; Dufour, 1991; Fiorillo, 1993; Goyard-Fabre, 1994.
[29] Pufendorf, *De iure naturae ac gentium* (1672), I. I. 3 (Frankfurti et Lipsiae, 1744), I, p. 5.
[30] Pufendorf, *De iure naturae ac gentium*, I. VI. 4 (I, p. 89): '*decretum quo superior sibi subiectum obligat.*' Above he made the distinction between law and pact, stating that pact was valid only between men, whereas neither positive divine laws nor *leges naturales* were given life by agreements between people (I. VI. 2).

and the will of the prince for positive laws,[31] both made binding by public power, that is, the state. Voluntarism is transparent in his approach, and is confirmed partly by the links to the principles of Lutheran theology that he professed and partly by the influence of Hobbes' political thought.

His voluntarism is not limited to positive law, but extends to natural law. For Pufendorf, natural law is indeed founded on reason, yet (unlike Grotius) it is unthinkable to separate it from divine will, which is what marks man with precepts that are rationally demonstrable.[32] What makes the principles of natural law operative in the real world – and therefore in effect legal – is coercion, related to positive law by royal power: a power which had the supreme and indivisible authority which is typical of absolutism. However, the type of government, which Pufendorf thinks should ideally be established by the people before becoming subject to sovereign power, should be freely chosen by the people themselves.[33] And because law, both natural and positive, is made up of rules and sanctions, where these are absent the space for liberty is greater: that which is not forbidden is licit by law, even if it should not conform to morality (*non omne quod licet honestum est*). The consequence is a clear distinction between law and theology: the purpose of the one being the relationship (and the duties) between individuals, and the other the relationship of the individual with God. The space left to human freedom is therefore broad.

Pufendorf's contribution includes a work on the relation between state and Church, in which he draws a distinction between the legal discipline of the Church in the context of public law (*ius circa sacra*) and the rules within the internal organisation of the churches themselves (*ius in sacra*),[34] the first reserved to the state, the second to single churches: the doctrine is at the basis of ecclesiastic theories of Protestantism and is the premise for a separation of the role played by the state with regard to

[31] Pufendorf, *De officio hominis et civis*, I. 2–3; II. 11–12.

[32] Pufendorf, *De iure naturae ac gentium*, II. III. 13 (I, p. 197). Here and elsewhere there is a dissonance between the idea of voluntarism (law as sovereign's will) and the rational idea of natural law (law based on reason).

[33] Pufendorf, *De iure naturae ac gentium*, VII. II. 5–8. Pufendorf adds an important intermediate stage, consisting in the choice of the form of government, to the theory of social contract, widely accepted by natural lawyers, according to which humanity emerging from the original natural state would have made a 'pact of union' (i.e. a voluntary association for mutual defence) followed by a pact of submission to the sovereign (*pactum subiectionis*).

[34] Pufendorf, *Über die Natur und Eigenschaft der christlichen Religion und Kirche in Ansehung des bürgerlichen Lebens und Staats*, 1687.

different religious denominations that can exist and co-exist within each state.

In Pufendorf's treatment of individual legal institutions, the construction of a body of rules conforming to natural law is clearly the outcome of a laborious work on a wide range of sources. For example, on the subject of marriage the evangelical precept of its indissolubility is discussed with reference to the different hypotheses of adultery and of the refusal to procreate, and is translated in a formula which states that disparity in character or culture does not constitute legal reason for divorce, whereas the infringement of the fundamental promise made in the marriage pact (fidelity and procreation) makes divorce legal.[35] His style of argument was replete with citations from ancient sources both literary and historical, but included also poetical works of contemporary authors such as Molière and Milton, to describe different historical customs and divergent opinions on the questions being discussed. Often the conclusion of what does or does not conform to nature or natural law was purposely left up to the reader (e.g. on the subject of polygamy).[36]

This approach which the author himself considered eclectic – and which Leibniz was to see as not entirely philosophical, perhaps because in his opinion insufficiently rigorous and coherent – was probably one of the reasons for their broad influence. In fact, the features he exhibited, for example, in defining the necessary requisites of 'law' – generality, non-retroactivity, pertinence to externally perceptible actions, application of the same legal rules to everyone indistinct from *status* – anticipates some fundamental positions of legal Enlightenment.[37]

It was precisely the plurality of historical experiences brought into his discussion of individual themes that, on one hand, made problematic Pufendorf's construction of a system of natural law endowed with an absolute foundation; however, on the other, it allowed him to reason not only on positive norms, but on the true foundations of every single institution. And this opened the path to the legislative reforms of the eighteenth century.

[35] Pufendorf, *De iure naturae et gentium*, VI. I, §§ 22–25 (*Francofurti ac Lipsiae*, 1744), vol. II, pp. 41–48, at p. 48: '*Deus coniungit coniuges interveniente pacto; igitur ipsos non vult dirimi, nisi pactum illud fuerit violatum.*' There is also an acerbic reference to canon law and the Church of Rome's procedure in the ascertaining the nullity of the marriage (ibid., VI. 1, § 21, vol. II, p. 40).

[36] Pufendorf, *De iure naturae et gentium*, VI. 1, § 17: '*nos quae in utramque partem iactantur argumenta proponemus, iudicio penes lectorem relicto.*'

[37] Dufour, 1986.

23.1.5 Leibniz

An idea of natural law very distinct from that of Pufendorf was that furthered by Gottfried Wilhelm Leibniz (1646–1716), who, besides being a great mathematician as co-founder with Newton of differentiated and infinitesimal calculus, was also a great philosopher and historian, as well as a jurist. He had a degree in law and in the course of his variegated intellectual activities repeatedly devoted himself to topics related to legal theory, associated with questions of a theological and logical-philosophical nature.[38]

In answer to Pufendorf's voluntarism, he proposed a rational structure of natural law, which extended to the internal *forum*, so much so as to lead him to consider theology a sort of divine jurisprudence.[39] His aspiration was to demonstrate that – based on a few fundamental principles and through a method akin to a mathematical combination – it was possible to create a coherent system of norms applicable to an infinite number of cases, even if with the indispensable aid of the interpretation of professional jurists. He was firmly in favour of a rational approach to law, in the sense that legal precepts (not to be confused with positive law) have the same rational basis as those of arithmetic, and at the same time are coherent with the evangelical precept of charity towards others: an early writing by him bears the telling title of *Justice as universal charity* (1670–1671).[40]

Normative material was not unlike that of Roman *ius commune*, of which Leibniz did not question the permanent value, a position partially different from that held by Grotius and other natural lawyers.[41] But he was in favour of a more rational structure, which led him to suggest a veritable code to solve controversial cases. He expressed unconventional ideas also concerning the teaching of law – he had acquired his doctorate in philosophy at age twenty and in law the following year – and suggested condensing the curriculum to only two years of historical notions, interpretation, practical apprenticeship and training in dispute resolution.[42]

[38] For an account of Leibniz's intellectual activities, see Antognazza, 2009; on his *ars combinatoria* and early works (1663–1667), ibid., pp. 80–90; on his *Methodus*, p. 81 s.; on *ius naturale*, pp. 141–143.

[39] Leibniz, *De fine scientiarum* (1693), in *Textes inédits*, ed. Grua, I, p. 241 [Birocchi, 2002, p. 261].

[40] In Leibniz, *Scritti politici e di diritto naturale*, Mathieu (ed.) (Turin, 1965), pp. 83–105. See also Leibniz, *La giustizia*, ed. A. Baratta (Milan, 1967).

[41] E.g. he did not share Grotius' view of the binding and enforceable effect of bare pacts.

[42] Leibniz, *Nova methodus discendae docendaeque jurisprudentiae* (1667), later revised [Birocchi, 2002, p. 211].

23.1.6 Domat

Another important exponent of the natural law school was Jean Domat (1625–1696), one of the most significant European jurists of the seventeenth century.[43] Initially active as a lawyer, he was later Procureur du Roi at Clermont Ferrand and from there called by the king to Paris, where he authored a work that was to have a profound impact for more than a a century in Europe. In his treatise *Les lois civiles dans leur ordre naturel*[44] – significantly written in French but soon translated into Latin and the principal European languages[45] – Domat outlined the normative rules of France based on some fundamental principles heretofore summarised.

The imperfect nature of man, deriving from original sin, condemns him to work and labour confines his behaviour to within natural rules common to all mankind. Looking after one's self, and one's interest, though apparently in contrast with the divine precept of love for your neighbour, can nevertheless foster activities for the good of all. The rules of natural law – like those of legal capacity when reaching adulthood, the guarantees of the seller to the buyer or compensation for damages and a great many others – can be made into positive laws which are often different in different territorial legal orders and also within Roman texts themselves. Other rules, dependent on circumstances and contingent choices of rulers, mostly but not exclusively in public law, are instead arbitrary and therefore differ from natural law, which is immutable. Social order, with its allocation of burdens and status for each social class, must be accepted without criticism and subversion. Within the limits of public order and good behaviour, individuals are free to carry out their transactions in keeping with good faith and conforming to natural law, in large measure coinciding with what was already received from Roman law.

Though complex, his vision was not eclectic. Roman law tradition was seen in the light of natural law, which was perceived not only through reason, but also through ethics, in turn derived from religious faith, this last being the dimension most alive in the Jansenist Domat, who was a friend of Pascal, and in the approach to questions of legal logic also connected to the masters of Port-Royal. Although his views do not qualify as liberal, neither in economics nor in ethics, many of the rules he spoke of – particularly to do with contracts – would eventually, in

[43] Baudelot, 1938, Matteucci, 1959. [44] Renoux-Zagamé, DGOJ, 208, p. 139.

[45] As many as sixty-eight editions of the work were published up to the beginning of the nineteenth century; the first edition was in 1689.

a markedly different historical and social context, be received by the Code Napoleon and the succeeding doctrines of civil law up to the nineteenth century.

23.1.7 Thomasius

With the work of Christian Thomasius (1655–1728),[46] the doctrines of modern natural law were to see a partly new approach. The cultural tie with Pufendorf did not prevent Thomasius – who, along with his teacher Stryck, founded the faculty of law at Halle, where he taught for thirty years, as his criticism of the university teaching of the time had forced him to leave Leipzig – from taking an entirely different stance from his master. In his most famous work – published in 1705[47] and written in a concise form, a successful formula for any legal work – Thomasius held that it was necessary to make a clear distinction between the legal sphere from that of individual and social morality. The distinction he formulated, soon to become widely known, separated what was 'just' (*iustum*), what was 'honest' (*honestum*) and what was 'decent' (*decorum*).[48] Only the first of these belonged to the sphere of law because it concerns the relation between subjects and it dictates the rules (and the related sanctions) aimed at avoiding the infringement of the rights of others. The category of honesty, on the other hand, belongs to ethics and has no relevance to law ('*non omne quod licet honestum est*', but the opposite is also true: the two notions never coincide),[49] whereas the category of decency (*decorum*) includes behaviours that are appropriate and desirable in mutual relations, but if not respected cannot be sanctioned, as in the case of natural or merely social obligations.

The boundary between law and non-law was in this way made clear – however attributing a legal nature only to the norms that are commanded by the prince,[50] a point on which neither Pufendorf nor Leibniz had been

[46] On Thomasius, see Luig, 1998a, pp. 186–195, 1998c, pp. 148–172; Schneiders, 1989; Villani, 1997.

[47] C. Thomasius, *Fundamenta juris naturae et gentium ex sensu communi deducta*. The reference to common sense in the title is worth noting.

[48] Thomasius, *Fundamenta juris naturae*, Proemio, § XII, lib. I, ch. VI (Halae et Lipsiae, 1718), p. 5, 164–186.

[49] Ethics can dictate rules of behaviour inspired by generosity and love, but they are not legally binding.

[50] '*Doctoris character est dare consilium, Principis imperare*,' C. Thomasius, *Fundamenta iuris naturae et gentium*, I. IV. 79 (Halae, 1718, repr. Aalen, 1963), p. 139, on which, see Prodi, 2000, p. 407.

as clear – but it drew a kind of boundary to the territory belonging specifically to law, leaving a broad margin to the freedom of the individual. This consented the unbinding of morality from all attempts to absorb it into a normative body of a juristic nature, in contrast with some streams of Protestant thought, but also to free the individual from the excessive dictates of the legislative state [Solari, 1959, p. 294].

Thomasius showed his unorthodox temperament not only in criticising current university teaching methods – favouring one closer to the reality of law and supporting his theories with logical reasoning and the 'common sense' that featured in the title of one of his works, and making no reference to models of the past – but also condemning as contrary to reason and as a consequence of natural law, a number of institutions extant at the time. He criticised judicial torture,[51] the crimes of heresy and witchcraft,[52] the canonical prohibition of interest and the doctrine of the just price; in line with his approach, he held that behaviours such as cohabitation outside marriage (*concubinage*) or sexual relations between consenting adults should not be sanctioned by law, but evaluated and possibly rejected only on an ethical basis.

Because of the nature of his activity, but also for his contribution to the codification entrusted to him by the king of Prussia in 1714 in the faculty of law at Halle[53] and for the ideas expressed in a work on legislation published posthumously,[54] Thomasius' thinking reflects a significant moment of transition between the theories of natural law and the next phase of legal Enlightenment that was to flourish in the late eighteenth century.

To conclude, the historical importance of the doctrines of natural law, from Grotius to Wolf, from Hobbes to Locke and other authors mentioned previously, rests not only on the intrinsic value of their legal and political theories, but also – and perhaps mostly – on the spirit of reform implicit in these theories. The building of a legal system, both of public

[51] C. Thomasius, *De tortura* (1705): judicial torture is criticised because it is in itself a punishment, inhumane and vindictive and because it violates the right to defence and can result in false confessions. Already almost a century before Michel de Montaigne with bitter and paradoxical irony had observed that '*il y a plus de barbarie à manger un homme vivant qu'à le manger mort, à déchirer par tourmens un corps encore plein de sentiment, le faire rostir*' (*Essais*, I. 31 *des cannibals*, Paris 1962, p. 307 s.): on which, see Schmoeckel, 2005, p. 270.

[52] C. Thomasius in his *An haeresis sit crimen* (1697) states that it should not be punished, as it is an act of the intellect, not of the will; in his *De crimine magiae* (1701), that it should not be punished as there is no object.

[53] Birocchi, 2002, p. 229 sq. [54] C. Thomasius, *Lectiones de prudentia legislatoris* (1740).

and private law, which conforms to human nature and reason, that is valid at all times and everywhere, implicitly called for reforms in order to align positive laws with these ideas, modifying any rule that did not conform to it. The eighteenth-century legal Enlightenment was to emerge and develop from these very premises.

Only a few isolated voices rose against the natural law approach. Among these the most notable was that of the Neapolitan philosopher Giambattista Vico (1668–1744), author of a work in which law was steeped in history.[55] He declared that in the same way that human civilisation has gone through stages of evolution, each with its behaviours, customs, arts and intellectual manifestations coherent with the spirit of its time, so law reflected the specific character of the phase of civilisation in which it flourished.[56] It was an approach clearly distant from that of the supporters of a permanent and immutable set of natural law rules. Vico's historical perspective, however, would be rediscovered and credited with its innovative potential only a century after his death.

[55] G. Vico, *La scienza nuova seconda* (1st ed. 1725, 2nd ed. 1744).

[56] Vico correlates three types of natural laws to the three fundamental phases of civilisation: the poetical, heroic and the human and rational phases: divine right (centred on divine will); the law of force (represented by Achilles, who 'places all reason on the tip of the spear'); the law that is 'human and dictated by human reason' (Vico, *La scienza nuova*, cit. IV. 3, p. 437). Vico also equated these criteria to private law norms, e.g., the right to legitimate succession with regard to the exclusion of women, such as was in effect in the 'heroic' phase of the primitive people: from archaic Rome and the Germanic tribes (Vico, *La scienza nuova*, IV. 12. 2. p. 476).

24

Jurists of the Eighteenth Century

24.1 Italy: Gravina, Averani

During the centuries of foreign dominion in Italy legal culture had maintained a significant role, particularly in Naples. An élite class of jurists – mostly advocates and judges of the high courts of the kingdom – developed a critical spirit alongside a consciousness of the importance of their function in the management of political institutions, which manifested itself in criticism even of the greatest constitutional powers, that of the Church and the state, though they never contested these on a religious or political level. These and other figures, not only in Naples, were learned in a wide range of disciplines, from mathematics to history, from classical literature to law. Within the academies flourishing at the time in Italy and in Europe, they came in contact with other scholars and gave rise to a wealth of ideas which were not always purely academic. This is an intellectual tradition that historiography has rightly underlined.[1]

The advocate and judge Francesco D'Andrea (1625–1698), already mentioned, acted as a point of reference of professional ethics and critical spirit for at least two generations of Neapolitan jurists, to whom he bestowed – not in the lecture hall, as the liveliest elements of culture did not pass through the university – a sense of pride because their mastery of legal knowledge would allow them to rise in Neapolitan society even without an important family paving their way.[2] Another example of moral and intellectual rigour informally exercised through the critical interpretation of legal texts was that of Domenico Aulisio (1649–1717). An important role was also played by Francesco Fraggianni (1725–1763), jurist and acute critic of the law of his time,[3] who as a high

[1] Benedetto Croce admiringly described it as 'a severe cohort that unfolds in the centuries' in the introduction to his *Storia del regno di Napoli* (1924) (Bari, 1958), p. 5.

[2] F. D'Andrea, *Avvertimenti ai nipoti*, Ascione (ed.) (Naples, 1990), p. 156.

[3] Fraggianni noted that 'never before has so much been published on natural law and of the peoples, and never as today has every natural right of the peoples been so violated,' in F. Fraggianni, *Promptuarium*, Di Donanto (ed.) (1996), I, p. 65.

ministerial official fiercely defended the rights of the king over ecclesiastical interference [Di Donato 1996, p. 841].

A pupil of Aulisio, Pietro Giannone, was author of the *Istoria civile del Regno di Napoli* (1723) which – while having aroused an implacable ecclesiastical and secular persecution that cost him life imprisonment – should be considered, on one hand, an accusation of the temporal power of the Church and, on the other, a key work in the burgeoning identity of Naples and southern Italy. For the most part, the work is written as a history of the law of Italy, medieval and modern. Though much of the material is drawn from the work of De Luca and others, the social and cultural perspective within which he vindicates the autonomy of the kingdom is in Giannone entirely original.[4]

An important work was that of Gian Vincenzo Gravina (1664–1718), also educated in Naples, where he had come from his native Calabria in his youth to study, and where for several years he was part of the legal circles still inspired by Francesco D'Andrea. Soon he moved to Rome, however, where he was called to the chair of *ius civile* and then of canon law. He was among the founders of Arcadia, an academy which promoted a new and more sober poetic style in the wake of the new European culture. Gravina's fame is mostly tied to a work he published in 1701–1708, titled *Origines juris civilis*, and was the fruit of his teaching in Rome. The historical framework of this work on one hand reconstructs – among the first to do so in Europe – the legal science of the Glossators, the Commentators and the humanists, and on the other supports the idea of a new and different education of the legal practitioner, founded both on knowledge of history and on the capacity to articulate legal arguments in a coherent and rigorous way, based on solid reasoning rather than vague doctrinal quotations [Ghisalberti, 1962]. Gravina believed, in fact, that the fundamental rules of a legal order are invariable among all peoples. In this there is evidence of his having assimilated humanist ideas as well as elements of Cartesian rationalism and modern natural law, added to which is the embryonic idea of a separation of powers with the essential distinction being made between the power of government and judicial function. The work of Gravina was admired and cited throughout Europe (in Germany it was commented on and used in university teaching) and a few decades later was to be used by Montesquieu in his *Ésprit des lois*.

[4] For a critical reconstruction of Giannone's historiographic method see Ajello, 2002, pp. 155–160.

Another notable author of this time was the Tuscan Giuseppe Averani (1662–1738), a member of the Accademia della Crusca, mathematician, physicist and theologian but first of all an accomplished jurist, for many years a professor at the university of Pisa. The nature of his intellectual endeavours can best be appreciated in his main work, the five books of *Interpretationes iuris*,[5] which contain a number of treatises on legal topics, analysed in correspondence with passages in Justinian's Compilation, particularly the *Digest*. The author thoroughly analyses the interpretation of previous scholars, including the major humanists on every question, and then proceeds to a carefully calibrated personal interpretation. Averani believed that the essential task of the university professor as teacher of future jurists was precisely the work of in-depth inquiry directly on sources. His teaching – only in appearance technical and removed from the reality of the times[6] – was particularly fruitful, as is clearly shown, other than in the testimony of his cohorts, also in the studies and historical research on Roman law that flourished in Pisa. A learned and lively scientific debate on the origin of the manuscript of the *Pandectae* involved two figures tied to Averani, Grandi and Tanucci [Marrara, 1981]. It is significant that some of the most important figures of the Italian reformist movement of the eighteenth century emerged from the circle of Averani in Pisa: among them, Bernardo Tanucci, later minister of Carlo di Borbone in Naples, and Pompeo Neri, a Tuscan reformer, later in Lombardy under Maria Teresa of Austria.

Another figure originally from Tuscany was Luigi Cremani, professor in Pavia. His three-volume work on criminal law[7] had a notable impact because, though conceived of as adopting the traditional framework of the *ius commune*, it included also some natural law doctrines and (although not inclined to a humanitarian approach) did not neglect the new ideas of Cesare Beccaria that had rapidly spread through Europe.

In the same years, just before the Napoleonic invasion would put an end to the Ancien Régime, the Piedmontese Tommaso Maurizio Richeri published a vast treatise that made large use of *ius commune*, the Piedmontese constitutions and the decisions of the senates to lay

[5] J. Averani, *Interpretationum juris libri quinque* (Lugduni, 1751), 2 vols.

[6] Among other things, Averani defended with learned historical and legal arguments the autonomy of the Grand Duchy of Tuscany in legal advice of 1722, on which see M. Verga, *Da 'cittadini' a nobili. Lotta politica e riforma delle istituzioni nella Toscana di Francesco Stefano* (Milan, 1990), pp. 56–112. He also favoured the rehabilitation of Galileo Galilei (Birocchi, 2002, p. 327).

[7] A. Cremani, *De iure criminali libri tres* (Ticini, 1791–1793).

down the law of Savoy, in accordance with the system of the Justinian *Institutions*.[8]

24.2 Holland: Bijnkershoek

The professors of Leiden and other universities in the Low Countries – but also some universities in Germany – maintained their high prestige throughout the eighteenth century. The writings of Noodt and Schulting were widely circulated in Europe and in Italy.[9] Cornelis van Bijnkershoek (1673–1743) was not a professor, but a judge and for twenty years president of the supreme court of Holland, the *Hoge Raad*, but at the same time an interpreter of Roman sources with an approach notably closer to the text of the *littera Florentina* of the *Digest* than Noodt.[10] His fame is tied to his work on public law[11] and international law,[12] as well as a collection of private law questions published posthumously.[13] To this day his work is used in South African judicial procedure. The Neapolitan jurist Rapolla considered Bijnkershoek the most accomplished jurist of his time.[14]

24.3 Germany: Böhmer, Heinecke, Wolff

Works inspired by the methods of the *Usus modernus pandectarum* mentioned earlier (Chapter 19.6), continued to flourish, particularly in Germany. The texts of Adam Struve – particularly his *Jurisprudentia Romano-Germanica forensis*, reissued on several occasions during the eighteenth century, and called 'the little Struve' as it was more concise than his ponderous treatises – enjoyed lasting favour in many universities, in the same way as the volumes by Samuel Stryck, beginning with the work that had given the practical-theoretical approach of the *Usus modernus* its name, and which was to have success also outside Germany.

[8] T. M. Richeri, *Universa civilis et criminalis jurisprudentia iuxta seriem Institutionum ex naturali, et Romano iure deprompta, et ad usum fori perpetuo accomodata* (Placentiae, 1790–1795), 13 vols.

[9] As mentioned previously, Vittorio Amedeo II asked these very authors their opinion on a project of reform in the early part of the eighteenth century.

[10] C. v. Bijnkershoek, *Observationes juris Romani*, eight books (1710–1733); Sirks', in *Judges and Judging*, 2012.

[11] C. v. Bijnkershoek, *Quaestiones juris publici*, 1737.

[12] C. v. Bijnkershoek, *De foro legatorum*, on diplomatic law.

[13] C. v. Bijnkershoek, *Quaestiones juris privati* (1744).

[14] F. Rapolla, *Difesa della giurisprudenza* (1744), p, 96, cit. in Birocchi, 2002, p. 368.

The analysis of the Justinian texts, using methods of the humanists but mostly those of the Dutch elegant school, went hand in hand with a sustained attention given to legal practice.

Among the universities known for the excellence of their professors was the University of Halle – which counted Thomasius and Wolff among others – as well as those of Jena and Leipzig.

A pupil of Samuel Stryck, Justus Henning Böhmer (1674–1749), who taught for many years at Halle, was to have an important role. His treatise on Protestant ecclesiastic law[15] constituted the basis of a coherent system of law; though deriving some categories from the canonist tradition, it furthered the principle known as 'territorialism' in religious matters, by which the secular prince was entrusted with the function of guardianship, at the same time promoting religious tolerance. He also turned his attention to civil law in the tradition of the *Usus modernus Pandectarum* [Rütten, 1982].

The most productive and most widely known figure of the time is Johann Gottlieb Heinecke (Heineccius) (1681–1741), professor in various universities in Germany and Holland, whose *Elementa juris civilis secundum ordinem Institutionum* (1725) counted no fewer than 150 editions in the course of the century. Another equally well-known work followed the systematic order of the *Digest* in fifty books.[16] The enormous success of his works is due to their concise structure, each institute clarified by a brief and clear definition and followed by a set of well-argued corollary statements. The 'pure' principles of Roman private law, set down without indulging in *subtilitates*, were thus placed within a systematic framework which, despite the adoption of the traditional outline of the Justinian *Institutions* or the *Digest*, was removed from ancient law. In this form the text became a useful introduction to the system of 'modern' Roman private law connected directly to ancient sources, without resorting to the *ius commune* but with frequent references to the judicial practice of his own time, particularly where it departed from the rules of Roman law. The direct contact to the ancient

[15] J. H. Böhmer, *Ius ecclesiasticum* Protestant*ium* (1734–1736), 6 vols.

[16] Io. Gottl. Heineccius, *Elementa juris civilis secundum ordinem Pandectarum* (Venetiis, 1737), 2 vols. An example of his approach, extracted from the rules and texts on the appeal in book 49, tit. 1–12 of the *Digest*. Einecius summarises each of the twelve titles referring to parallel passages in the *Codex* and the *Novellae*, he then condenses into two *axiomata* some basic rules: appeal is possible when (i) one considers to have suffered encumbrance at the hands of the judge, (ii) in seeking recourse to a higher judge. He warns, however, that 'today many things have changed' compared to the ancient discipline. He refers to the judicial practice of the German courts, far from the Roman rules as to criminal appeal, and to the necessity for resort to a higher authority (*Elementa*, vol. II, § 266).

legislative source, without the mediation of *opiniones communes*, is particularly significant: the call for simplification was becoming clear.

Eineccius did not ignore the fascination of his time with *ius naturale* and *ius gentium*, and dedicated to them a well-received manual, the *Elementa juris naturae ac gentium* (1737)[17] in which he begins by tracing an outline of natural law (man's duties towards God, towards himself and others, property, pacts and obligations), in part based on normative material drawn from Grotius and other natural lawyers; he then proceeds to consider man as a social being with duties towards his family and the state (*ius gentium*). Eineccius also wrote what is arguably the first text of a system of private law of Germany, the *Elementa juris Germanici* (1735–1736),[18] which was written in Latin, whose purpose was to identify the special features of customary law in the German territories in the field of private law.

Christian Wolff (1670–1754) was a philosopher, theologian, mathematician and renowned professor at Halle and Marburg. He was author of a huge number of works in several fields and, among them, in his later years he devoted two works to outlining the essential features of natural law.[19] He drew a parallel between the natural obligations and duties to which each individual is held (*obligationes connatae*) – the respect for life, the obedience to legitimate authority, the respect for others – and the natural rights deriving from them: the duty to observe obligations, for example, mirrors the right for the obligation to be fulfilled.[20] Duties and rights are common to all mankind and belong therefore to a category of rules that are universally valid without distinction of social status: legal norms are addressed in the same form to any single human subject, thus conceiving a unified and abstract human entity.

According to Wolff, civil society was the historical continuation of the original social contract. From this the sovereign took legitimate power over his subjects for the purpose of ensuring their security and well-being (*Wohlfart*), through a body of laws and dispositions over which he had full control.[21] The idea was partly derived from Hobbes and Leibniz and congruent with the nature of Prussian and Austrian monarchic

[17] Io. Gottl. Heineccius, *Elementa iuris naturae ac gentium* (Venetiis, 1740).

[18] Io. Gottl. Heineccius, *Historia iuris civilis Romani ac Germanici* (Venetiis, 1742), the first part is dedicated to Roman law followed by a second which traces the history of medieval German laws.

[19] C. Wolff, *Ius naturae methodo scientifica pertractatum* (Halae, 1749); Id., *Institutiones iuris naturae et gentium* (Halae, 1750); cf. Stolleis, DGOJ, 2008, p. 604.

[20] C. Wolff, *Institutiones*, § 45.

[21] C. Wolff, *Institutiones*, §§ 833; 1017–1040; Id., *Ius naturae*, I. 26; II. 284; VIII. 390–398.

absolutism. This may explain why Wolff's theories attracted so much attention in those regions and were drawn on and developed by jurists such as Karl Anton Martini in Austria and Joachim Darjes in Germany, who were among the most influential advocates of administrative and legislative reform in Germany. A rare Italian jurist follower of Wolff was the professor from Pisa Giovanni Maria Lampredi.[22] Other authors – David Nettelbladt and Johann Pütter – some pupils of the latter being among the jurists and reformers of the nineteenth century in Göttingen[23] – developed Wolff's vision in the form of manuals featuring a 'general part' of law (*Allgemeine Theil*) that identified a set of categories and principles drawn from private law for the purpose of developing broad ideas that transversally encompassed single institutes: for example, legal capacity, the juristic person and representation. This was the premise for the subsequent handbook production on private law.

24.4 Switzerland: Barbeyrac, Vattel

Jean Barbeyrac (1674–1744) was a follower of Pufendorf and an acute commentator on his and Grotius' writings on natural law. Originally from France, he was a Protestant and after the revocation of the Edict of Nantes in 1685 fled to Switzerland, where he became professor in Lausanne and Groningen.[24] He contributed to spreading the ideas of natural law in Europe and with notable clarity developed Pufendorf's idea of limiting the normative power solely to the sovereign and the divine will, therefore leaving a space to individual freedom, which for Barbeyrac constituted a veritable natural right.[25]

Among Wolff's disciples a particular role was played by the Swiss Emeric de Vattel from Neuchâtel (1714–1767), author of a work that widely influenced the doctrine of public international law.[26] The *ius*

[22] Lampredi authored a work in three volumes, *Juris publici universi sive juris naturae et gentium theoremata* (Leghorn, 1776–1778).

[23] Among these were Baron von Stein and Karl Friedrich Eichhorn; see later. It is worth noting that beginning in the mid-eighteenth century, Pütter also successfully taught a course on the history of German public law [Kleineyer and Schröder 1996, p. 333].

[24] Maylan, 1937.

[25] Barbeyrac, Note to Pufendorf, *De officio hominis et civis* (1707), I. 2. 2: 'this is the source of the right to act as one desires as long as it is permitted and from this right comes that of others not to obstruct it,' on which see Tarello, 1976, p. 129.

[26] E. Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite des affaires des nations et des souverains* (1758); cf. Santulli, DGOJ, 2008, p. 591; Haggenmacher and Chetail, 2011).

gentium was to take on a new profile: the principle of non-interference in the internal affairs of other states – sanctioned in 1648 following the age of religious wars, by the Peace of Westphalia, as seen earlier – led Vattel to conceive of states as 'free people living in the natural state' endowed with full autonomy in the management of their internal politics and legitimately refuting the right of intervention on the part of other states. According to him, the position endorsed by Grotius and others in favour of such interventions 'opens the doors to the fury of enthusiasm and fanaticism' and must therefore be rejected.[27] At the heart of his theory is an emphasis on balance, and particularly the non-intervention in international law, in observance of state sovereignty. It is easy to see how this vision is coherent with the tendencies of the time and future European politics.

However, in earlier years others had voiced very different-sounding opinions. In a work published in 1713 – at the same time as the treatise of Utrecht concluded the long battle of succession in Spain and recognised the sovereignty of the kingdom of Prussia – the Abbé de Saint Pierre proposed an ambitious plan for 'permanent peace' (*paix perpetuelle*) in Europe which incorporated some notions of a 1598 project by Minister Sully for Henry IV of France. The sovereigns and regents of the principal eighteen European powers, according to Saint Pierre, should form a permanent league, based on equality, each being represented by their deputies in a permanent assembly which would produce binding deliberations on a three-quarter majority vote.[28] It is not surprising that this project, though admired and commented on (fifty years later Rousseau would sing its praises),[29] was never developed.

24.5 France: Pothier

Among the French jurists of the eighteenth century an outstanding role was played by an Orléans judge who was the first professor to teach French law at a university, namely Robert-Josef Pothier (1699–1772)[30].

[27] E. Vattel, *Le droit des gens*, ch. Preliminaire, §§ 4–7.

[28] C.I. Castel de Saint Pierre, *Project pour rendre la paix perpetuelle en Europe* (Utrecht, 1713, ed. Paris, 1986), p. 95; on Sully's project see pp. 80–86, 677, 687.

[29] J. J. Rousseau, *Extraits du project de paix perpetuelle* (1761) in Id, *Oeuvres complètes*, éd. de la Pléiade, Paris, 1964, vol. III, pp. 563–599); see the *Fragment* of 1782: '*qu'on ne dise donc point que si son système n'a pas été adopté, c'est qu'il n'était pas bon: qu'on dise au contraire qu'il était trop bon pour être adopté*' (ibid., p. 599); anyway Rousseau had no illusion about the possibility of the project being implemented.

[30] Cf. Thireau, DHJF, 2007, p. 636; Halpérin, DGOJ, 2008, p. 460.

He was author in 1740 of a renowned commentary on the *Coutume* of Orléans, revised and supplemented in 1760, in which he shows its clear affinity with other customs in the intent of establishing 'customary common law' of France. A few years later he proposed the essentials of Roman law in accordance with the systematic order of the *Digest* (*Pandectae in novum ordinem digestae*, 1748), accompanying the treatise with concise notions whose strong point is the comment on the title *De regulis iuris* closing the *Digest*. Pothier's fame, however, is tied to a number of treatises on private law – on property, real rights, succession, obligations, sale, lease, exchange, marriage and others[31] – in which he was able to skilfully combine the *ius commune* of Roman origin with the more established elements of the French customary tradition.

Where customs had specific rules, Pothier made them the foundation of his treatise. For example, in the treatise on succession he discusses the question of the right of the firstborn male to inherit two thirds of the feudal property (*droit d'ainesse*) on the basis of customary norms, not all in agreement, of Paris, Orléans and Tours, and completes unresolved cases of the *coutumes* with references to Roman law.[32]

In his treatises the clarity, the masterful use of the French language and the intent to simplify and unify made them particularly useful not so much for legal science, but rather to legal practice. This explains not only the long life of his work, but also why the Code Napoléon was to amply draw on it, though to see Pothier (Domat even more so) as a sort of ante-litteram codificators or even as a potential reformer would be incorrect.

[31] See, among several others, an edition of Pothier's *Oeuvres complètes* (Paris, 1821–24, 26 volumes). An Italian edition was published in Milan in 1807–1813 in forty-six volumes.

[32] Pothier, *Traité des successions* (Paris, 1812), pp. 66–110. In the case of twins for whom there was no evidence of the order of birth, Pothier believed that the right of the firstborn on feudal property should not be applied (whereas Du Moulin had opted for drawing lots) because neither one could prove his rights in case of contention, whereas the Roman rule imposed the burden of proof on the claimant (ibid., p. 69).

25

The Sources of Law

25.1 Local Laws and *Ius Commune*

State legislation, local customs, city and guild statutes, feudal law, Roman *ius commune*, canon law and the decisions of the superior courts: these and other sources of law coexisted on the continent with differences between countries and sometimes within single states, in a complex interweaving going from the fifteenth to the end of the eighteenth century and the modern codifications.

In order to succinctly describe this interweaving, it is first of all necessary to keep in mind the fundamental dualism between local and particular laws on one hand and *ius commune* on the other, a dualism which dated back to the Middle Ages and which persisted for the three centuries of the early modern period. To simplify, the first segment of this dual normative order might include all that is local (statutes, customs) or particular (personal status laws, feudal norms), whereas the second segment might include not only Roman laws (the *Corpus iuris civilis*) and (for countries that remained Catholic) canon law (the *Corpus iuris canonici*), but also the opinions of jurists whose direct or indirect reference was to Roman law. This dualism was, however, to take on a very different character in some continental states with stable and consolidated monarchies: first of all in France, where the late sixteenth century saw the rise of a 'French common law', discussed later.

The new and third element that was to have the greatest impact on the early modern sources of law was state law. Sovereigns had legislative power in many branches of law, as we have seen. Where they intervened with general laws, these were imposed so as to override any other source of law. This priority was not new, keeping in mind, for example, the medieval ordinances of the king of France, the statutes of the Norman kings and the constitutions of Fredrick II in the kingdom of Sicily, all of which had expressly overridden local laws and Roman *ius commune*. But in the early modern age recourse to royal legislation – although this

generally avoided entering the vast province of private law with all its normative provisions – became much more frequent, as we have seen, so much so as to constitute a necessary part of European legal orders.

A third entity was therefore added, thus transforming the duo into a trio: state laws, local and particular laws and *ius commune*. This is the hierarchy which was most often accepted within the single legal order: judges would apply the sovereign norms first, followed by local or particular laws and only as a last resort the *ius commune* when the first two classes of norms could not solve the case at hand or needed to be supplemented or interpreted.

Royal legislation was at one time a common law when compared to local laws, and a particular law when compared to the Roman *ius commune*. This dual nature created problems in the rules of interpretation of law. According to the order of priority mentioned previously, as well as to the rules of interpretation of the statutes in their integral relationship to the *ius commune*, the prevailing criterion was to apply the same principle: the sovereign law was interpreted as special law, the *ius commune* being turned to in case of lacunae.

Although this was the general principle, as we find for, example, in Neapolitan writings on the Swabian and Anjou constitutions included in the systematic collections,[1] legal practice was inclined to take a different path. In Naples the Sacred Royal Council sometimes overrode the literal interpretation of the norms enacted by Fredrick II.[2] In Milan the broad discretionary powers of the Senate permitted it to pass judgements without having to justify any divergence from the rigorous application of the constitutions of Charles V, or the *ius commune* itself [Monti, 2003, p. 326]. In the eighteenth century Senator Gabriele Verri held that Charles V's constitutions, which were the basic text of Lombard law,

[1] See, among others, De Nigris, on whom Miletti (1995), p. 111; Caravale (2005), p. 82.

[2] An interesting case, of which Prof Marco Miletti made me aware, concerns the contribution (*adiutorium*) to the dowry which the vassal was held to provide on the occasion of the marriage of the daughter of his master (*Constitutiones Regni Siciliae*, III. 20, c. *Quam plurimum*). In the specific case, where the father of the bride had died and the grandfather demanded the contribution, the vassal, wishing to avoid having to make the payment, argued that the norm should be strictly interpreted (daughter is not equivalent to granddaughter), but the court held that the custom was applicable, stating that the norm should be interpreted extensively because '*favorabilis*' – though favourable to the master, less to the vassal – and the interpretation by analogy was not necessary because applying the norm to the grandfather meant making the normative content explicit ('*non est extensio sed comprehensio*'): De Franchis, *Decisiones Sacri Regii Consilii Neapolitani* (Venetiis, 1720), I, dec. 225.

should be interpreted by analogy as it was the dominion's common law [Di Renzo Villata, 2006b, p. 239].

The jurisdictional powers exercised by the supreme courts played a key role within the system of sources and the normative rules. Within the legal orders or the regions in which the supreme courts functioned as one of last instance, their pronouncements determined the line of judgement of inferior judges: not only because of the institutional dependence, occasionally reiterated, but because it was implicit that the superior court's decision would override any decision made by an inferior court, which naturally avoided the opportunity for their judgements to be overruled.

As to the relationship between judicial decisions and normative rules, one doctrinal stream held that, as they held sovereign power in matters of justice, supreme courts could make decisions which diverged from the law (*contra ius*), whereas others believed that these courts could only have such prerogative if granted specific royal authorisation in given cases (as Antonio Tesauro, e.g., stated with regard to the Piedmont Senate). Giovanni Battista De Luca was to declare that not even the Roman Rota could make judgements against the law as 'the judge is not the legislator'.[3] Note also on this point that Roman texts were not always in agreement: on one hand the Code underlined the unassailable role of the law, which could not be amended by recourse to decisional precedent,[4] on the other hand the *Digest* admitted that ambiguities in the law could be solved either by custom or a steady line of decisions.[5]

The decisional line taken by the supreme court within a state or region and the inferior court's subsequent compliance ensured that not only the enormous variety of jurisdictions and decisions, but also the great variety of doctrinal opinions was held in check: it was a way to counteract the growing uncertainty of law.[6]

The imposing edifice of the *Corpus iuris civilis* – enormously enriched and enhanced first by the work of Glossators and Commentators and then, beginning in the sixteenth century, by the humanists – still stood

[3] De Luca, *Theatrun veritatis ac institutiae*, XV, p. I, 35, n. 72; on which, see Savelli, 1994, p. 9.

[4] *Cod.* 7. 47. 13, of 529 (Justinian): not even imperial pronouncements on single cases could constitute a precedent, '*cum non exemplis sed legibus iudicandum est*'.

[5] *Dig.* 1. 3. 38 (Callistratus): '*Imperator noster Severus rescripsit in ambiguitatibus quae ex legibus proficiscuntur, consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legum obtinere debere*'.

[6] A statement by De Luca confirmed this sentiment in *Theatrum*, vol. XC, De iudiciis, XXXV, nr. 75.

during these centuries, towering over local and particular laws and even surpassing the laws of absolute sovereigns. And the role of Roman law remained crucial in continental Europe until the end of the eighteenth century [Luig, 1977].

25.1.1 Italy

In the Italian states the applicability of the *ius commune* – as norms subsidiary to local law to be resorted to in case of lacunae or ambiguities – was still general and undisputed. The relationship between local law and *ius commune* was to retain the medieval characteristics discussed earlier, but with one proviso – found, for example, in a sixteenth-century treatise by Stefano Federici from Brescia[7] – that the *ius commune* was effective in the interpretation of the rules of statutes that conformed to it (*secundum legem*) and even of those that were foreign to it (*praeter legem*), but not of those that were contrary to the *ius commune* itself (*contra legem*).

One significant exception was Venice, which as we have seen, never adopted the *ius commune* as an official source of law, leaving judges free to decide in cases where the statutes and other normative dispositions did not contain norms fit for resolving a specific question [Zordan, 2005, p. 175]. During the early modern period, with the creation of a territorial state that extended as far as the river Adda, the primacy of Venice in the territory was established through the work of the Venetian courts. The constitutional balance, which prevented the emergence of a centralised absolute power and preserved the republican nature of the Serenissima [Povolo, 2006], was possibly due primarily to the decisions of the courts (particularly the *Avogaria de comun* and the *Quarantia*), who exercised their role in a singular interweaving of competencies, making extensive recourse to discretional 'equity', far removed from the procedures of strict law known in the *ius commune* [Cozzi, 1982, p. 319], which was being taught at the nearby university of Padua, politically dependant on Venice.

The ubiquity of the *ius commune* in civil and canon law, the pervasiveness and persistence of written local laws and the growing impact of sovereign law in no way diminished the importance of custom in Italy in the early modern period. In every sector of civil, commercial, feudal, criminal and procedure law, custom retained a role. The characteristics of customs were a subject of intellectual debate: how many repeated

[7] S. Federici, *De interpretatione legum*, nn. 4; 53. On this, see Piano Mortari, 1956.

instances constituted a custom? Within what time limit, how was consensus to be reached in creating the premise for a custom, how should the rational ground (*rationabilitas*) required to constitute a custom be understood (this last being a requisite which was strictly connected with ethical and religious values, (Garré, 2005))? Actually the effectiveness and applicability of a custom essentially rested on the judge's power of judgement and skilled use of discretionary powers (*arbitrium*), in an age in which the role played by court decisions had become fundamental.

As to statutes, the effectiveness of the text of the last approved draft was undisputed (often dating back to the end of the fourteenth century), and equally undisputed was the fact that sovereign or princely laws overrode them and that the *ius commune* came into play third in case of lacunae in the local norms, according to the late medieval criterion described earlier. However, the authority of the statute of a dominant city compared to other minor statutes of the territory was not undisputed in the same way. In Lombardy, for example, it was debated among interpreters during the seventeenth century whether to the priority of the 1541 constitutions of Charles V might be added the statute of Milan's priority over the statute of any other city in the Duchy.[8] In Tuscany also the codified supplementary role of the statute of Florence[9] having priority over other city statutes of the Medici Duchy was only partially respected [Mannori, 2006, p. 357].

25.1.2 France

Under King Philip the Fair, France had made the Roman *ius commune* legitimate in the southern regions – the *Pays de droit écrit* – though only as a general customary law in order to avoid any acknowledgement, even indirect, of the authority of the Germanic empire, which considered Justinian law its own. Later the supreme courts of Languedoc, Provence, Dauphiné and Roussillon gave the *ius commune* growing authority also because most local customs, which had existed in the south of France since the twelfth and thirteenth centuries, had not been recorded in writing as they had been in Italy in the communal age in order to protect them from the dreaded rivalry of Roman law. Furthermore, a procedure became widespread whereby one might

[8] For the opposing opinions on the subject of the Lombard seventeenth-century jurists, Francesco Redenaschi and Giovanni Battista Barbò, see di Renzo Villata, 2006b, pp. 232–235. The question concerned a norm from Pavia on succession, which differed from the Milanese.

[9] Firenze, *Statutes* (1415), V. I.

apply to the sovereign for a 'letter of annulment', which effectively rescinded specific contractual clauses with which the parties renounced the right to apply Roman norms (*renunciationes*). In these cases, Roman law, which had been excluded by those clauses, went back to being applied.

On the contrary in the central and northern regions of France – *Pays de droit coutumier* – customs alone were in force, as seen previously. In regions which were part of the Empire such as Flanders and Alsace, Roman law was applied as subsidiary law in cases of lacunae in customs, whereas in other regions recourse was instead made to the laws of neighbouring provinces and in the last instance to Paris customs, which held great authority because they were extensively applied by the Paris Parliament. This view was expressed by the commentator Charles Du Moulin, among others, who – having previously acknowledged the role of Roman law as *ius commune* – was later, in the 1550s, to reach a different view [Thireau, 1980]: he decidedly dismissed the idea of comparing *coutumes* to Italian statutes and of the general validity of Roman norms, maintaining that there had been general customs in France from time immemorial and they were very different from Roman law.[10] He therefore believed that not Roman law, but the customary law of the larger regions constituted the common law of France.[11]

Other authoritative jurists held similar views, among them Guy Coquille, Louis Charondas Le Caron and Etienne Pasquier. The latter expressed the opinion that Roman law of the *Pays de droit écrit* of southern France had not derived from Justinian's *Corpus iuris*, but rather from the Theodosian Code of 438 and from Visigoth norms which had incorporated and applied it for centuries, eventually becoming customary law [Thireau, 2006].

The relationship between particular and local customs (e.g. concerning feudal law) and general regional customs was subsidiary, in the sense that recourse was made to the latter only in case of lacunae in local and particular customs. However, for some questions (such as for the feudal

[10] '*Franci et Galli semper habuerent consuetudines quasdam generales et communes [...]*' Caroli Molinaei, *Prima pars Commentariorum in Consuetudines Parisiensis*, n. 106, in id., *Opera omnia*, I (Parisiis, 1658), col. 44.

[11] Du Moulin cautioned 'young inexperienced' jurists who had studied at the universities not to adopt the 'scholastic arguments of Italian jurists' – who bound the interpreter to the literal meaning of statutes and recourse, if necessary, to the *ius commune* ('*stricte ad verborum proprietatem intelligenda, semper in dubio [ad ius commune] recorrendum*') – as in France customs are general, not special norms. On this, see Caravale, 2005, pp. 129–131.

succession), considered as belonging to public law, a renowned jurist such as Le Caron held that general customs could not be overridden by local customs.[12]

The authority of customs was such that even after they had been approved by the monarchy in the sixteenth century as seen earlier, the prevailing notion was that customs maintained their original essence even after having received the royal seal. A large part of legal doctrine (e.g. Pierre Rebuffi) held that even royal legislation – in the form required by the *ordonnances*, that is, registered with the Paris Parliament – could not override customs, except in some crucial instances and with the explicit clause of the ordinance's authority, even over contrary customs [Piano Mortari, 1962]. A further limit to the king's legislative power was comprised of a restricted number of principles, qualified as 'fundamental laws of the reign', which were held to be immutable because founded on long and uninterrupted tradition: among these were the succession to the throne exclusive to the firstborn male in the line of succession (a rule which was incorrectly thought to date back to Salic law) and the inalienability of royal property.[13] The significance of this is that even in the age of absolutism legal doctrine thought that the normative power of the king was bound by limits, and these were essentially based on tradition.

Roman law nevertheless did have an effect also on the countries ruled by customary law. It was consistently present as *ratio scripta*, conceived as the ultimate law to turn to if necessary, held to be superior and conforming to reason, justice and natural law. Du Moulin himself acknowledged this, as did others among the major jurists who held the *coutumes* to constitute the common law of France. Pothier, as seen earlier, made ample recourse to Roman law: not only in areas in which the *coutumes* were less developed, such as obligations, but also in matters about which they had express rules, such as on succession. The relation between the two normative regimes was in any case analysed by Pothier in a subtle interplay between lacunae, general rules and the relation between rule and exception in both Roman and customary law.[14]

[12] Caravale, 2005, p. 167. [13] Sueur, 1994, I, pp. 75–105.

[14] An example: as to the succession of chattels and acquired goods (*acquêts*), in the Paris *coutume*, contrary to Justinian's *Novel* 118, the deceased collaterals were excluded in favour of the sole ascendants, but in case only one paternal and two maternal ascendants were alive, should the deceased's possessions be divided into two or three parts? The *coutume* was silent on the subject, whereas Justinian adopted the first solution. Pothier opts for the second solution by referring to the general rule on succession whereby the assets are equally divided among relations of an equivalent degree (Pothier, *Traité des successions*, Paris 1813, p. 112), in the absence of a specific rule such as the one regarding the firstborn. In this case, therefore, to fill in a lacuna in the *coutume*, a general principle clearly derived from the *coutumes* themselves (not from Justinian law, as within a single law the normative exception would have prevailed over the rule: '*in toto iure generi per speciem derogatur*') was seen as overruling Roman law.

Other authors held a different opinion, believing that also in France Roman law was not merely *ratio scripta*, but rather positive law that should be applied as a complement alongside customary law: so was to state in the sixteenth century the president of the Paris Parliament Pierre Lizet, whose decisions when possible reflected Roman law. He was to be opposed by Christophe de Thou, also president of the Paris Parliament, who held the *coutumes* to be the common law of the kingdom (Caravale, 2005, p. 137).

25.1.3 Germany

Roman law fared differently in the German territories. Beginning with the first age of the university of Bologna, and in ever greater numbers, students from the German regions – as from all other parts of Europe – went to universities in Italy and France to study law and obtain a highly qualified degree in legal studies. Beginning in the fourteenth century, universities that established studies in law based on the Bolognese model sprung up also in Germany (Prague in 1348, Vienna in 1365, Heidelberg in 1386, Cologne in 1388, Leipzig in 1409), as in the cities and territorial states the demand for learned jurists was ever growing. Princes, cities, corporations and individuals needed civil servants, judges, advocates and consultants endowed with high professional skills, which could be acquired only through specialised study at the university level. As we know, the exclusive object of legal study at universities everywhere was the *Corpus iuris civilis* and canon law.

It is therefore not surprising that in their written memoires and arguments the jurists tended to favour the structure, rules and methods learned for years on the sources of the *ius commune*. This in turn led to a progressively more common use of this normative body being applied to controversial questions and legal decisions. The process went hand in hand with the progressive weakening of the binding force of customs, which were not always clear, often piecemeal and also not easily ascertained. It is therefore understandable why Emperor Maximilian I entrusted the newly instituted Court Chamber of the Empire (*Reichkammergericht*, 1495) with the task of making decisions 'according to the common law', that is, on the basis of Roman law supplemented

with the opinions of the Accursian *Glossa* and the commentators. Also the *Constitutio Criminalis Carolina* that reformed criminal law in 1532 referred to the *ius commune*, as did the Regulation for Notaries in 1512, valid for the entire territory of the Empire [Schmoeckel, 2012].

At the outset there was a strong resistance to Roman law. The diffidence towards learned jurists and their refined arguments found fodder on the religious front, with the accusation of jurists being 'bad Christians' (*'Juristen böse Christen'*). The rural classes, made up of villagers who lived on the lands of the princes, preferred keeping to established customs, which tended to be more favourable to them than Roman law with its emphasis on the rights of the landowner. The feudal classes also resisted Roman law at first, the nature of the legal ties they had with the king being very different from the subordinate role played by every subject of the Roman or Byzantine emperors, as established in the Justinian texts. But gradually the reception of Roman law succeeded and for no less than four centuries profoundly influenced law in the German territories in the form of the *Usus modernus pandectarum* discussed previously.

The preeminent position held by the *Reichkammergericht* in comparison to local courts greatly reinforced the role of the *ius commune* in the German territories. Other minor courts of justice, knowing that an appeal to the Court Chamber of the Empire would be decided on according to the *ius commune*, began to adjust their decisions so as to avoid them being overturned.

This doesn't mean that all other sources of law were set aside, or that the *ius commune* held absolute pre-eminence. On the contrary, in the hierarchy of legal sources, city laws (*Stadrecht*) prevailed over the law of the principality (*Landrecht*) where the city was located, and the *Landrecht* prevailed over the *ius commune.*[15] An examination of the decisions confirms this practice.[16] Norms of the Empire that had been approved

[15] *'Stadtrecht bricht Landrecht, Landrecht bricht gemeines Recht'.*

[16] The following is one example among many. In the collection of questions discussed by the Brandenburg jurist Johannes Köppen and published in 1600, one of these concerns the destination of the products of a landed property enfeoffed at the time of death of the feudatory. The author cites the diverging opinions of the most famous jurists of the *ius commune*, from Bartolus to Jason del Majno (some held that only the agnates should legitimately receive them, others divided them between the agnates and the heirs of the lord of the manor who had died: this was what the faculty at the Frankfurt university had pronounced, according to the author), but he immediately adds that 'iure saxonico plene secus statuitur', as the *Landrecht* destined the products of the land to the heirs (J. Köppen, *Decisiones in quibus quaestiones illustres in Germania quotidie occurrentes [...]*, Magdeburgi q. 13, nn. 41–44). The customary rules are often quoted in German.

in the form noted earlier (*Reichsrecht*) prevailed above all others, as was the case with all the states in the age of absolutism; in the same way, norms of the territorial prince (or those formally approved by him) prevailed above others, including the *ius commune*, within that territory.

Local German customs were, therefore, not rejected, in fact, they still had priority over the *ius commune* – in the same way as in Italy the city statutes prevailed over the *ius commune* as a source of law – but in practice in many circumstances they were not easily documented and in case of lacunae and when the need for interpretation arose, it was again the *ius commune* that prevailed. The constant presence of the *ius commune* explains the phenomenon of the codification of the *Landrechte* – produced by a fusion between local customs and Roman norms – which occurred in many German principalities in the course of the sixteenth century, as discussed earlier.

The role of consultant played by the university faculties of law and a number of colleges of *scabini* (*Schöffen*) in the German principalities is worthy of note. The faculties of Halle, Leipzig, Jena, Wittenberg and others engaged in this activity, some beginning in the sixteenth century. The documents of the case were entrusted to the faculty, which prepared an opinion drawn up by a rapporteur; the approval by the faculty as a whole followed, sometimes in the form of a simple deliberation, more often accompanied by a motivation in law and fact. The opinion was received by the judge who had commissioned it and transposed into a sentence. An accurate investigation of a number of specific cases has led to the conclusion that the quality of these opinions was rather mediocre [Falk, 2006], so it seems that the severe judgement on the part of Carpzov, who accused the university consultants of aiming for monetary gain rather than safeguarding truth and justice[17] was not entirely unfounded.

25.2 The Crisis of the *Ius Commune* and the Rise of the *Ius Patrium*

The multiplicity of sources and the difficulty of interconnecting so many different normative orders, combined with the ever-growing quantity of printed texts available and the number of opinions that flourished within the great European 'republic of legal culture', all this explains the reasons for a growing challenge to the *ius commune* system. The symptoms of

[17] *'Doctores in consulendo aeris saepe magis quam veritatis studio duci, experentia compertum habemus'* (Carpzov, *Responsa juris electoralia*, Leipzig 1709, *praefatio*).

a crisis were already perceptible in the sixteenth century, and at the end of the eighteenth century the crisis would bring about the great shift towards codification.

An analysis of the collections of decisions of the late *ius commune* gives a clear perception of the symptoms of this challenge. The tribunals of the Italian Rote themselves, despite the undoubted quality of their decisions [Gorla, 1977], had in large part already been deserted by the litigants [Birocchi, 2006]. But what is most relevant is that the presence of a myriad of disparate normative and decisional sources allowed the courts enormous discretional latitude, only somewhat contained by the influence of precedent and the *stylus iudicandi* of the individual court.[18]

This historical process had once again a European character; it was felt everywhere on the continent, from Spain to Germany, from Holland to France and Italy. Nevertheless, in every region of Europe – also within every kingdom or republic – the situation regarding the sources of law was quite different, despite the circulation of works and opinions being intensive.

A phenomenon of great consequence, which legal historiography has only recently begun to study, is the emergence of what has been called the *ius patrium* [Birocchi, 2006]. Within each legal order, local and particular laws of medieval origin, statutes, customs, feudal norms and other specific laws all remained operative. In every legal order norms of royal origin, approved in the forms that have been discussed previously, were in force. In each order there were the decisions of the superior courts and the principal collections of *decisiones* on cases, mostly written by judges or jurists who had had a role in the cases; their decisions were, therefore, a somewhat binding source of law for judges of inferior courts. In every order recourse was made to Roman law, to supplement interpret and

[18] The following is only one example, among the possible thousands, showing how flexible the use of a law might be in practice. The norm requiring the declaration of at least two witnesses as proof (sanctioned by the Justinian Code and deriving from the Old Testament) was still in force during the *ius commune*; in a 1735 case decided by the Piedmont Senate – whether to allow a son to inherit what had been apportioned to him, when the father in his will had directed that if the son should give in to gambling he would have to be content with receiving that portion over which the father had no control – the judges, to whom the other siblings had turned, did not consider the son's gambling as having been proved, despite the fact that many witnesses testified that they had seen him at the gambling table; he was seen gambling only on separate occasions and always by single witnesses, not two. The court (evidently in favour of the son as there was no doubt he had remained a gambler after the father's death) rested on the thesis of the sixteenth-century jurist Aimone Cravetta on '*testes singulares*' (on this, see Padoa-Schioppa, 2003, p. 465).

connect specific norms to each other, although by then it was seen as a law of reason rather than positive law [Luig, 1977].

Yet the effect of the complex tangle of legal sources was different in each country: not only because the local and royal laws differed, but because the *ius commune* itself was different because it interacted with different sources. In the seventeenth century there had already been those who, also in Italy, pointed to diminishing role of Roman law: for example, Paolo Sarpi (referring not only to Venice: Povolo, 2006, p. 31), but also Giovanni Battista De Luca [Mazzacane, 1994]. Even the notarial formularies were regionalised, although the classic *Summa* by Rolandinus was still being circulated. In this context, it is not difficult to understand the emergence of proposals and attempts to draft the *ius patrium*, for example in Tuscany on the initiative of Pompeo Neri.

In Savoy Piedmont the authority of the *ius commune* was curtailed in 1729 when, in the second edition of his constitutions, Vittorio Amedeo II explicitly forbade advocates to cite learned opinions, allowing only direct reference to Roman sources,[19] but subordinately to the constitutions, the statutes and the judicial decisions of the Savoy senates [Pene Vidari, 2006].

The system of sources in non-monarchical legal orders presents particular features. Venice has already been mentioned. In Genoa the trace of three fundamental normative bodies remained fundamental until the end of the eighteenth century [Savelli, 2006]. The *regulae* of 1413 continued to be understood as binding the Doge's exercise of power; and the two legislations of 1528 and 1576 determined the canons of the nobility's power within the republic. In particular, the laws of 1576 had instituted the magistracy of the *Sindacatori* [Ferrante, 1995], which effectively controlled the governing power of the *Doge* and the *Signoria*, as well as of the two tribunals of the rota, the civil and the criminal, mentioned previously, which were deliberately made up of foreign jurists.

In France, as seen earlier, beginning in the late sixteenth century a doctrinal trend developed aimed at identifying the universal elements in written customs so as to construct a veritable customary common law, deemed to be the expression of a French national identity. There were authors and works on institutes of French law, in which different categories of sources (local, royal and Roman law) are included and shaped

[19] *Regie Constituzioni* (1729), book III. Tit. 22, § 9. The 1723 edition admitted the opinions of jurists as long as they were founded 'on natural reason or the people' (*Regie Costituzioni*, 1723, book III, tit. 29, § 2).

into a coherent legal framework, as, for example, in Louis Le Caron[20] and Guy Coquille.[21]

The Roman *ius commune* was by then disengaged from canon law, which in turn after the schism resulting from the Protestant reforms, no longer constituted the universal system that it had been in medieval Europe, although the traditional boundaries that assigned the regulation of marriage and the privileges of the clergy remained in the hands of the Church until the late eighteenth century.

The emergence of a national law in France beginning in the sixteenth century manifests itself also with regard to Roman law. On one hand a number of Roman rules are accepted on the strength of their being, as Etienne Pasquier put it, 'naturalised' by French law, therefore in a fragmentary and specific way, not as part of a coherent normative body: in fact, the *Corpus iuris* was not credited with such a role even in the *Pays du droit écrit* in the southern part of the kingdom. On the other hand the rules themselves of Roman law were valid and applicable because they were the expression of 'natural laws' and conformed to 'reason' and therefore valid at all times and expressed in a commanding way in the *Digest* and the Code. This is the significance attributed to Roman law norms by authors such as Domat and other natural law scholars [Thireau, 2006].

Thus although in seemingly opposite ways (identifying Roman laws as traditional local and national laws; identifying them as universal natural law), Roman law's role as such was to be reduced in the France of the Ancien Régime. Nevertheless, it would be misleading to underestimate its influence: entire sectors of private law – obligations, property, succession – in the written customs were still modelled on Roman law, sometimes in the most rigorous and philologically sound form, stemming from the work of the humanists. In the late eighteenth century, when Pothier wrote his treatises on private law, the Roman law component was not inferior to that of custom. Both were by then considered elements of a single national French law.

The German situation was different, as the presence of the Roman *ius commune* as general law had from the sixteenth century become formalised with its reception. However also in Germany, beginning in the seventeenth but mostly in the eighteenth century, a work of comparison and interpretation occurred with regard to customs and Roman law,

[20] L. Charondas Le Caron, *Pandectes ou digestes du droit françois* (Paris, 1610).
[21] G. Coquille, *Institutions au droit des François* (Paris, 1608).

from which a dual approach was to emerge. On one hand, the normative rules of the *Corpus iuris* which were no longer in effect were no longer taught and learned in the university courses; specific works were dedicated to identifying 'abrogated norms' and showing the extent to which courts of justice employed customary law of German origin in their place.[22] On the other hand, for the first time rules of law were examined which were unconnected to Roman law but which were applied in customary form in the German territories. Among these, a number of private law norms are particularly important: for example, the rule of one 'one hand helping the other' (*Hand wahre Hand*) concerning the receipt of movables in good faith;[23] or in matters of succession, the children of a second marriage on an equal footing to those of a first marriage (*unio prolium, Einkindschaft*); or the traditional and medieval 'morning gift' (*morgengabe*) of the groom to the bride the day after the marriage, and others.

In 1707 a list of 'Germanic' norms was drawn up by Georg Beyer in Wittenberg which was subsequently ordered systematically by Johann Gottlieb Heineccius in his work on Germanic law as said above.[24] In the attempt at identifying the original features of Germanic law as distinct from Roman law but complementary to it, some authors adopted the dual criteria of considering applicable by analogy customary laws from other cities and of considering as 'pan-Germanic', and therefore general, customs of specific territories which had been drafted in texts. Others, among whom was Heineccius, rejected this idea of extending local customs [Luig, in *Diritto patrio*, 2006].

On the other hand, the doctrinal tradition of the Roman *ius commune* and its application in legal practice took advantage of the approach of the humanists, the Dutch school and the German *Usus modernus Pandectarum* and now incorporated the natural law framework, inasmuch as Roman law was considered as conforming to reason, a true *ratio scripta.*

Similarly, the elegant school of Vinnius[25] offered, in the traditional systematic framework of the Justinian *Institutions*, not only the basic

[22] Simon van Groenewegen, *De legibus abrogatis*, 1649; Simon van Leeuwen, *Censura forensis theoretico-pratica*, 1662.
[23] The rule states that in case an object has been by contract given from subject A to subject B who in turn gives (e.g. pawns) it to a third party C in good faith, subject C cannot suffer subject A taking the object from him as vindication (*reivindicatio*, as Roman law would have had it): in this case A would have to pay for the pawned object and then recover the loss from B.
[24] Heineccius, *Elementa iuris Germanici* (Halae, 1746).
[25] Vinnius, *In quatuor Libros Institutionum Commentarius* (Venetiis, 1768).

notions of Roman law, but also a number of legal arguments and examples extrapolated from legal cases which proved very useful also to the legal professions, as proven by the numerous editions throughout Europe. This was to occur also in Germany [Luig, 1970], for example with the work by Georg Adam Struve[26] and with the commentary of the Justinian *Institutions* by Joachim Hoppe,[27] the concise manual which the young Goethe was to study.[28]

Traces of these transformations are therefore perceptible in the methods of legal education. In Holland, Sweden and Germany chairs of *Ius hodiernum* [Ashmann, 1997] were instituted; in the south of France the teaching of French law began in 1679 [Chène, 1982]; in the course of the eighteenth century courses on *Ius patrium* begin in Naples, Tuscany, Lombardy and Louvain; works of Spanish legal history came to light at the hand of Gregorio Mayans [Vallejo, 2001],[29] on Portuguese law by Mello Freire [Almeida Costa, 2005, p. 289], on Danish law by Peder Kofod Ancher [Tamm, 1990], on German law by Hermann Conring and Johann Heinecke, mentioned previously[30] [Luig, 1983, 2006].

In Italy among the most telling signs that the system of the *ius commune* was in progressive demise were the views of one of the most learned historians of eighteenth-century Europe, Ludovico Antonio Muratori (1672–1750) as expressed in his concise and well-known essay *Dei difetti della giurisprudenza*, published in 1742. The author was a historian, but conversant in legal matters, having graduated with a degree in civil and canon law from Modena. The essay condensed into a few pages a critical judgement of the legal system of his time, drawing a careful line between what he considered ineradicable defects in all legal orders – the impossibility of the legislator's foreseeing every possible case, the difficulty in interpreting the original intent of the law, the inevitable difference in judgement and mentality of those called on to apply laws – from those defects that might be corrected, beginning with the inextricable jumble of sources and most of all the innumerable and dissonant opinions of jurists.

[26] G.A. Struve, *Jurisprudentia roamno-Germanica forensis* (Jena, 1760).
[27] Hoppe, *Commentatio succinta ad Institutiones Justinianeas* (Francofurti, 1715); id., *Examen institutionum imperialium* (Francofurti, 1733).
[28] Goethe, *Dichtung und Wahrheit*, book IV; book IX. His father tried to introduce the young poet, not yet at university, to the more complex of Struve's works, but with little success.
[29] *Origen i Progresso del Derecho Español* (Birocchi, 2006, p. 51).
[30] Heineccius, *Elementa iuris Germanici*, 1735–1737.

In the past Muratori had addressed the emperor with the suggestion of a legislative intervention to make some particularly controversial questions clearer.[31] In the essay written in 1742 Muratori addressed Pope Benedict XIV proposing the draft of a legislative text that would clarify and simplify the laws of the time and also introduce some reforms, for example, concerning *fidei commissa*. He praised the work of the Savoy king, Vittorio Amedeo II, who had recently concluded a comprehensive revision of the legislation with his Piedmont constitutions of 1723, revised six years later. The historian expressed scepticism of the grand schemes of global reforms which had been proposed by the major exponents among the natural lawyers, such as Grotius and Pufendorf, and considered the idea of identifying a law of reason valid for all time as ill-founded. He did, however, think it possible, more modestly, to rectify those ambiguities that made the administration of justice uncertain and confused, sometimes in the hands of that multitude of litigious legal professionals with whom the author was disenchanted. Similar thoughts re-emerged seven years later in his slender volume *Della pubblica felicità*.[32]

The authority and prestige Muratori held, as well as the clarity of his judgements and the liveliness of his exposition, perhaps unexpected in a learned and erudite man such as he, may explain why his essay gave rise to an animated debate; it found a courteous but firm critic in the Neapolitan Francesco Rapolla, who years before had condemned both the convoluted disputations of jurists and the purely philological approach of the humanists, deeming it useless in legal practice.[33] Rapolla was critical of Muratori's emphasis on legislative intervention as a solution, whereas he felt that what was needed was a clear and coherent legal doctrine, both as rigorous and rooted in legal practice as that of the Dutch jurists, in his estimate.[34]

In conclusion, even at the risk of oversimplification but nevertheless founded on many elements that emerge from historical analysis, the

[31] Muratori, *De Codice Carolino*, 1726: remained unpublished until 200 years later when it was published by B. Donati, *Ludovico Antonio Muratori e la giurisprudenza del suo tempo: contributi storico-critici seguiti dal testo della inedita dissertazione di L.A.M. De Codice Carolino, sive De novo legum codice instituendo* (Modena, 1935).
[32] L. A. Muratori, *Della pubblica felicità: oggetto de' buoni principi*, ed. C. Mozzarelli (Rome, 1996).
[33] F. Rapolla, *De juriconsulto* (1726), ed. I. Birocchi, Bologna, 2006): a work with which Muratori was acquainted.
[34] F. Rapolla, *Difesa della giurisprudenza*, 1744.

demise of the *ius commune* might be summarised as the result of a twofold set of problems.

On one hand there is an extant body of sources – statutes and customs both local and personal, the texts of the *Corpus iuris*, practical and theoretical treatises collected over many centuries, legal decisions, monarchic laws, canon law texts – so large and varied as to make it difficult, if not impossible to identify an unambiguous normative rule, legal for a large sector of disputed questions and cases, in spite of the rules on the hierarchical order of sources and on how this complexity should be managed. On the other hand it was clear that the state of affairs concerning sources left enormous latitude to the interpreter or judge, a latitude that extended to the criminal field.

This resulted in the courts and judges effectively governing the law. It was precisely over the question of the judges and courts that a storm was brewing. On the continent, because of their uncontrolled power, the judges of the supreme courts were losing the consensus of both the litigants and the subjects. The distrust regarded a judicial discretion which could not be restrained, either by appeal or by (decisions being generally pronounced without motivation) checking the soundness of the legal reasoning. Other claims openly criticised the selection procedures of supreme court judges, the legalised practice of selling offices, these being permanent, the difficulty of litigants choosing the competent court, the severity of a criminal system which – although supported by the public in its most cruel punishments as crowds would flock to executions[35] – was by then criticised by the opinion of many cultivated observers.

The Habsburg reforms and the French Revolution were to have a largely anti-judicial outcome. In just a few years and with the decisive role played by a group of intellectuals, the vast discretional powers of the judges were replaced by the assertion of the principle of legality, the public nature of decisions, the motivation of sentences, the right to defence, the limiting of the judge's powers to the direct and literal application of the written laws. In the place of the unmanageable multitude of sources, state law took centre stage, not only as the foremost instrument of political power, but also to restore the certainty of law.

[35] This aspect of the criminal law of the old regime, in which capital punishment was favoured by the citizenry, was emphasised by Cavanna, 1975.

26

English Law (Sixteenth–Eighteenth Centuries)

By the end of the Middle Ages, the body of English law was extensive and established, but it was still to evolve in important ways in every sector of both private and public law. One work on English law stands out among the doctrinal texts, characteristically limited in number in the English legal tradition, written by a jurist of the second half of the fifteenth century who at the end of his career was a judge in the Court of Common Pleas, that is, the *Treatise on Tenures* by Thomas de Littleton (d. 1481),[1] dedicated to property. The systematic structure of the three volumes in which the work is divided, the clarity of the writing, the meticulous scrutiny of the various types of property and possession and the careful distinction between substantive law and procedure are the qualities that made Littleton's text universally consulted and regarded as unsurpassed for three centuries. In the seventeenth century Judge Edward Coke would dedicate a commentary to the work, which in turn became a classic.

A 1470 work by Chief Justice Sir John Fortescue of the King's Bench, who was exiled in France after the Lancastrian defeat, *De Laudibus Legum Angliae*,[2] addressed to the young Prince Edward in exile, clarifies the peculiarities of English law in a style suitable for a non-jurist and includes an interesting description of the legal professions and the Inns of Court.

Alongside the fundamental works of Edward Coke, discussed later, a significant role in English legal doctrine of the seventeenth century was to be played by the writings of John Selden (1584–1654), a learned jurist and politician (but not judge) who, among other things wrote a work comparing English, Roman and Jewish law.[3] In the constitutional crisis of 1628 he defended the position of Parliament and the courts against

[1] T. de Littleton, *Treatise on Tenures* (New York, 1978). The first edition was issued in 1481, one of the first books published in London.

[2] J. Fortescue, *De Laudibus Legum Angliae* (New Jersey, 1999).

[3] J. Selden, *De successionibus in bona defuncti secundum leges Ebraeorum; De successione in pontificatum Ebraeorum*, 1631; *De iure naturali et gentium juxta disciplinam Ebraeorum*, 1640.

the monarchic claim to the prerogative of arresting individual subjects [Baker, 2002, p. 474]. The historical dimension of law was taken up by William Prynne (1600–1669) but chiefly by Matthew Hale (1609–1676), who was at first judge in the Court of Common Pleas and subsequently a justice of the King's Bench; he must be considered the first great English legal historian. His most important works were *History of the Common Law* (1713)[4] and *History of the Pleas of the Crown* (1736), both published posthumously – Hale, like other scholars of the seventeenth century, was strangely reluctant to publish his work – both works having great impact among common law jurists ever since.

26.1 Justice

The importance of procedure in the evolution of English law remained an essential feature throughout the entire early modern period. Writs were now fixed in number, also because Parliament had claimed legislative powers, and this led to various forms in which the available legal instruments might be extended, some of them through legal fictions. An example is the *writ of ejectment* which, originally designed to protect real estate or land tenants from orders of expulsion, was extended to protect property and possession in general, adding to and in part replacing older writs. Over time, this writ in fact became the primary remedy for real actions, aimed at protecting the possession and ownership of real estate. For this purpose, the fictional expedient was used whereby the two litigants nominated two delegates as tenant and landlord [Plucknett, 1956, p. 374].

The nature and function of the civil and criminal jury was to evolve in significant ways. While the original role of the jury was that of witnesses to the facts or persons related to the dispute or the crime, in the course of time it gradually evolved into a different function: from being witnesses the jurors effectively became judges who, though their role was limited to deciding on the question of fact at hand, decided the case by verdict (*vere dictum*) based on witness accounts, documents and other proofs. The professional judge was then expected to apply the law to the verdict. This procedure, already consolidated at the beginning of the early modern period, did not prevent judges from playing an effective role in instructing the jury before it retired to the council chamber. Moreover, the judge had the power to question a verdict if he felt it was unjust or erroneous

[4] Sir Matthew Hale, *The History of the Common Law*, ed. Ch. M. Gray, Chicago, IL 1971.

and ask for a second jury to be nominated. Further, there was the *writ of attaint* [Langbein et al., 2009, p. 417], a criminal procedure in case the jury's verdict was proven false.

The early modern age saw the rise of a special criminal court established by a royal statute in 1487,[5] the Star Chamber made up of the chancellor, the treasurer and other ministers of the King's Council, as well as by judges and a bishop; in the beginning it was chaired by the king himself. The Star Chamber's prevalent activity concerned controversy over property rights, often claimed by litigants of a modest social standing [Baker in OHLE, VI, p. 197–198] and often resolved with harsh measures of a criminal law nature. The Chamber prosecuted a broad range of misdemeanours with a summary and expedited procedure, quick and effective also with regard to powerful individuals, without the intervention of a jury. Although it could not inflict capital punishment, it did have recourse to judicial torture, unlike other English courts. The Star Chamber was active for a century and a half and was accepted as a legitimate court by other courts of justice, despite other statutes forbidding special criminal jurisdictions, in line with the principle of peer justice dating back to the Magna Carta. The diminished sovereign power and the new balance of government functions that signalled the end of absolutism in England led to the abolishment of the Star Chamber in 1641.

The role of the courts, which asserted itself beginning in the twelfth century, remained central to the development of English law during the early modern period. The prestige of judges and their authority were decisive also in the genesis of modern constitutionalism. The common law judge's autonomy and independence of judgement even with regard to monarchic power, high-ranking social classes and economic interests are essential components of English law. This did not mean, however, that judges were removed from the world of politics, as is exemplified by two outstanding figures in the history of English common law, both at the highest-ranking Courts of Common Pleas and the King's Bench: Sir Edward Coke and Lord Mansfield both played important political roles in the Westminster Parliament.

26.2 Equity

An essential element of English early modern law is the breadth of the jurisdictional powers of the Court of Chancery. The chancellor, who was

[5] 3 Hen. VII, c. 1.

keeper of the royal seal beginning in the Norman era, was endowed with judicial powers among which was emitting new writs, which constituted the basis for the royal jurisdiction. The chancellor could also decide on behalf of the king on appeals that continued to be addressed to the sovereign even after the constitutions of the central royal courts of justice, and could accept or reject the request for royal intervention in overriding the restrictive and coercive procedures of these courts. In the fifteenth century the role of the Chancery grew, gradually absorbing areas in which the common law did not offer effective legal remedies [Langbein et al., 2009, pp. 267–384; Maitland, 1969[2]].

The general criterion adopted by the chancellor was of judging 'according to conscience' (*secundum conscientiam*) with a combined examination of facts and the law and with broad discretion. In this approach the influence of canon law (and indirectly also that of Roman *ius commune*) was considerable.

One of the fields in which the Chancery was most creative was that of fiduciary relations. For example: A for personal reasons wanted to bestow his property in favour of B, with the understanding that B would hold the property on trust in the interest of A or of C nominated by A. According to common law, this was not possible, because the transfer of property to B attributed him with full rights over that property, either to keep or dispose of as he wished, without any obligation to anyone else. The fiduciary contract was enforced by the Chancery in the name of equity. It is worth remembering that the chancellor was often a member of the clergy and as such an expert in canon law as well as Roman law, and equity (*aequitas*) was one of the key components of ecclesiastical justice, as seen previously.

The king favoured the Chancery jurisdiction, and so from the fifteenth century it became complementary to the common law royal courts. It decided with rules that were at first fluid and then gradually became set by precedent [Baker, 2002, p. 107], his jurisdiction coming to be known as equity. The procedures were completely separate from those of other royal courts: among other things, Chancery trials had no jury, whereas the chancellor had the defendant swear an oath on the contested facts. The chancellor was also able to broaden his jurisdictional interventions through the *injunction*: if persuaded that the decision of a common law court led to results which were contrary to conscience and therefore contrary to equity, the Chancellor could order the litigants to appear before him to settle the dispute, even if another court had in the meanwhile intervened. Without formally contrasting with common law ('equity follows the law'), equity procedure was effective because it could act directly on individuals with binding orders ('equity acts *in personam*').

A number of new and effective rules were thus instituted and soon acknowledged. The value of equity compared to common law was the focus of a work written in the form of a dialogue[6] in which it was emphasised that there is no normative rule that can effectively answer the perpetually changeable needs and occurrences of life, whereas equity is flexible and well suited to apply law to cases arising in legal practice. This thesis was upheld with particular force by Cardinal Wolsey in the early sixteenth century.

Thomas More (1477–1535) was also to defend the role played by equity. He insisted that the judges of the Westminster courts should moderate the rigour of common law if they wanted to avoid the chancellor's interventions in their decisions in the name of equity [Baker, 2002, p. 107].He had been a pupil of Erasmus of Rotterdam, was a humanist, a common law jurist and the author of one of the most important political philosophy texts of the Renaissance. He was Lord High Chancellor when for religious reasons he refused to recognise the king as head of the Church of England[7] and was therefore condemned to death, which he faced with legendary courage.

Another great thinker of the early modern age was also a chancellor. Francis Bacon (1561–1626) was a philosopher and jurist and author of some fundamental works on the methodology of natural and human sciences.

In the early seventeenth century the heated debate between king and Parliament which would lead to civil war and the 1649 and 1688 revolutions, and to the eradication of absolutism, had its fiercest battle in the legal sphere, specifically between common law and equity. In opposition to Edward Coke's position, the Court of Chancery was led by equally eminent intellectual and political figures such as Lord Ellesmere and Sir Francis Bacon. Against Coke they defended equity and the king's supremacy as superseding all other authorities, as well as the sovereign's role as supreme judge, a standpoint which found a solid ground in the political and legal thinking of antiquity and the Middle Ages. The supporters of common law questioned the very criterion of equity at the basis of the chancellor's jurisdiction, ironically denouncing its arbitrary nature, as

[6] *Dialogues between a Doctor of Divinity and a Student of Laws* published in 1528, written by Christopher of Saint Germain, a barrister of the Inner Temple and learned in canon law and theology.

[7] Thomas More, *Utopia*, 1516.

changeable over time, they said, as the chancellor's height or the size of his feet. If under the Stuarts the monarchy was to support the chancellor, ultimately the victory of Parliament was to redress the balance in favour of common law.

In time the Chancery Court's jurisdiction activity slowed down and became hampered by the fact that every legal decision was taken by the chancellor, although with the help of many collaborators. This might explain why at the end of the nineteenth century, after a long period of upheaval, equity's jurisdiction was acquired by the single central court of justice, as we will see (Chapter 34.7).

However the contribution made by the Chancery court to early modern English law should not be underestimated: equity must be credited with the establishment of many important institutions and innovative rules in several sectors of law: in addition to uses and trusts, mentioned earlier, rules on fraud and error, rescission of contracts, and specific performance law (unknown to common law) and many more [Baker, 2002, p. 203].

Not only the system of equity, but also the Admiralty Court for maritime law controversies testifies to the influence of Roman and canon law not being at all marginal in English law of the early modern period. For these controversies, the requirement was to turn to Roman law, as legal treatises and writings testify [P. Stein, 2003]. An association, the Doctor's Common, created in the sixteenth century and active for three centuries [Coquillette, 1988], gathered lawyers with competence in canon and civil law. But the courts of common law were able in time to considerably circumscribe the jurisdiction of the Admiralty Court, claiming competency in everything concerning the land, also beyond the seas, as well as maritime crimes and piracy and maritime contracts among foreigners.

Ecclesiastical jurisdiction preserved an important role because of its competence in cases of ecclesiastical benefices and marriage [Helmholz, 2004]. Many rules of canon law origin were to be preserved even after the separation of the English church from that of Rome [Baker in OHLE, VI, p. 252].

26.3 Edward Coke

The separation between common law and equity was to grow and develop into open conflict in the seventeenth century. This occurrence signalled one of the most critical moments in English law, and a key

protagonist was Edward Coke (1552–1634),[8] an outstanding figure in the history of English law. Coke had a profound mastery of common law and wrote some works destined to remain of fundamental importance in the centuries that followed: in particular his *Reports* in thirteen volumes[9] succeeded in reconstructing the entire common law system through the collections of many hundreds of cases from medieval times until the early seventeenth century. The influence and the prestige of this work was enormous; the further four-volume *Institutes*,[10] a systematic exposition of real estate law, criminal law, the principal statutes and the system of the courts of justice, was to receive equal acclaim.

Coke was the chief justice of the Court of Common Pleas as of 1606 and took a decisive position against the sovereign's request to call back a case from the jurisdiction of the common law, which had been brought forth by a physician whose claims had been acknowledged by the Court of Common Pleas [Bonham's case]. Coke argued that the justice of professional judges, that is, the justice administered by the traditional royal courts, must constitute the real foundation of English law and as such could not be substituted nor invalidated, even by the sovereign's will. His perception of common law as the 'fundamental law' of the kingdom, superseding the crown and Parliament itself, was expressed in terms which have remained memorable, as did a notion directly concerning the king, according to which in order to get a correct judgement, 'natural' equity alone does not suffice: the requirement is also for those legal techniques that are possessed only by experts and that must be based on their familiarity with past decisions: 'out of old fields must come the new corn.'[11]

Some years later, in 1611, in another case, Coke was to deny the right of a special commission nominated by the king to order the penalty of imprisonment. Again in 1615, having become the chief justice of the King's Bench, he opposed the Chancery, which was intending, as in the past, to modify a royal court decision, a decision which the litigant claimed to be fraudulent. He was opposed by the acting chancellor,

[8] A chronology of Coke's life and works is found in Sheppard, 2003, vol. I, pp. 33–65.

[9] E. Coke, *The Reports [. . .] in Thirteen Parts* (London, 1826), 6 vols. A selection of the *Reports* and other relevant material on Coke is in Sheppard, 2003. On the *Reports, Law, Liberty and Parliament*, 2004, pp. 357–386.

[10] E. Coke, *Institutes of the Laws of England, I–IV* (London 1628–1648), 4 vols. A large selection is in Sheppard, 2003, vol. II, pp. 577–1186.

[11] E. Coke, Bonham's Case, 1610; the text of this famous case in *English Reports*, Abington (Oxfordshire, 1979), vol. 77, pp. 638–658; Sheppard, 2003, pp. 264–283; Plucknett, 1956, p. 51; *Law, Liberty and Parliament*, 2004, pp. 150–185.

Lord Ellesmere, who had the full support of James I in his battle in favour of the court of equity. A royal decree ordered that the chancellor could intervene with a judgement even after the case had been decided according to common law. Edward Coke was defeated, and a little later in 1616, having remained in the minority in his court on the question of the king's prerogative in ecclesiastical matters,[12] he was forced to vacate the bench.

However, in the following years he was to retain an important role on the opposition front, in the course of the political events that led to the triumph of Parliament and modern English constitutionalism: in 1628 there was bitter conflict between the King's Bench and the king's government that had five knights imprisoned who had refused to underwrite a loan imposed by the crown.[13] Coke's contention – declaring the imprisonment of a subject without reason against the Magna Carta – did not solve the question. The conflict between the king and Parliament was on the verge of breaking into civil war.

26.4 The Bill of Rights

The religious policy of the Stuart monarchy under James II was to take the conflict between the monarchy and Parliament to its conclusion. Although in the name of tolerance and religious liberty, the sovereign's claim to the royal prerogative of dispensing – in particular cases and by his own initiative – the execution of legislative rules voted by Parliament led to the king's defeat, abdication and the ascent to the throne of his daughter Mary with her husband, William III. The new order was set out in the Bill of Rights of 1689.[14] It declared 'illegal' – without prior authorisation from Parliament – orders given by the king to suspend the application of a law, to impose permanent taxes and to maintain an army in time of peace. Furthermore, the principle was established whereby Members of Parliament were freely elected, had unconditional right to free speech and were required to hold regular parliamentary sessions.

Ten years prior to this in 1679, the Act of *Habeas Corpus*[15] had introduced guarantees against government orders that would restrict personal freedom. The *habeas corpus* – which paradoxically indicated the judge's power to have custody of an illegally held individual – had

[12] Case of Commendans, 1616: Colt and Glover v. Bishop of Coventry (text in *English Reports*, vol. 80, pp. 290–313).
[13] Five Knights Case, Darnel's Case, 3 State Trials, 1 (Baker, 2002, p. 474).
[14] 1 William and Mary, sess. 2, c. 2. [15] 31 Car. II, c. 2.

remote as well as more recent precedent, but was legally formalised only with this law to prevent illegal arrest on the part of executive power. Every English subject could acquire the writ of *habeas corpus* so as to have the right to a regular trial in the presence of a jury. To begin with, the law was limited to control irregularities in the arrest procedure; later, it was extended to ascertain the basis for the arrest itself [Baker, 2002[4], pp. 146, 474].

Judge John Holt (1642–1710) with a series of decisions was in turn to reinforce the protection of the defendant in criminal cases; furthermore, he recognised the value of commercial customs, even when they diverged from common law. And he was to declare (circa 1702) that 'as soon as a negro comes to England, he is free'; [Baker, 2002[4], p. 475], being a precursor of the future positions taken by Lord Mansfield (see later).

In 1701 the Act of Settlement formally sanctioned the guarantee of the autonomy of judges, assuring judges of a salary and a tenured position from which they could only be ousted on the vote of both Houses of Parliament.

These rulings substantially diminished the king's and the government's power and at the same time strengthened the role of Parliament and the independence of judicial power. The regime of monarchic absolutism was thus brought to a close and the foundations laid of the modern model of the constitutional state, based on the balance of three powers.

26.5 The Contract: *Assumpsit*

In the sphere of private law, the evolution of contract law is worthy of note, whose origins go back to the first phase of common law. A turning point was in the sixteenth century, when the remedy of the *assumpsit* began to be applied to some types of contract. This was a writ which extended to the non-fulfilment of an obligation – such as not to take appropriate care of an animal left to one's custody – the protection granted to the victim of a tort by the writ of trespass. Later a similar protection was added to debtors who had begun to pay back their loan, but hadn't finished paying the debt (*indebitatus assumpsit*); in such cases the fact required to have recourse to *assumpsit* (i.e. the beginning of the execution of the obligation) had to be proven for the protection to stand.

The *assumpsit* was founded on the premise of a unilateral commitment, not based on a *sinallagma* that incorporated equal advantage to both contracting parties (based on the element known as consideration);

this approach, which might be defined with the formula of the theory of *voluntas*, would progressively affirm itself until the seventeenth century and was disallowed only in the eighteenth century.[16]

A conflict was to arise between the King's Bench and the Court of Common Pleas, both competent in the matter of the *assumpsit*, which was to lead to a historically relevant decision in 1602 known as the *Slade Case*. It was decided that 'That every contract executory importeth in itself an Assumpsit, for when one agreeth to pay money, or to deliver anything, thereby he promiseth to pay, or deliver it.'[17] So, if the agreement could be proven to exist, the *assumpsit* was presumed, without having to prove it [Plucknett, 1956, p. 645]. What form this agreement was to take to become enforceable, however, was for a long time a matter of debate as common law did not admit (in the same way as Roman law, but unlike canon law) the enforceability of bare pacts (*pacta nuda*): this explains why after the Slade Case English legal doctrine was to give weight to the *consideration*, that is the motivations expressed by the parties when agreeing to the contract [Milsom, 2007, pp. 314–360].

A further step was made in the second half of the eighteenth century, when Lord Mansfield (see later) declared in a number of historical decisions[18] that *consideration* should be considered a simple means of proving a contract, so it could be substituted with other means of proving the debt or the obligation, also by virtue of the recent Statute of Fraud. He declared that when the existence could be proven, even with an informal writing, of an obligation having been taken in conscience, the obligation became enforceable. The continental doctrine also played a role in this, particularly that of Robert Pothier, whose work on contracts had been published a few years earlier and was known to the great English judge.

26.6 Reports

The transcription of trial debates – in the form of Year Books which recorded the activities mainly of the Court of Common Pleas – began, as we have seen, at the end of the thirteenth century and continued until the sixteenth century. In the latter half of the fifteenth century a number

[16] On this, see Ibbetson, 1999, pp. 135–151, 236–262.

[17] Slade Case (1602), in *English Reports*, vol. 76, pp. 1074–1079, 1077; Sheppard, 2003, pp. 116–125; Simpson in *Law, Liberty and Parliament*, pp. 70–84.

[18] Among many famous cases are those of Pillans v. Van Mierop (1765) in *English Reports I*, vol. 97, pp. 1035–1041; Trueman v. Fenton (1777) in *English Reports*, vol. 98, pp. 1232–1235.

of members of the Inns of Court edited collections of reports, which often covered many years or even decades: examples are those of Roger Townhend, John Bryt and John Spelman,[19] John Caryll[20] and John Port.[21]

With the advent of the printing press the cumulative editions of the Year Books began to appear, at first dedicated to the decisions of the two centuries between 1327 and 1535, the largest of these collections being the folio edition of 1679–1680.

From the beginning of the sixteenth century the style of the Reports began to change and the legal questions debated in the trials became more and more important. The decisions of the King's Bench increasingly attracted the attention of reporters. Even after the introduction of the printing press, manuscripts continued to be produced as an alternative. Some of the collected Reports of particular authors acquired more prestige than others, for example, those of Edmund Plowden for the years 1550 to 1570 with his own comments; of particular relevance were the eleven volumes of Reports commented on by Sir Edward Coke, published between 1600 and 1616, to which two volumes were added posthumously. Many collections written and edited by these same authors were published also in the course of the eighteenth century.[22]

At the same time, it became apparent that the material should be arranged by subject matter, making it possible for the lawyer to find his way in the immense amount of material offered in the Reports collected over several centuries. From the end of the fifteenth century indexes were put together and published indicating the Reports of single cases ordered alphabetically by subject. The most important of these Abridgements was published by Charles Viner in the mid-eighteenth century,[23] with comprehensive notes and cross-references.

A later collection of Reports is that of 178 volumes of the years 1902–1932, reissued in a facsimile edition in 1979.[24]

[19] *The Reports of John Spelman* (London, 1977) (Selden Society, 99).

[20] Published in 1602; critical edition: *Report of Cases of John Caryll* (London, 1999–2000) (Selden Society, 115–116). His reports extend for forty years, from the 1480s to 1523.

[21] *The Notebook of Sir John Port* (London, 1986) (Selden Society, 102).

[22] On this, see Baker, 2002, pp. 180–184.

[23] Ch. Viner, *General Abridgement of Law and Equity* (London, 1741–1753).

[24] *The English Reports* (London, 1900–1932); facsimile edition, Abingdon (Oxfordshire, 1979). The cases are divided by court. Those of the King's Bench are in vols. 72–122 (from the year 1378); those of the Common Pleas in vols. 123–144 (from 1486); those of the Exchequer in vols. 145–160 (from 1286); those of the Chancery Court (Equity) in vols. 21–47 and 56–71 (from 1557).

26.7 Lord Mansfield

A sector in which English law of the modern age had significant developments was that of commercial law. In the Middle Ages Italian commercial customs had reached England and commercial law was exercised by the Piepowder courts, with merchant-judges on the continental model of judges of specific courts such as those acting in fairs, markets and corporations. But at the beginning of the seventeenth century, first Coke, then, at the end of the century, mainly Holt [Plucknett, 1956, p. 669], transferred cases of commercial law to the jurisdiction of the Court of Common Pleas. A decisive contribution was that of William Murray, Lord Mansfield (1705–1793).

This key figure in eighteenth-century English law, born into Scottish nobility, was a Latinist and an effective and elegant orator. Subsequent to his classical studies at Oxford he was first a barrister in Lincoln's Inn, then Solicitor General (1742), then Attorney General (1754) in the House of Commons, where he was also politically active, notably as an adversary of William Pitt. In 1756 he opted out of a political career and became chief justice of the King's Bench and as such was for around thirty years the author of a series of common law case decisions of historical weight. His learning included Roman law and continental doctrine. In his decisions he often included rules drawn from the rich doctrinal tradition developed on the continent, skilfully grafted onto the context of customs and traditions of common law.

The decisions that shaped commercial law were to be fundamental – particularly to do with contracts, navigation, insurance, companies and bills of exchange – definitively including the commercial customs within the common law system, with the accent placed on the value of pacts and the emphasis on good faith.[25] He was in the habit of submitting controversial commercial cases to jurors chosen from among the best merchants in London and listened carefully to their opinions before examining the legal issues of the case at hand. Moreover, he was in the habit of taking copious notes in the course of hearings [Oldham, 1992] and used them to instruct the jury, willing also to intervene with observations and points on the question of fact [Baker, 2002, p. 85]. His attitude was deliberately informal in tackling legal questions: as he famously declared during a trial, 'I never like to entangle justice in matter of form.'[26] It was characteristic of him to declare himself pleased when encountering conflict between common law and equity [Baker, 2002, p. 203].

[25] As Lord Mansfield was to declare in 1765: 'Hodierni mores are such that the old notion about nudum pactum is not strictly observed as such [. . .] Fides servanda est' (Pillians v. Van Merop, in English Reports I, vol. 97, p. 1040).

Lord Mansfield's decisions were crucial in other matters as well. The question of slavery, for example, had already been the subject of decisions. Judge Holt had already declared that a slave became a free man on arriving in England regardless (many disagreed on this point) of his being a Christian or heathen: in England (it was said) there was service (*villeinage*), but not slavery, which transformed man into a movable thing, like an animal. Blackstone too was to affirm 'the moment a slave sets foot in England he is free'.[27]

Opinion was, however divided on the specific point of whether a slave, who enjoyed the status of free man in England, could turn back into a slave if he left the country. In another famous decision Mansfield did not deny in principle the legitimacy of slavery, although declaring it odious, but in the specific case he decided that a slave, who had become free on English soil, could not exit the country against his will. This was later used as a general argument against slavery [Baker, 2002, p. 476].

The legislative abolition of slavery, already envisioned in 1792 under the influence of the French Revolution, came into effect in 1807 for African slaves[28] and in 1833 for the English colonies of the West Indies.[29]

26.8 *Stare Decisis*: Legal Precedent

One of the cornerstones of English common law, the binding nature of legal precedent – for which Hale used a formula in the seventeenth century, which then became traditional: *stare decisis* – was consolidated slowly and in the modern age.

The large use that Bracton had made of decisions which he consulted and transcribed had been an exception, in that the records were not normally accessible and could not be consulted at that time. Bracton did not in any case always go along with cited cases and often rated good decisions from the past as superior to those of his contemporaries, whom he deemed less well instructed than their predecessors. It should also be clear that reference to precedents by advocates in a trial was not binding in itself, but rather as a custom: in fact, reference to more than one same

[26] Lord Mansfield about the Trueman v. Fenton case of 1777 (English Reports, vol. 98, p. 1233).

[27] Blackstone, *Commentaries*, vol. I, p. 123.

[28] Statute 47 George III, c. 36.

[29] Statute 3 and 4 William IV, c. 73, c. 12.

decision demonstrated it to be customary and a new trial should therefore conform to it. There was not yet the rule whereby a single decision constituted a precedent. On the contrary, an authoritative judge at the time of Hale, Chief Justice Vaughan of the Court of Common Pleas, declared in 1670 that it would be irrational to follow a mistaken legal precedent and that though the precedent should be taken into consideration, it should not necessarily be repeated.[30] Only a consolidated and steady line of decisions was therefore considered binding [Baker, 2002, p. 199].

Between the sixteenth and the seventeenth centuries decisions made by the Exchequer Chamber began to be considered binding as this was a supreme court which gathered royal judges from the three central courts, the Court of Exchequer, the King's Bench and the Court of Common Pleas for particularly important cases. By the end of the seventeenth century the principle was settled that decisions of the Exchequer constituted a binding precedent [Plucknett, 1956, p. 348]. Similarly, pronouncements of the Equity Court began to have binding force at that time. Although the distinction between the core arguments, decisive for the case, and the collateral arguments (*obiter dicta*) to the judgement by then existed, the judge's freedom in giving weight to precedent was still considerable: it was not rare for a judge to declare as inappropriate the report of a precedent he disapproved of, producing a different legal argument that he considered to have more value: Lord Mansfield made frequent recourse to this expedient [Fifoot, 1977, pp. 198–229].

Only later in the nineteenth century would the rule whereby a single precedent – if it was clearly argued that the legal question was the same – have an absolute binding force for a lower judge: a precedent of the Court of Appeal would be binding for the Court of Justice; a precedent of the House of Lords would be binding over the Court of Appeal and the Court of Justice. Opinion was (and still is today) discordant on the binding force of a single precedent, in the same court where the decision had been made. The same can be said for holding fast to custom, the binding force of which was somewhat flexible to begin with, but ever greater as it was consolidated, so to speak, with one or more judicial decisions over time. The modern principle of *stare decisis* thus comes into play.

[30] 'If a judge conceives a judgement given in another Court to be erroneous, he being sworn according to law [. . .], in his conscience ought not to give the like judgement': Vaughan declared in the Bole v. Horton case (*English Reports*, vol. 124, pp. 1113–1129, p. 1124).

26.9 William Blackstone

Together with Bracton and Coke, although very different from each other, one of the most widely circulated and authoritative authors in the history of English law was Sir William Blackstone (1723–1780).[31] His fame is due to the *Commentaries on the Laws of England*,[32] a treatise in four volumes conceived as a textbook for teaching at Oxford, where he held the first and at the time the only university chair of legal studies. The whole of common law was set out with reference to judicial and legislative sources: private, public, procedure and criminal law. The means by which to disregard some procedures which had been in disuse for centuries but never formally abrogated – such as the judicial dual: trial by battle – were discerningly illustrated, as were the legal expedients and fictions established for the same purpose. In fact, at this time the central courts extended their jurisdictional competencies through challenging legal fictions [Maitland, 1948, p. 79].[33] The *writ of trespass* in its various forms thus acquired more and more weight.

The systematic and updated legal framework emerging from the pages of Blackstone, written also for non-professional jurists but much respected by highly qualified ones, such as Lord Mansfield [Braun, 2006, p. 152], together with his persuasion of the 'superior reasonableness'[34] of common law compared to civil law, with which the author was also familiar, can explain the great fame of this work. In the American colonies too Blackstone's text was widely used and reissued. No other work offers such a clear and comprehensive account of English law in the latter half of the eighteenth century.

[31] Doolittle, 2001; Halpérin, DGOJ, p. 55.

[32] W. Blackstone, *Commentaries on the Laws of England* (London 1765–1789), 4 vols. The text can also be retrieved online at: www.lonang.com/exlibris/blackstone/.

[33] E.g. the King's Bench could take on cases to do with debt (which in principle was dealt with by the Court of Common Pleas) by imprisoning the defendant who as prisoner came under the jurisdiction of the Bench, which in turn accepted to debate the plaintiff's question regarding the debt. The Court of Exchequer, which was competent for tax cases, but not for obligations or private contracts, similarly declared the plaintiff as being debtor of the king, who had defaulted on his debt by reason of being an unsatisfied creditor, and in this way the Exchequer ascertained the debit and credit of the two litigants (Maitland, 1948, p. 79).

[34] 'The superior reasonableness of the laws of England': this judgement that underlies his entire work, refers specifically to the common law rule regarding testimony as different from the continental rule 'unus testis nullus testis': Blackstone refers to the 'ingenious expedient' devised by the *ius commune* on the Continent – accompany testimony of a single witness with the supplementary oath of the party as full proof – but then defends the more flexible English law praising its 'superior reasonableness' (Blackstone, *Commentaries*, III. 23).

26.10 Scots Law

Northern Britain, where from the Middle Ages Celts, Angles and Normans together with the Scots from Ireland formed a separate kingdom than that of England, also developed a quite distinct body of customary laws. The Church was to have great influence also in the legal sphere, and jurisdiction was exercised in accordance with continental Roman-canonical procedure. Through canon law, Roman law was grafted onto local norms acquiring great authority, although it was never directly and formally adopted [Robinson, 2000, p. 228]. The first universities in Scotland (St Andrew, 1412; Glasgow, 1451; Edinburgh, 1556) did not stop the flow of students to the continent. The University of Leiden in Holland, founded in 1575, was a particular attraction. The Edinburgh legal library (of which the philosopher David Hume was librarian) was amply supplied with the best continental law texts.

Among the authors who wrote on Scots law, a central role was played by James Dalrymple, Viscount of Stair (1619–1695). He was professor at Glasgow, advocate and from 1671 president of the principal Scottish court, the Court of Session; in 1681 he published a fundamental work,[35] in which he set out local customs – integrated and selected – and made them coherent within the framework of natural law doctrine, starting from the premise that law 'must be regarded as a rational discipline' [Robinson, 2000, p. 235]. The influence of Grotius and the Dutch school is clear, also in the frequent reference to Roman law.

With the 1707 Act of Union, Scotland became part of the United Kingdom [Levack, 1987]. Scottish representatives entered the English Parliament and the constitutional autonomy of Scotland came to an end, as it could not be on the same footing as a federal state.[36] But Scots law remained essentially distinct from common law; *inter alia*, in the Act of Union of 1707 it was stated that legal decisions of local courts could not be re-examined by common law judges. This did not prevent the use, although limited to exceptional cases, of a procedure whereby decisions taken by the Supreme Court of Scotland could be appealed to the House of Lords.

The Scottish people were proud of their local laws. Scotsman James Boswell overcame his awe of Samuel Johnson – who liked to make ironic remarks about the Scottish at the expense of his younger friend and

[35] Stair, *Institutes of the Laws of Scotland*, 1681.
[36] The Scottish Parliament, which has limited powers, was instituted only in 1998.

future biographer – vindicating the superiority of Scottish law in the different procedure regarding debtors, who in England were imprisoned based solely on the word of their creditors, whereas in Scotland they were protected by the law.[37]

During the eighteenth century the University of Glasgow in particular was to flourish. Francis Hutcheson influenced the thinking of David Hume and was teacher of Adam Smith, one of the founders of modern economics. He was in turn professor of law at Glasgow and author of an important series of lessons in *Jurisprudence*[38] with a wealth of historical and contemporary references to family law, contracts and enforcement law.

[37] Boswell's *Life of Johnson*, 15 May 1776 (London, 1957, p. 774).
[38] Italian edition: A. Smith, *Lezioni di Glasgow* (1763–1764), edited by E. Pesciarelli (Milan, 1989); Adam Smith, *Lectures on Jurisprudence*, R. Meek, D. Raphael and P. Stein (eds.), Oxford, 1976.