4

The Carolingian and Feudal Age

4.1 Political Structures, Kingdoms and Empire

From the time the Merovingians were supplanted on the Frankish throne by Pippin the Short in the year 751, the direct association with the Church was not only maintained, but reinforced. Even before this, in the year 732, at a time when it might have been expected that Islam would spread from the Iberian Peninsula to the whole of Western Europe, the Arabs had suffered a momentous defeat at the hands of Charles Martel at Poitiers. Over the course of forty years, Pippin's son, Charles, having ascended to the throne in 768, was to bring the Frankish kingdom to a position of absolute pre-eminence in Europe. Having conquered the Lombard kingdom, adding it to the dominions of the Frank kingdom in 774, he then bitterly fought the Saxons, pushing the frontier line to Elba, proceeded over the Pyrenees and faced the Muslims on the Ebro River.

In addition to these victorious military campaigns, he was also to carry out a profound reform of the internal framework of the kingdom. The control of the territory was assigned to around 400 counts, nominated for life by the king and entitled to the power of '*bannum*', a Germanic term meaning military and civil command. The counts were also expected to preside over hearings in the administration of justice, which they exercised by keeping a third of the amends due to the king by the litigants.[1] In trials Charlemagne added semi-professional judges known as *scabini* to the local notables. Nevertheless, contemporary sources reveal the counts' arrogance towards their subjects and the iniquities of a justice system often unscrupulously conducted.[2] To counter these shortcomings, Charlemagne systematically entrusted

[1] *Capitularia regum Francorum* [see note 3 later in this chapter], nr. 95, c. 5, vol. I, p. 201.

[2] See the realistic representation of Theodulf, an important personality in the king's circle, *Contra iudices*, in MGH, *Poëtae Aevi Carolini*, ed. Dümmler, I (Berlin 1881), pp. 493–517. See also the capitular of the year 811, in *Capitularia regum Francorum* [note 3 of this chapter] vol. nr. 73: a mention is made of subjects being forced to sell their property to the count for less than what it was worth, whether they liked it or not.

secular and ecclesiastical figures of his choosing, known as *missi dominici*, with the task of overseeing the work done by the counts through investigative missions carried out throughout the territory. During the ninth century in Italy, more than half of the 100 trials of which documentation has come down to us were handled by *missi*.

On Christmas Eve of the year 800 Pope Leo III placed the imperial crown on the head of the Frankish king. In the West, the Empire was thus to rise once again, but in a different guise and taking the name of Holy Roman Empire, in deference to the formal ties to the Church of Rome that had existed from the kingdom's inception. With the new investiture the Frankish king acquired a role and a status that put him on a higher plane than other kings. In fact imperial power had a universal character, at least in the realms of Western Christendom (relations with the Eastern Empire were often discordant, as the Emperor of Constantinople considered himself the legitimate successor of the Western Emperors). In addition to which, whereas in the Germanic tradition regal authority also depended on the consensus of the people (or rather the consent expressed by the notables of the kingdom, gathered in the presence of the king), the imperial authority was free from such dependence and held to be derived from God himself, through the intercession of the Church [Calasso 1954]. For centuries this was to have important consequences also in the exercise of legislative power, as the holder of the imperial crown could, in the same way as the Emperors of antiquity and Byzantium, operate autonomously, without the formal consent of the notables of the reign.

At different times between the years 789 and 802, first as king then as Emperor, Charles imposed on his male subjects an oath of allegiance, binding them more closely to strict obedience [Prodi 1992]. But this also introduced a contractual element in his relationship to his subjects [Ganshof 1968] which was to have historical significance in successive times.

4.2 Capitularies

These and other reforms were introduced by the sovereign together with other interventions of a different nature. Partly by direct orders which were subsequently converted into unwritten customs – for example, when he imposed *scabini* in the counts' trials, figures which were to be present regularly in courts of justice from this time on – and partly with acts of a legislative nature, which took the name of capitularies, great

numbers of which were emanated by Charlemagne and his successors.[3] These were written laws, with which the king dictated his will after having expressed it in words [Ganshof 1968a], in the presence of the notables of the kingdom.

The object of the normative discipline of the capitularies is varied. There are ordinances on judicial procedure, for example the obligatory requirement of hearing each witness separately,[4] or on the authority of the judge to acquire credible and informed witnesses through a specific procedure, the so-called *inquisitio* [Bougard 1995]. Other capitularies contain criminal and administrative dispositions. Still others are addressed to regulating the relationship between civilian authorities and bishops, churches and monasteries. In fact, Charlemagne took addressing religious and even liturgical questions as his pre-eminent mission, and imposed a tight cooperation between bishops and counts, going so far as to assign bishops to civil duties.

Legislative interventions were not aimed at substituting national laws or those of each race; on the contrary, Charles and his successors maintained these laws in effect, even though in some measure they were to be revoked by the new dispositions in the capitularies. The Salic law continued to be effective for the Franks; the Lombard edicts were preserved for the Italic kingdom, as were the laws of the Bavarian race, of the Saxons and other people of the kingdom, as well as Roman law for the Latin population. Charles and his successors gave the existing Lombard kingdom a separate legal order which is manifest also in the legislation: only a few of the general capitularies were extended to Italy, whereas others were destined specifically for the peninsula in the form of additions to and corrections of Lombard law.[5]

4.3 Fief, Vassal and Benefice

The Carolingian age yielded a set of new rules pertaining to the relationship between the king and the nobility of the kingdom and established a bond of dependence among the vassals. Only much later would historians retrospectively name the period between the ninth and the eleventh centuries the 'feudal age', thus attributing to a legal term the role characterising an entire span of three centuries of European history.

[3] *Capitularia regum Francorum*, ed. Boretius-Krause, in MGH, 2 vols. (Berlin, 1881).
[4] *Capitulare missorum* (of the year 805), in *Capitularia*, n. 44, c. 11 (vol. I p. 124).
[5] Both are collected in the *Capitulare italicum*, in MGH, Leges, IV, ed. Bluhme (Hanover 1868).

The personal tie between two men of different rank was undertaken on one hand to guarantee assistance in any circumstance, particularly in war, to the superior of the two in rank and protection and the provision of a stable means of sustenance to the inferior in rank, mostly through the concession of lands as benefice. This brief definition of the feudal relationship does not take into consideration the variety of forms nor the features which the system would acquire in different parts of Europe, but does underline the personal element and the contractual nature of the relationship. The backdrop was that of a primitive and violent society, in which the guarantee of relative security often depended on the protection provided by a powerful figure, assuring both security and a livelihood. There are early examples of lifelong commitments of service to a lord and protector on the part of freemen claiming poverty and hunger.[6] In other instances, the freeman would cede his lands to a lord, who reassigned them back to him in fealty in exchange for protection (*feudum oblatum*).

The personal character of the contract is revealed by the legal weight given to the value of 'fidelity', which the vassal owed to the lord and vice versa. It was a total form of loyalty, ethical before being juridical,[7] inspired by the Germanic custom which tied young nobles to their king (*Gefolschalft*) and also bound the king to the protection of the weak and defenceless (*mundeburdium*), but refashioned and infused with Christian spirit.[8] The breaking of fidelity (*fellonia*) was the gravest of crimes: 'the vassal must help his master against everyone: against his own brother, his son, his father.'[9]

The pact was formalised with a ceremony of homage. The vassal put his clasped hands into the clasped hands of his lord – an act first witnessed in Campiègne in 757, a gesture which would later assume a higher significance in Christian prayer – the pact was then solemnised by an oath of fealty. To this model others were added wherever the feudal

[6] Testimony to this effect is in a significant text of the Formulary, written in Tours in the first half of the eighth century, in *Formulae Turonenses*, 43, ed. Zeumer, MGH, *Formulae* (Hanover 1886), p. 158.
[7] In a text from the year 843, the Frank noblewoman Dhuoda urged her son to follow the model of obedience of the Church Fathers so as to avoid the 'germ of evil to grow in your heart rendering unfaithful to your lord in every way'. See on this E. Bondurand, *L'éducation caroligienne, Le manuel de Dhuoda* (Paris 1887), pp. 90–92.
[8] *The Manual of Dhuoda*, ch. 15 (see note 7 earlier in this chapter) actually suggested to her son as a model of *fidelitas* of the servant towards his master 'the lives and sayings of the saints'.
[9] *Consuetudines feudorum* 2. 48. 4 (ed. K. Lehmann, *Das langobardische Lehnrecht* (Göttingen 1896), p. 159).

bond existed in the different parts of Europe: for example in the Mediterranean regions the pact between vassal and lord took a written form and the homage came only later. Fossier (1982) has counted as many as seven different models.

The obligation of the vassal may be summarised as that of having to assist his lord in warfare and as his adviser in public duties, such as his compulsory presence in judicial assemblies: to render 'help and advice', as Bishop Fulbert of Chartres wrote in 1020.[10] The feudal pact was originally strictly personal, intended to last for the lifetime of the two subjects. But the tendency to render the feudal relationship a permanent one manifested itself with such insistence as to eventually emerge, in different but converging ways, as an inheritable asset.

The contractual nature is in turn a significant element because the relationship, though it was between men of different social standing, nevertheless implied the free consent of the vassal and not his unconditional subordination.[11] Even the fundamental bond of service in war and of fidelity could lawfully be regarded as interrupted if the war the lord engaged in was unjust[12] or if he had acted illicitly, or against the law and justice:[13] so it was to be declared in two authoritative sources on feudal customs, the *Libri Feudorum* of the twelfth century and the *Saxon Mirror* of the thirteenth century, respectively, from Italy and Germany.

The feudal relationship was all the more important as in the Frank kingdom and those regions of Europe in which it flourished – Italy, Germany, England, the Iberian Peninsula and others – it became a central element of the political system. In France the counts were also tied to the king with the bond of a vassal, which between the tenth and the eleventh centuries, in practice often became the only real element of subordination, as at the time the power of the monarchy over the local

[10] *The Letters of Fulbert of Chartres*, ed. Behrends (Oxford 1976), n. 51, pp. 90–92. The letter was reproduced in many collections of canon law, up to Gratian's *Decretum* (C. 22 q. 5 c. 18).

[11] See Charles the Bald's statement in a capitulary of the year 847: '*volumus etiam ut unusquisque liber homo in nostro regno seniorem qualem voluerit, in nobis et in nostri fidelibus accipiat*' (*Capitularia regum Francorum*, MGH, n. 204, vol. II p. 71); cf. ibid., n. 194 of the year 831, c. 8, vol. II, p. 22 Ludov. the Pious).

[12] '*Domino guerram faciente alicui, si sciatur quod iuste aut cum dubitatur, vasalus eum adiuvare tenetur*' (*Libri Feudorum*, 2. 28 pr.). The fact that the obligation is expressed in positive terms and is confirmed in case of doubt does not take away the formula's effectiveness if the vassal was certain the war to which the lord called him was unjust.

[13] *Sachsenspiegel, Landrecht* 3. 78. 2, in MGH *Fontes iuris germanici antiqui* (Hanover 1966), p. 80.

lords was minimal. The king's interest not to permanently lose control of feudal benefices which had tended to become a hereditary asset explains why they were often granted to bishops and ecclesiastical figures with no descendants.

The web of feudal relationships became ever denser as vassals could in turn tie bonds with vassals of inferior rank in a sequence of relationships and subordination that could reach four or even five levels. Often someone was the vassal of two lords: in these cases, the conflict of fidelity that might arise was solved by instituting the priority of one relationship over the other, the homage of 'liege lord'. In some European regions, for example in England during the tenth century, every man who was not in a servile state was compelled to be bound to a lord or otherwise be considered an outlaw. Similarly in Normandy and in Brittany the adage '*nulle terre sans seigneur*' was common. But the king's control was in any case weak, because the vassal's bond was with his own lord, not with his lord's master: 'the vassal of my vassal is not my vassal,' jurists were later to declare.[14] Only in the thirteenth century and only in France was the monarchy able to make the principle of vassals as 'all in the hands of the king' prevail.[15]

In addition to the protection which corresponded to the obligation of fidelity and the undertaking of assistance and council, the recompense received by those who took an oath of fealty to a lord was the concession which came to be known as a *benefice*. This normally consisted in granting the vassal the rights over lands belonging to the crown for which the king had executed an infeudation, or over lands which were the property of an overlord of minor infeudations. Not only did the profit, whether in goods or money, rightfully belong to the vassal, but also rights of a public or semi-public nature: often the sovereign guaranteed the owner the benefit of immunity, debarring a local count from entering and demanding taxes or exercising justice. To this privilege, which had been granted to churches and monastic institutions beginning in the Merovingian age and then with Charles the Great, was eventually often added the positive dispensation of jurisdictional powers over the lands given as benefice.

What should be emphasised, as far as the sources of law, is that the entire body of norms which regulated the genesis of the feudal relationship, its form, the rights and duties of lord and vassal, emerged and

[14] Jean de Blanot, *De homagiis*, c. 12, ed. Acher, in RHDFE 30 (1906), p. 160.

[15] *Livre de Jostice et de Plet* (1260 circa), 1. 16, ed. Rapetti (Paris 1850), p. 67.

established themselves through custom. Fief and feudal law were also mostly created from custom. The few capitularies that treat the subject presume its existence. Only much later did legislative norms intervene as in the Edict of Milan of the Salic emperor Conrad II in 1037,[16] guaranteeing the *vavasour* (the vassals of the vassals) the inheritance of the fief: thus was the much-aspired aim of the vassals achieved through custom and formally recognised for the feudal title and its benefice to pass on to the sons – in favour of the firstborn or with the subdivision between the male heirs, depending on the period and European region.

Only later, in northern Italy in the twelfth century, were the feudal customs recorded in writing in the *Libri Feudorum*, which would be for centuries the text of reference in Europe.

4.4 The Feudal Church

Church law was to go through complex phases and events during the early Middle Ages, all tied to ecclesiastical institutions having a multiplicity of roles in their dealings with secular power. Each of the numerous collections of canons which succeeded one another between the seventh and the eleventh centuries, although containing many common texts extracted from the same councils of late antiquity, papal texts (mainly from Gregorius the Great), Carolingian and post-Carolingian synods and also texts from the patristic tradition, reveal the tendencies of the time and the age in which they came into being in the selection of sources, their form and organisation.

To the vast collection of the Visigoth age known as *Hispana* (seventh century),[17] collections which made the Church's prerogatives evident were added during the Carolingian age, for example with the dispatch of the collection known as *Dyonisiana* from Pope Hadrian I to Charlemagne in 774.[18] During the ninth century, the intent of limiting interference from local lords but also of local ecclesiastical authorities of higher rank (the metropolitans) with the clergy and the local churches, led to the singular phenomenon of falsifications [Fuhrmann 1972–1974], consisting of inserting a series of forged texts attributed to popes or councils of the first centuries in some collections of canons (among

[16] *Edictum de beneficiis*, in MGH *Constitutiones*, vol. I, n. 45.

[17] Published in PL 84. 93–848; Martinez, *La colección canonica Hispana*, 5 vols., Madrid 1966–1992; Kéry 2013, pp. 61–67.

[18] Written in Rome in 498–501 (Kéry 2013, pp. 9–13); second review in PL 67, col. 137–316.

which was the collection of decrees known as *Pseudoisidorian*[19] edited in Reims in the years 847–852, probably written by a monk named Paschasius Radbertus). Often the alleged principles corresponded to tradition or to the ancient doctrine of the Church, but the means employed to claim them – particularly when it came to limiting interference from secular powers with the clergy or the church's possessions – consisted of formulating them *ex novo* and attributing them to authorities, often to the early popes, who had never issued them. Again in the most important canon collection of the first half of the eleventh century, the *Decretum* of Burchard of Worms in the year 1025,[20] the power of the bishop with respect to the metropolitan and even the papacy was particularly emphasised [Fournier and Le Bras 1931–1932].

A notable phenomenon in these centuries was the mingling of pastoral and secular functions by the ecclesiastical hierarchy. Many bishops exercised power of government over the territory, which implied the organisation of armed men for the safety of the diocese. Moreover, the feudal bond not only tied many bishops to royal power, but was also transmitted to the ecclesiastical hierarchy. In these centuries the election of bishops, which the canons reserved to the clergy and the faithful – that is, to the chapter of the cathedral followed by the confirmation from the faithful – was often in fact directly decreed by the sovereigns, also in light of the civil functions already mentioned. The contemporary ideology, that conceived of the Church – although endowed with freedom (*libertates*) – as an internal structure of the Empire [Tellenbach 1936] is consistent with reality.

It was in this historical context that the practice of granting ecclesiastical benefices to whoever was able to provide the benefactor, whether layman or clergy, with an adequate recompense in money (simony)[21] became widespread: the degeneration and consequences of this practice at the pastoral level – the prelates being often chosen as beneficiary of tithes for their military or secular abilities rather than for their spiritual gifts – need not be underlined.

[19] *Decretales Pseudoisidorianae*, ed. Hinschius (Lipsiae 1863, repr. Aalen 1963); Kéry 2013, pp. 100–114; probably written in Reims between 847–852, perhaps suggested by Archbishop Ebo (Fuhrmann, *Einfluss*, 1972–1974).

[20] Published in PL140. col. 537–1090; Kéry 2013, pp. 133–155.

[21] 'This vicious trade had become customary in the Church and ensured that anyone who intended to be promoted to a higher level needed only to pay a 'set fee': so wrote in 1089 a monk on the front line in the battle against simony, Pier Damiani, with regard to the clergy in Milan, where he had been sent by the Pope (Pier Damiani, *Opuscolo V*, in *La Pataria* (Milano 1984), p. 174).

In addition to which, for a large part of the secular clergy the custom had developed of living in concubinage rather than that of celibacy (marriage being prohibited), with obvious consequences on the condition of sons of clerics and their pretensions to succession at their fathers' deaths, as they tended to transmit their ecclesiastical benefice to their sons. The Roman papacy itself went through a deep crisis in the tenth century.

4.5 Judicial Procedure

Multiple orders of judges, each corresponding to different competencies and procedures [*La Giustizia* 1997], coexisted in Europe between the ninth and the eleventh centuries. Public judges (the counts, the *missi dominici*, the court of the king-judge), ecclesiastical judges (the bishops, the Pope), feudal judges (the court of peers, *pares curiae*, made up of vassals for questions pertaining to feudal rights), seigniorial justice (exercised by the lord with regard to the tenant, on the basis of the contract made with the act of concession) form a varied mix of courts. It is therefore more appropriate to speak not of 'the' justice, but rather of several 'justices' [Bloch 1953].

Speaking only of the first category of judges, it suffices to note how the Carolingian reforms were to modify both the composition of public courts – introducing the itinerant *missi dominici*, and the *scabini* in the form of professional judges – and the procedural rules, among other things limiting the possibility of being heard as witness in judgements to landowners.[22] In examining Italian *placita*, the judges' difficulties in fact-finding become clear as they were often unable to obtain evidence. Often witnesses could not to be located, probably due to the reluctance to appear in court for fear of reprisal.[23] In the absence of documents or witnesses, it was up to the judges' discretion which of the litigants – the actor or defendant, the one that presented the best argument – would have the burden of proof, primarily by oath [Padoa-Schioppa 2003a].

Sometimes the presence of authoritative figures sent by Charlemagne permitted subjects to denounce misdemeanours of the local count or duke before the imperial *missi*, as occurred in 804 in a well-known trial

[22] *Capitulare Olonnense* (year 825), ch. 7, in MGH, *Capitularia regum Francorum*, n. 165.

[23] See another trial on personal freedom, held in Piacenza in the years 878–884, in which the judges suspect that the absence of witnesses was caused by '*alicuius hominis timore*' (Volpini, *Placiti del Regnum Italiae*, in *Contributi dell'Istituto di storia medievale* ed. P. Zerbi (Milano 1975), n. 5). See on this Padoa-Schioppa, 2003a.

held at Istria.[24] In a court case in Milan in 900,[25] the brave testimony of a few 'noble and credible' men supported a group of men from Cusago's claim that they were freemen, thus obtaining recognition of their free state from the count. This is an exceptional case as on the contrary it would have been in the interest of the count for the judgement to have decreed the servile state of the men: the group in fact belonged to his *curtis*.

The role of bishops in implementing justice during the Carolingian era was a topic to which Frankish kings dedicated uninterrupted and close scrutiny, beginning with Pippin and Charlemagne, followed by Ludwig the Pius, Lothar and Charles the Bald.[26] The reason for this constant attention was the close interweaving between the temporal order and the ecclesiastical one: a pillar of Frankish dominion in Italy and elsewhere. 'It was Charlemagne and his successors who first created, in an integrated way, a political programme aimed at bringing a whole people, over a large segment of Europe, close to salvation' (Wickham, 2010, p. 555).

The Church's close involvement in secular law was exercised through assigning the function of *missi* to sovereign's trusted bishops: there were many secular *placiti* in which the court was presided over by one or more bishops, abbots or other ecclesiastical figures. Though the fact that the controversy involved litigants of whom at least one if not both belonged to the Church, these were nevertheless secular cases, decided in accordance with secular law.

Moreover, sovereigns took direct charge of cases involving '*potentes*', among whom they expressly included bishops and abbots, alongside the counts.[27] The privilege of the ecclesiastical forum was thus in part derogated despite various capitularies recalling it (on the strength of ancient councils of Calcedonia and Ancira) for controversies in which both litigants or at least the defendant was an ecclesiastical figure.[28] The underlying

[24] Manaresi, *I placiti del* Regnum Italiae (Rome, 1955–1960), vol. I, n. 17; on the renowned *placitum* of Risano, the locality in which it took place in the presence of as many as 170 local men.

[25] Manaresi, *I placiti*, n. 110, vol. I, p. 407. The decision was confirmed in a new *placitum* of the following year: Manaresi, n. 112, September 901, vol. I, pp. 414–418.

[26] On this topic, regarding Carolingian capitularies, see Padoa-Schioppa, 2014, pp. 37–68, here summarised.

[27] *Capitulare de iusticiis faciendis*, a. 811–813, *Capitularia regum Francorum*, ed. Boretius-Krause, MGH Hannover 1883, nr. 80, pr. (vol. I, p. 176) = *Capitulare italicum*, Charlemagne 42.

[28] For example in the *Admonitio generalis*, a. 789, *Capitularia* I, nr. 22, cc. 7; 28; 30, pp. 54 e 56; c. 28 was included in the *Capitulare italicum*, Charlemagne 134.

political motive behind this disposition is clear. Charlemagne developed very close ties with the Church both in order to have its valuable support in governing the territories and also in directing and conditioning its choices and decisions in matters to do with normative discipline as well as in practical decisions regarding debated questions and controversies.

Another important factor is the sovereign's desire for a strict collaboration between the secular and ecclesiastical orders, both in punishing crimes and in implementing criminal sanctions. On one hand the bishops and clerics were required to collaborate in reporting illicit acts,[29] whether these entailed *crimina* or illicit sexual relations, severely prosecuted in accordance with the harsh discipline of 'incestuous' subjects, which included in-laws and stepparents, as well as cousins, uncles, aunts and grandchildren. On the other hand it was the bishops themselves who sometimes asked the secular powers to aid them in punishing with temporal sanctions those who circumvented the penance imposed by the Church.[30] There was therefore at least a partial commonality between penitential and temporal sanctions, particularly regarding public penance which the Church sometimes felt could replace secular punishment, including the death penalty.[31]

This is only partly explained by the fact that at the time both temporal and spiritual sanctions were in force, as crime and sin involved the same individual, who was at the same time a subject and a believer. But the clergy's recourse to secular intervention for 'impenitents' reveals also an avoidance of religious observance, whereas the sovereign's requiring the active cooperation of the clergy in reporting the authors of crimes shows how the clergy's extensive control over the territory and the community of the faithful constituted an essential instrument of internal order as well as of secular powers. On the other hand the infliction of ecclesiastical penalties was an essential element of dissuasion and a powerful instrument of social pressure in a non-secularised society.

Beginning with Charlemagne, Carolingian legislation is known for having included numerous interventions regarding the administration

[29] *Capitulare Aquisgranense*, a. 801–803, c. 1 (*Capitularia* I, nr. 77, p. 170) *Capitulare e canonibus excerpta*, a. 813, c. 25 (*Capitularia* I, nr. 78, p. 175): '*ut qui publico crimine convicti sunt rei, publice iudicentur et publicam poenitentiam agant secundum canones*'.

[30] *Concilium Turonense* (a. 813), c. 41 (*Capitularia*, II/1, nr. 38, c., p. 292; MGH *Concilia Aevi carolini*, 3 (843–859), nr. 21, Pavia 845–850, c. 12, p. 214.

[31] *Capitulare de partibus Saxoniae*, a. 775–790, c. 14 (*Capitularia* I, nr. 26, p. 69), *pro mortalibus criminbus*.; Council of Tours, a. 813, in MGH, *Concilia aevi carolini*, II/1, nr. 38, c. 41.

of churches and monasteries, this not only in the *Capitularia ecclesiastica* but also in the secular capitularies. At the same time sovereigns were to repeatedly intervene so as to ensure that ecclesiastical hierarchy was respected, imposing the clergy's submission to their bishops and in turn the bishops' submission to their metropolitan archbishop. A united church was essential for secular public order, in an age in which this was often weak and powerless.

Although in principle prescribed on an evangelical basis as well as on the traditions of the Western Church, the borderline between the secular and spiritual spheres was repeatedly crossed, in both directions. Never in the history of the Western world had the ties between the two 'justices', the two forums, been so close as often to be inseparable. The age in which the Church would vindicate effective autonomy from secular power was still far in the future; similarly far was the vindication of imperial authority with respect to that of the Church of Rome.

A singular trial format developed in the judicial acts of the Italic reign during the tenth and eleventh centuries. It seemed to eliminate all contraposition between the litigants and actually resulted in the defendant's recognition of the plaintiff's arguments, often following the presentation of a document produced by the plaintiff himself (*ostensio chartae*). Such a procedure was applied with an identical format in the different courts of the kingdom, probably established by the judges of the Palace of Pavia, the *judices sacri palatii*, where the highest court of the land resided [Bougard 1995]. It was introduced outside of any legislative intervention; it imposed itself on judicial practice until the end of the eleventh century, even after the destruction of the *Palatium* in 1024.

This procedure attests to the weakness of public powers in the *Regnum Italicum* during the post-Carolingian age, a situation which was to change radically with the advent of the communal age.

4.6 International Law Relations

The existence in these centuries of legal relations between people, kingdoms and empires that qualify as international law[32] has at times been unfoundedly questioned.[33] There were four principal players in these

[32] These pages reproduce the concluding remarks of my work on the features of international law in the early Middle Ages, published in 2010: A. Padoa-Schioppa, 2010, pp. 1–78.

[33] As correctly stated in Mitteis, 1950, pp. 76–140. Research on Merovingian and Carolingian treatises included accords between 'states, peoples, tribes, or rulers' (Ganshof, 1967, pp. 23–50, p. 23; id., 1964, pp. 163–192; id., 1953).

relations, each basically different: the Germanic kingdoms, partly including the renewed Western Empire, the papacy, the Byzantine Empire, and Islam. These relations were prevalently customary, the normative legal framework within each order being weak. The only truly international and supranational normative bases, inasmuch as they operated above the single states, were the sacred texts of the three monotheistic religions, the two Testaments (Old and New) of the Christians and Islam's Coran. Contractual agreements, particularly in the form of treatises, were instead widely used by emperors, kings and caliphs as well as military commanders.

Between the fourth and sixth centuries, the new political orders of the Germanic kingdoms, resulting from wars in which the Germanic tribes victoriously occupied Western territories, were often recognised by Constantinople, in such a way as to give the Emperor institutional primacy, but also a different configuration to the legal relationships between independent states or kingdoms, as it was considered an internal element of the political and juridical sphere of the Empire.

International law in late antiquity and the early medieval era may be portrayed from various perspectives: the Church Fathers' and Saint Augustine's ideas on just war; the procedures in the declaration of war; the treatment of prisoners of war and the protection of legates and ambassadors; the instruments of international politics, which were to produce a wealth of treatises not only between kingdoms and the Byzantine empire as well as Islam, but beginning in the eighth century also between the different kingdoms and the Roman papacy, which had by then become an active player in international law. International relations also developed between kingdoms governed by those related by blood, based on the patrimonial nature of the kingdoms themselves, which were subdivided among relatives when the king died; also political alliances were often made (or at least attempted) through marriage between princely personages of different kingdoms.

The coexistence of separate ethnicities disciplined by a single legal order constitutes an essential feature of early medieval law, not to be underestimated even in the sphere of international relations: the question of ethno-genesis has been summarised as 'how peoples coalesce into *a* people'.[34] Though a unified concept of the identity of a people is inappropriate in these centuries, the conscious claim to one's 'national' identity is undeniable; in time, also other means of creating an identity

[34] A. Noble, 2006 (ed.), p. 91.

were to develop, sometimes embroidering on mythical elements in their distant past: *gentes* existed before *regna*, but kingdoms were in turn to shape and transform the identities of their peoples. However it would be misleading to conclude that statements of identity tied to ethnogenesis had a decisive role in international relations in these centuries. War initiatives like peace accords were based on military force and expediency.

A turning point occurred in the mid-eighth century with the transformation of the relation between the papacy and the Frankish kingdom, first with the legitimisation, then with the anointing of Pippin by Pope Zacchary, a tie which was to become even closer with the *Renovatio imperii* of AD 800, that introduced a new element in Western history and in relations with Constantinople. The Pope, who already claimed his rights on the *exarchatus* of Ravenna, from that point onward became a subject who moved autonomously in the international scene on a political and on a diplomatic level. What is more, the Holy See was able to directly or indirectly strengthen its political and juridical role within single kingdoms and the Empire as a whole by calling on its undisputed religious authority.

The second half of the eleventh century might be considered a new phase of discontinuity. The schism that definitively split the Western Church from the Oriental one in 1054 had an enormous impact also in the legal sphere. What was to become known as the Gregorian reform resulted in the increase of the powers of the papacy with regard to secular powers and to the Emperor himself, to the point that in case he were excommunicated, a sovereign might be legally delegitimised before his subjects. In the Christian West, the idea of a just and holy war against Islam also surfaced, leading to the Crusades at the end of the eleventh century: an idea that was only in some respects equivalent to the Coran's Jihad and also different from the Byzantine notion of holy war. This approach far superseded the ban on ungodly alliances that in the ninth century had found Pope John VIII a fearsome supporter also on the theological and juridical front.

The combined historical presence of societies, cultural traditions, legal customs and religious beliefs all so different from one another – deriving from the Roman and Christian world in the West, from the Byzantine civilisation of Constantinople, from Germanic peoples and kingdoms, and from Islam in its various declinations – might lead us to conclude that both in practice and in principle, differences, conflict and reciprocal estrangement were prevalent in international relations. Nevertheless, on

some fundamental points not only was there no estrangement, but on the contrary certain values and juridical principles were common to Western and Eastern Christianity, the Germanic kingdoms and Islam. Among these was the protection of legates and ambassadors; the respect for pacts made and word given; the faith in God as judge who would one day (if not immediately) punish those who lied under oath; the conviction that in war or the process of an ordeal it was God himself from above who decided how human events would unfold, making the just victorious and wrongdoers suffer defeat, even if they were more powerful or in greater number, a conviction which existed as early as Saint Augustine and which only a few questioned, notably Agobard the bishop of Lyon, in his writings against Burgundian law.[35]

It is remarkable how not only in the doctrine of the Church Fathers but also in pontifical interventions, constant reference was made to the sacred texts, particularly that of the Old Testament, sometimes interpreted with great audacity, so as to validate the scriptural and therefore divine basis of the events pertaining to the people of Israel in matters of war, peace, respect for pacts and in relation to infidels. The scriptural tie was fundamental not only on the religious front, but also on the legal level concerning war and peace. It was a set of religious principles which would be considered also legally binding for centuries.[36] Compared to the ancient Greek and Roman traditions, the scriptural basis of key precepts in international law constituted a new element, as it bestowed an indisputable authority on the Holy Scripture as based on the divine word and shared by the entire *Respublica christiana*, including people from different barbaric ethnicities, once having been converted to Christianity.

Similar ties to the written word of the Coran was to be found among Muslims. In the Muslim world, not only men of learning (such as the African Fatimid doctors who in the tenth century counselled against intervening in Sicily, as they feared this was a breach of the peace pact with the Christians),[37] but also a later tradition which referred to

[35] Agobard, *Adversus Legem Gundobadi*, in PL 104. 113–126.

[36] Among these are the full legality of defensive war, following unsuccessful attempts at offering peace (Deuteronomy 10.20); the sanctity of an oath even if broken by the enemy (Joshua 9.16–18); the admissibility of pacts and accords with infidels (Genesis 21.23–31 and 31.44: pacts between Abraham and Abimelech, and between Jacob and Laban). The sacred anointment of kings on the part of popes was also adopted by Stephen II for Pippin the Short and his sons (year 754) in replicating that of the ancient prophets such as Nathan and Samuel.

[37] *Cronacle* of al-Maliki, tenth century, in M. Amari, *Biblioteca arabo-sicula*, Turin-Rome 1880, vol. I, p. 305 s., cf. for the source, p. XLIII.

Mohammed's successor Abu Bakr,[38] expressed ideas and convictions which correspond closely to those of Christians: on the necessity of honouring pacts, on God's intervention in battle, on the humane treatment of prisoners and on the sanctity of oaths. Also in Islam the contrasts between statements of principles of moderation and practice were no less dissonant than among Christians.

Legal principles were therefore common ones, but the guarantee of their being respected was only partly assured, both within Western Christianity and the Islamic world. No institution existed that could ensure their widespread observance, both inside and beyond political and religious divisions.

[38] On this tradition, see Padoa-Schioppa, 2010, p. 26 and note 92.

5

Customs and Legal Culture

5.1 Social Classes: Servants, Yeomen, Freemen, Nobility

During these centuries, not just feudal but all relations regulated by law were prevalently of a customary nature.

The slavery of antiquity having disappeared almost everywhere, the condition of the servant – who had some rights and was not merely an object like a slave – took a variety of forms during the Middle Ages, sometimes with service to the overlord performed directly on his land or in his home, sometimes living in a house allocated for his use with the return of an old Germanic custom, which had been mentioned by Tacitus.[1] The difference between the servant and the freeman was in his juridical status, which precluded freedom of movement and the use of goods held in common with freemen and which bound him to his lord also in decisions concerning his family. The right to purchase property through his own labour and the right to have a family were recognised as a servant's right and sometimes guaranteed through legislation.[2] Nevertheless, the rights did not include marriage to a free woman.

As a villain, the freeman who worked on land that wasn't his was held to paying a duty (*datio*) in agricultural products or money to the owner; it was not unusual for him to also be obligated to dedicate part of his time and labour to cultivating the *demesne*, that is, land directly held by the landowner. Among the agricultural contracts which established the rights and obligations of the villain, the most common was the leasehold (*libellum*) which lasted twenty-nine years, so as to avoid the risk of *usucapio* which would take effect after thirty years. By far the greatest part of the lands was therefore cultivated by villains who leased it; these lands constituted the *pars massaricia* of the property belonging to the

[1] Tacitus, *Germany*, 25.

[2] Liutprand established that if a master abused a married servant, both she and her husband would automatically acquire their freedom, as if they had been granted manumission (Liutprand, 140, of the year 734).

lord or ecclesiastical institution, church or monastery, as opposed to the '*pars dominica*' lands mentioned previously. With time the leaseholder acquired the right to sublease the land to other villains: although not everywhere in the same way, the rights of the villain were configured as those of real property ownership, which included both the right of *usufruct* and of alienation. Subsequently jurists of the late Middle Ages were to qualify this arrangement as that of the 'divided dominion': both the freeholder and the leaseholder could dispose of his respective rights as he wished, by selling, donating or leaving them as inheritance.

As to freeholders of lands which had not been feudalised and not leased, these too are separated into groups of different status: for example in Italy, besides the freeholders of free lands (known as allodial tenure), we find '*arimanni*', who were held to military duties and tied with a direct relationship to the king; in Germany and elsewhere, we find the 'king's freemen', that is leaseholders of lands belonging to the king's fiscal properties.

Within each category, the tripartite division between 'those who fight, those who pray and those who work' [Duby 1984] was again subdivided. The aristocracy was divided into several distinct orders. The Frankish king usually bestowed the title of count to men belonging to the highest and most powerful families of the nobility. By this time the election of the bishop took place among the circle of cathedral canons and was then approved by the faithful and confirmed by the metropolitan archbishop. As a rule, the choice of the candidate fell on members of the local aristocracy.

From the ninth to the eleventh century – particularly in the territory of the Frankish kingdom – many members of the high nobility acquired powers comparable to that of the king. In turn the local minor nobility, despite being bound to the higher nobility by feudal ties of fidelity, nevertheless exercised autonomous powers and was empowered with the building of thousands of fortified castles throughout parts of Europe, as defence against attack in response to the waves of Hungarian and Saracen incursions. The population relied on the lord of the castle not only for its defence, but also in the exercise of important public functions, beginning with justice. The power of judgement (*districtus*) which already belonged to the counts was then extended to local lords throughout the territory. It was a very significant development as it marks the high level of privatisation of public power in the early Middle Ages. The rural, ecclesiastical and lay nobility gained power to the point of effectually having full civil and criminal jurisdictional power – powers attested to by the many charters requested and granted by the king – in

fact retaining the right to freely transfer these same powers and rights: an 'allodial tenure of power' [Tabacco 1970] has been the expression used to describe it. These lordships (*signorie*) would survive in many European regions until the end of the eighteenth century.

The genesis of a series of territorial principalities was also of great significance, beginning in the tenth century and resulting from the attainment of greater autonomy on the part of dukes and counts with respect to sovereign power. In Germany some of the great Duchies (Saxony, Franconia, Bavaria, Svevia) were constituted first and foremost on the basis of ethnic origin as their name would suggest, but sometimes also on a territorial basis. This was the case in Austria when in 1156 it was made into a duchy, the duke of which was granted the concession to exercise civil and criminal jurisdiction, and also to authorise the lower levels of jurisdiction, including the power to freely transfer these powers.[3] In France a series of around fifty duchies and counties (Flanders, Normandy, Brittany, Anjou, Toulouse, Auvergne and Burgundy among others) completely transformed the institutional geography of the post-Carolingian kingdom. This process on the one hand shows the weakness of sovereign power, but on the other had the effect of deterring private wars within the principalities [Fossier 1982].

It was in this context that over the coming centuries the Capetian monarchy was to move towards conquering control of the territory.

5.2 Local Customs

The occurrences between the ninth and the eleventh centuries briefly mentioned previously occurred essentially through custom and underline transformations in society and law destined to weigh heavily on late medieval and early modern Europe.

Contrary to common belief, custom is not a static phenomenon, but rather a dynamic and flexible one, and susceptible to sometimes profound and even sudden transformations. There are customs that mirror the social organisation, the interests and long-standing values and principles of the people of a given place, others that undergo slow transformations, yet others that spread quickly from their place of origin to distant provinces. There are also customs which impose themselves by sheer force, whereas others are imposed and become rooted due to pressures exerted by the powers that be.

[3] *Privilegium minus*, in MGH *Constitutiones*, vol. I, n. 159, p. 221.

These multiple and different aspects were evident in the legal landscape of the early Middle Ages, and for this reason if no other it might be defined as the age of custom.

Between the ninth and the eleventh centuries Europe was to undergo a crisis of the personality of the law. The increase in relations between people of different races raised complicated questions regarding the conflict between laws, which were in part solved by adopting specific rules through legislation. The aforementioned Edict of Liutprand, for example, allowed forsaking the laws of the race and adopting that of the other party in contracts.[4] In criminal law, Pippin sanctioned the criterion of having amends paid on the basis of the personal law of the offended party.[5] At various times the Carolingians were to reiterate the principle of the legal personality.[6] But in many fields the problem of identifying the law or custom applicable to the case in question remained open and not easily solved. A well-known ninth-century text by Bishop Agobard of Lyon laments the fact that 'five men sit together and none have the law of this world in common, whereas for the eternal questions they are all tied by the one law of Christ'.[7]

The differences between laws could sometimes be merely the formalities required: for example, the bestowal of a token in a sale agreement differed in Roman from Lombard or Salic law (according to the latter, for example, the *traditio* was followed with the symbolic offer of a knife or a glove to the buyer).[8] In other cases the difference was greater, as with donations, which in Lombard unlike in Roman law, to be irrevocable required the delivery of equal compensation, the *launegild*. As to the succession of daughters, Roman law was more favourable than that of the Lombards; in the system of punishment, for example penalties inflicted on thieves were subject to Roman law rather than Lombard.[9] In many

[4] Liutprand, 91. [5] *Capitulare Pippini*, c. 4 (*Capitularia*, I n. 95, of the year 790).

[6] '*Ut unusquisque homo suam legem pleniter abeat conservatam*' (so reads the *Capitulare missorum*, c. 5 of the year 786, in *Capitularia regum Francorum*, I. n. 25). See also the capitulary attributed to Charlemagne but of uncertain origin which prescribes the application of personal law with regard to succession, written documents, oaths and fines (*Capitulare italicum*, Kar. M. 143, in MGH Leges IV, ed. Boretius, p. 514).

[7] Agobard, *Ep.* 3. 4 (MHG, *Epistolae* V, Karolini Aevi III (Berlin, 1899), p. 159).

[8] *Chartularium langobardicum*, 2, *traditio venditionis* (ed. Bluhme, in MGH Leges IV, p. 610).

[9] In Roman law the penalty was double or four times, respectively, depending on whether the theft was manifest (*Inst.* 4. 1. 5); in Lombard law the Edict of Rothari established the penalty of nine times for the culprit of a theft caught *in flagrante*, to which was added a fine of eighty silver coins or the penalty of death (*Roth.* 253); sanctions were repeatedly modified over time, first by Liutprand, then by the Carolingians.

regions it therefore became common practice to declare the law to which one pertained (*professio iuris*), so as to establish at the outset which law was to be applied in the dispute.

In any case the key issue of the conflict between personal laws persisted and advanced towards a solution by a unique route. The coexistence of clusters of people belonging to different races living in the same location ultimately generated the phenomenon of local customs which were followed by everyone living in that locality. Many Italian documents dating from the centuries just before and just after the year 1000 attest to customs limited to a single village, sometimes a single parcel of land (*usus terrae*) in matters such as farmers' contracts, heredity, sanctions for illicit acts and others. How such customs originated and evolved is wrapped in mystery, due mainly to *lacunae* in the documentation. What seems clear is that the nature of their customs at least in part mirrors the prevalent ethnic origin of the local population – it is therefore generally close to Roman law in prevalently Latin areas and close to Lombard tradition in territories with strong Lombard influence – and in part mirrors new demands of new realities, differing from one place to another as they did also in feudal customs.

What is significant is the fact that during 300 years, from the ninth to the eleventh centuries, specific customs began to evolve which were binding for everyone living in a given locality, irrespective of their ethnic origins. The notaries' formularies reveal the legal practice and occasionally legal conduct alternative to those practices. A passage contained in the seventh-century *Formulary of Marculfus* denounces the Frankish custom, which, as we have seen, was admitted into Salic law, of favouring the succession of sons to that of daughters as 'impius', as both (so Marculf writes) were gifts from God.[10] In Italy the *Cartularium Lombardicum* contains formularies – on trade, division, promissory notes and other matters – applied also to parties living either according to Roman law or Lombard law.[11] Legal practice also shows evidence of contamination between laws: in an act dated 1030, a donation was declared to conform to Roman law, despite the fact that the donor received the *launegild*, the gift typical of Lombard tradition.[12]

[10] '*Diuturna sed impia inter nos consuetudo tenetur ut de terra paterna sorores cum fratribus porcionem non habeant; sed [. . .] sicut mihi a Deo aequales donati estis filii, ita et a me setis aequaliter diligendi et de res meas post meum discessum aequaliter gratuletis*,' cf. *Formularium Marculfi*, 2. 12, ed. Uddholm (Uppsala 1960).

[11] *Cartularium Langobardicum*, MGH, Leges IV, ed. Boretius, p. 600.

[12] *Codex diplomaticus Cavensis* (Milan 1873–1879), vol. V, n. 828.

Three aspects of the process of development of local customs, which is among the most important phenomena in the history of early medieval law, are particularly significant.

We must first of all acknowledge that this was the age in which pluralism reached its height in Europe, for the very reason that local customs were extremely fragmented. Nevertheless, this fragmentation does not affect the basic character of the law: in agricultural contracts there are many local variations in clauses concerning payments, leasehold agreements and the tenant farmers' obligations to the landowners; in *donatio mortis causa* or in exchange of goods [Vismara 1987] there are variations in the formal and practical requisites of transferrals; in the trial there are variations in the role and the manner in which parties and witnesses took oath. But there were no changes in the substance of the law.

This fundamental homogeneity is due to two converging factors: on one hand, early medieval society was fundamentally united by a common religious faith and consequently common values and these in turn were underpinned by a Church which was united in doctrine, organisation and pastoral framework. On the other hand, society during these centuries was also united by an essentially homogeneous economy [Duby 1972], as society was prevalently rural, not urban (in some regions of Europe cities almost vanished and where they survived as in Italy, they were in any case much reduced in size compared to late antiquity). Throughout the territory the economy was a rural one, not a trade or a commercial one. These characteristics have prompted the rightly expressed remark [Lupoi 1994] that this was the age in which Europe can truly be said to have had a 'common (customary) law', and this includes England which in the twelfth century was to dissociate itself from the Continental jurisdictional model.

Secondly, the principle of legal personality did not disappear, as custom generally operated in matters and fields for which legal texts – Roman, Lombard and Carolingian etc. – did not make provisions. The precept of the predominance of law over custom (which Isidore of Seville had affirmed in the seventh century),[13] was on several occasions reiterated by sovereigns of the time, among them Pippin and Otto I.[14] It is

[13] Isidore, *Etymologiae*, 2.10, ed. Lindsay (Oxford 1962): '*consuetudo autem est ius quoddam moribus institutum, quod pro lege suscipitur cum deficit lex.*' Otto condemns the *mos detestabilis* of perjury adding to the number of cases which should be decided by duel (in MGH, *Constitutiones*, vol. I nr. 13, of the year 867).

[14] '*Ubi lex deest praecellat consuetudo. Et nulla consuetudo superponatur legi*' (*Pippini Capitulare*, c. 10, in *Capitularia* [note 3 of Chapter 4], nr. 95; nr. 105).

important to remember that a resolutely adverse stance towards customs, sometimes held in order to contravene ethical and religious dictates, went as far back as Tertullian and was to be reiterated during the Middle Ages: Christ said, 'I am the truth,' not 'I am the custom.'[15] But the very insistence with which those who would reaffirm the primacy of written law did so attests to the impossibility of countering rooted customs. In Italy, until the age of the *comune*, different laws and normative systems actually coexisted in the same territory: for example, sources confirm that in Milan Roman law, Lombard-Frank and customary law all coexisted until the thirteenth century.

Thirdly, the course of development of local customs which, as we have seen, no longer held 'personal' rule but rather a territorial one, ran parallel with a covert, but no less significant, reinstatement of rules and institutions belonging to the Roman legal tradition [Calasso 1954]. It has rightly been observed that during these centuries Roman law was preserved within the Latin population through custom rather than written laws [Pitzorno 1934]. In many instances the analysis of procedural acts shows evidence of this influence – for example in the matter of succession, there is the reappearance of the unilateral will (*testamentum*) side by side with the *donatio mortis causa* which had prevailed for centuries. In the same way, as testified from the tenth century onwards, new legal instruments derived from the Roman tradition make an appearance in judicial procedures, such as the useful *investitura salva querela*, whereby a party might regain temporary possession of lost property in the case of contumacy upon the issue of a summons.[16]

Had this spontaneous and covert victory of the Latin juridical tradition not occurred, it is very probable that the sudden rebirth of Roman law through the auspices of learned juridical scholars in the twelfth century would not have been possible.

5.3 Notaries, Judges and Formularies

If the early medieval centuries were dominated by custom, and also to a significant degree by Germanic and Roman law, what then was the role

[15] Tertullian, *De virginibus velandis*, 1 (in PL 2. 889): '*Christus dixit Ego sum veritas, non dixit Ego sum consuetudo.*' We find this text almost 1,000 years later in Gratian's *Decretum* (D. 8 c. 5), as well as in a list of intermediate authors, and again in the canonists of the twelfth century.

[16] *Cartularium Langobardicum*, 20–21, '*qualiter sit noticia salvae quaerelae*', in MGH, Leges IV, ed. Bluhme, p. 610.

of legal doctrine at this time? Its role was clearly marginal, but not absent. The economy and society reflected, as we have said, a predominantly rural world; antiquity's flourishing cities were reduced to a few hundred, sometimes a few dozen, inhabitants, and the well-ordered system of government of the Late Empire had disintegrated. Political power was held by restricted oligarchies mainly belonging to the dominant races. Almost invariably the clergy and monks were the only persons who were able to read and write. It is not surprising that in such a world there was no space for an ordered and complex legal system, such as that which had been transmitted through the texts of late antiquity, nor for the theoretical explanation of legal norms.

In the early medieval encyclopaedia of knowledge, law was not an autonomous discipline. It was included among the liberal arts: as to its contents, it constituted a branch of ethics; as to method, it relied on ethics and dialectics, following intellectual models dating back to antiquity, still to be found for example in Boetius and in Isidore of Seville.[17] Not even the founding of a senior school in Italy in 825, by Lothair[18] [Riché 1979] resulted in the introduction of specific training in law for jurists.

The few traces of written interpretation of the Justinian compilation are limited to simplified and rather ingenuous summaries of the legal texts, with clear errors and omissions.[19] This was the form taken for example by the *Summa Perusina* from central Italy,[20] dating from the eighth century, which presents the Justinian Code in a series of brief propositions which were used in judicial cases in Sabina until the early eleventh century. Of the same ilk are the *Glossae* to the Institutions[21] and the Novels, the latter known in the Latin version written in the sixth century by the jurist Julianus, a professor in Constantinople.[22]

The German laws we have examined had in any case been committed to writing, and done so in Latin. Private documents and judicial acts were

[17] Isidore, *Etymologiae*, 2. 24, ed. Lindsay (Oxford, 1962).

[18] *Capitulare Olonnense*, c. 6 (*Capitularia regum Francorum*, n. 163, vol. II, p. 327).

[19] Omissions and mistakes provide precious clues for historians, as they allow one to understand which rules were no longer in effect in the centuries when the *glossae* were being written.

[20] *Adnotationes Codicum domini Iustiniani (Summa Perusina)*, ed. F. Patetta (Rome, 1900). A manuscript from Pistoia contains *glossae* to the Code: *La Glossa pistoiese al Codice giustinianeo*, ed. L. Chiappelli, in '*Memorie dell'Accademia delle Scienze di Torino*', 37 (1885).

[21] *La Glossa torinese*, ed. A. Alberti (Torino 1933); *La Glossa di Casamari*, ed. A. Alberti (Milan, 1937).

[22] *Iuliani Epitome Latina Novellarum*, ed. G. Haenel (repr. Osnabruck 1965).

also written in Latin. And as a legal regime practised through written law cannot be entirely devoid of an intellectual element, during these centuries that culture pertained to the judges, the lay and ecclesiastical writers of the chancelleries and most importantly to the notary publics who drew up the deeds for private citizens (sale agreements, donations *mortis causa*, exchanges, leases, dowries among others). It was through the work of the notaries that the formulas of judicial acts of antiquity and norms of Germanic law have been preserved, sometimes with startling anachronisms, almost like fossil remains of a bygone era.[23] The infusion of unwritten legal customs was also transmitted through the work of notaries. The formularies of notaries from Gaul, of which a great number have come down to us,[24] are of particular interest, beginning with that of Marcolfus, already cited, dating back to the seventh century.[25] As to Lombard Italy the set of *formulae* from a later period (perhaps from the eleventh century) known as the *Cartularium Lombardicum* is of fundamental importance.[26]

Private and judicial deeds, although written in a corrupt Latin, almost vernacular, are often not devoid of legal substance. For example, there are formularies derived from Roman law written in the eighth century concerning the exchange of goods (*permuta*), in which it is qualified as a contract of 'good faith' (*bona fides*) [Vismara 1987].[27] It is possible to discern precisely the normal judicial procedure prescribed by law and custom in the trials of the Carolingian age: access to justice, guarantees (*vadia*) provided by the litigants, examination of documents, declarations from the litigants, sworn declarations of witnesses and finally the court judgement, often founded on oaths taken by the parties. In some cases there was a direct or indirect reference to the norms in the edicts. The judges working in the Italic kingdom for the most part belonged to the local aristocracy and were undoubtedly professional figures. They were the 'Judges of the Sacred palace' (*judices sacri palatii*), authorised by

[23] So in a will from Ravenna of 690 which invoked the archaic Roman *Quirites* as witnesses to the act, in *Die nichtliterarischelateinische Papyri Italiens aus der Zeit 445–700*, ed. J. O: Tiäder, I (Lund 1955). So again in some documents from Piacenza of the eighth century which still mention the *mancipatio*, abolished by Justinian two centuries before [Calasso, 1954].

[24] *Formulae*, ed. K. Zeumer in MGH, *Legum sectio* V (Hanover, 1886).

[25] *Marculfi Formularium*, ed. Uddholm (Uppsala, 1962).

[26] *Cartularium Langobardicum*, ed. Bluhme in MGH Leges IV (Hanover, 1868), pp. 600–610.

[27] So in two documents drafted in Pavia and in Brescia in 761 and in 771, with reference to *Cod.* 4. 64. 2.

imperial nomination, and were tied to the *Palatium* of Pavia, site of the supreme court of the kingdom. For a time during the post-Carolingian age other minor judges were qualified by the city where they were active (for example, as *judices mediolanenses*). For notaries too, the qualification was bestowed by imperial authority, for many centuries through the agency of the Counts of Lomello.

5.4 The Judges from Pavia and the 'Expositio'

Towards the end of the eleventh century the picture changed. After five centuries of silence, a new legal culture centred on the study of legal texts suddenly made its presence felt in Italy. A text that comes down to us through a single manuscript (written in the thirteenth century in the writing style of Benevento, in southern Italy) has an exceptional historical value: the unknown author, who was active in northern Italy around 1070,[28] wrote an analytical commentary of the collected Lombard edicts and the capitularies of Italy. In so doing he referred to, among other things, the opinions of a group of jurists and judges the name for seven of whom was reported. Some of these, for example Bonfilius, are found in documents of the same era as judges of the *Palatium* in Pavia. The decisions by these judges, which have in some cases come down to us, show them to be firmly anchored to the traditional formulary and do not at all suggest the possession of a refined legal culture such as the text that the *Expositio* otherwise documents.

The *Expositio ad Librum Papiensem* examines hundreds of chapters of Rothari, Liutprand, Charles the Great, Pippin and other kings up to Otto I. For every chapter an effort was made not only to expound on its precise legal meaning, but also and more importantly, to make cross-references to other chapters dealing with the same matter in order to establish the applicable rule, in other words considering the entire collection as a unified text. Often the author of the comment limited himself to declaring that the later law abrogates (*rumpit*) the preceding one, or that the same law is abrogated (*rumpitur*) by a successive law referred to, but in many other cases the debate is much more subtle. For example on the subject of theft, the Edict of Rothari had established the punishment of the nine-fold in addition to a fine,[29] whereas a successive chapter

[28] *Expositio ad librum Papiensem*, ed. Boretius, in MGH Leges IV (Hanover, 1868), pp. 290–585.

[29] Rothari, 253.

of Charlemagne threatened the thief with a series of corporal punishments.[30] With regard to this question, the author of the commentary recorded that some judges felt that the Carolingian rule had substituted the Lombard rule, whereas the jurist Ugo (very likely also a judge) was of the opinion that the punishments handed out by the Carolingian king applied only if the thief was not able to pay.[31] There are numerous examples of this kind [Radding 2013].

Moreover, in the *Expositio* there are several hundreds of specific links to texts in the Justinian Compilation: the Code, the Institutions, the Novels, perhaps even to the Digest [Diurni 1976]. The author reverted to Roman law when the case could not be resolved with Lombard-Frankish law, that is in cases where there are *lacunae* in the *Liber Papiensis*: as openly declared in the passage where the justification for the reversal is expressed in this way: 'we must believe in the authority of Roman law rather than in rhetoric.'[32] Here for the first time Roman law is referred to as having 'authority' and considered to supersede merely logical or dialectical debate. In several passages this reference to Justinian texts is justified by the assertion that Roman law is the 'general law of everyone' (*lex generalis omnium*):[33] an assertion of exceptional importance, which the author attributes to the *antiqui*, the judges and jurists of the supreme court, therefore dating back to the first half of the eleventh century. From other sources we also know that in Lombardy secular laws were studied; this was attested to by Lanfranc (1010–1089), who was born in Pavia and later became the abbot of the Norman monastery of Bec and the archbishop of Canterbury.[34]

It is worth noting that the techniques of interpretation of texts which we have mentioned and which were undoubtedly new in the context of

[30] *Capitulare Haristallense*, 12 (*Capitularia regum Francorum*, in MGH, vol. I, n. 20, p. 49) = *Capitulare italicum* Kar. M. 44 (ed. Boretius, MGH Leges IV, p. 494).

[31] '*Potius enim credere debemus auctoritati romane legis quan rethorice*': *Expositio ad Librum Papiensem*, a Rothari, 253 § 3 (ed. Boretius, p. 364). Ugo based his thesis on the formula of the Carolingian capitulary (see note 9 in this chapter) which dictated '*ut pro prima culpa [latro] non moriatur*', so that, according to Ugo, it referred only to the end part of Rothari capitulary 253, which issued the death penalty only to those who could not pay nine-fold of the penalty plus the penalty. This is a subtle argument, which overlooks the fact that Charlemagne had dictated his capitulary in the context of the Frankish kingdom.

[32] *Expositio* to Otto I, 3 § 14 (ed. Boretius, p. 573). It is to observe that in the case in question, the author of the *Expositio* referred to Roman law in order to suggest the possibility of resorting to the duel (a typically Germanic institute) while the jurist and judge Siegfried held the contrary view.

[33] For example in *Expositio* a Wid. 5 § 4 (ed. Boetius, p. 561).

[34] Milone Crispo, *Vita Lanfranci*, in PL 150. 29.

early medieval culture were employed by the jurists from Pavia exclusively for analysing and applying *Lombard* Edicts and Capitularies (the *Liber Papiensis*) and not Roman texts, though these were familiar to them, as we have seen. It nevertheless remains that in the Lombard heartland, by the eleventh century, Justinian law was already considered subsidiary to Lombard-Frankish law. All this was occurring almost a century before the school in Bologna was to be created which would place Roman law, and only Roman law, at the centre of its new method of study.

6

Church Reform

The fact that a concubinary Pope, John XI, signed the Bull in favour of the monastery of Cluny in Burgundy acquires an almost symbolic value in view of the fact that this was later to become the cradle of the new European spirituality.[1] During the course of the eleventh century an increasingly forceful movement seeking reform in the church emerged from a few centres such as Cluny itself and from the rigorous stance held by certain prelates such as Bishop Attone from Vercelli as early as the tenth century.[2] The severe attitude of the Clunian reform within the Benedictine order, the writings of Bishop Wazo of Liège[3] as well as of intransigent monks such as Humbert of Moyenmoutier[4] and Peter Damian[5] against simony and concubinage among the clergy, was in the course of a few decades to reach the top level of the hierarchy, and in time popes favourable to the principles of the reforms were elected.

With a decree of 1059 by Pope Nicholas II,[6] the designation of Bishop of Rome began to be reserved for cardinals, in this way removing it from the power struggles within the Roman aristocracy. At the same time a strong condemnation of simony was sanctioned in two Roman synods: the purchase of an ecclesiastical position was considered a heretical act and sanctioned with the invalidation of the spurious nomination and the demotion of both the nominee and the nominator.[7]

[1] *Papsturkunden 896–1046*, ed. H. Zimmermann, I (Wien 1984), n. 64, p. 107.

[2] Attone di Vercelli, *De pressuris ecclesiasticis*, 2 (in PL 134. 71): the purchase of ecclesiastical roles was considered heretical. Against ecclesiastic concubinage, see Attone, *Epistulae*, 9 (in PL 134. 115–119).

[3] *De ordinando pontifice*, in MGH, *Libelli de lite*, I, pp. 8–14.

[4] Umberto di Silvacandida, *Adversus simoniacos* (1057–1058), in MGH, *Libelli de lite*, I, pp. 95–253.

[5] Pier Damiani, *Liber gratissimus* (1051), in MGH, *Libelli de lite*, I, pp. 15–75.

[6] Nicholas II, *Decretum electionis pontificalis* (1059), § 3, in MGH, *Constitutiones*, Legum sectio IV, n. 382–383, vol. I, pp. 537–546.

[7] Nicholas II, *Synodica generalis*, c. 6, in MGH, *Constitutiones*, n. 384, vol. I, p. 547; Niccolò II, *Concilium Lateranense posterius* (1060), c. 3 (ibid., n. 386, I, p. 550).

6.1 Gregorian Reform

Fifteen years later the ascent to the papacy of Hildebrand of Soana, a Tuscan monk and high exponent of the Roman clergy, marked the culmination of reforms generally referred to as 'Gregorian'. Gregory VII (Pope from 1073 to 1085) was able to assert the pre-eminence of ecclesiastical authority in the temporal order, even in the face of the supreme authority of that order, Emperor Henry IV.[8]

A well-known text by Pope Gregory, the *Dictatus papae* of 1075,[9] outlined his thesis in a series of brief and lucid propositions. The authority of the Pope was strongly reasserted, both with regard to the bishops and the Church as a whole – among other things the Pope had the authority to depose or transfer bishops, preside over *Concilia* through a legate, decide on major cases – and also with regard to the Emperor himself, whom the Pope could legitimately excommunicate, even depose, with the consequence that the Emperor's subjects were freed from the obligation of loyalty. The nature of the text was hierocratic and in part divergent from the Gelasian tradition. It was firmly objected to by defenders of imperial authority such as Petrus Crassus of Ravenna. The 'royalists' stressed the direct descent of imperial authority from God, considering the two laws, canon and secular, equally legitimate given that the two authorities which constituted their source, namely the Church and the Empire, were both willed by God himself.[10] This intense and heated debate was conducted along theological and even juridical lines of arguments – these were the same years in which Justinian texts were resurfacing – and constitutes the earliest expression of political literature in European history.

Gregory VII did not limit himself to theoretical pronouncements. In the year 1077, having excommunicated the Emperor for challenging the authority of the Church in the matter of precedence in ecclesiastical investitures, the Pope proceeded to declare that the Emperor's subjects would hence be released from their oath of allegiance to the Emperor.

[8] Gregory VII, *Registrum epistolarum*, ed. Caspar, in MGH *Epistolae selectae* (Berlin 1967); on Gregorian doctrine see two epistles sent by Gregory to Hermann of Metz in 1076 and 1081 in *Registrum*, IV. 2 (vol. I p. 293); VIII. 21 (vol. II p. 544). Cf. Tierney 1988, pp. 45–52.

[9] Gregory VII, *Dictatus papae* (1075), in *Registrum epistolarum*, vol. I, pp. 202–204.

[10] Petrus Crassus, *Defensio Henrici IV regis* (1084), in MGH *Libelli de lite*, I, pp. 432–453: Petrus Crassus furthers the argument of the dual dimension of authority wanted by God, respectively, for the apostolic succession and for the succession of the Emperors and kings (ibid., p. 438). See also the *Liber de unitate ecclesiae* (1082), in *Libelli de lite*, II, pp. 173–284.

Only King Henry IV's repentance, after having been kept waiting outside the castle of Canossa for three days, persuaded the Pope to revoke the excommunication.

The controversy came to a conclusion a few decades later. The Diet of Worms in 1122 was partly inspired by the criteria adopted in London in 1107, following the contrast between the great defender of the authority of the church, Anselm archbishop of Canterbury, and the king who had wanted to personally confer the ring and pastoral to the newly nominated bishops. It was established at Worms that the ensigns of the episcopal investiture would be conferred by ecclesiastical authorities and that the nominations would be carried out according to canonical procedure.[11]

One of the reasons for the importance of this phase in European history resides in the fact that with these reforms the Church effectively claimed as its own the direct legitimisation of religious matters and those pertaining to the internal organisation of the Church, thereby at least in principle taking it away from secular powers, and adopting a hierarchical structure culminating in the roman pontificate. At the same time secular power had begun to acquire a consciousness of its theoretical and practical legitimisation. Although at this stage still founded on direct divine legitimisation, secular power begins to be conceived – both in doctrine and by the secular authorities, in the Empire and the kingdoms of England and France among others – as independent of the Church.[12]

6.2 Canon Law Collections

The success of the reform is clearly discernible in the canonical collections which emerged in the Gregorian and the post-Gregorian age. The Collection in 74 Titles had opened the way in the year 1076.[13] A little later Bishop Anselm of Lucca in turn produced an important systematically ordered collection.[14] Others were issued by Cardinal Deusdedit[15] and

[11] *Pax Wormatiensis*, in MGH *Legum sectio* IV.1 *Constitutiones*, n. 107–108, vol. I pp. 159–161: '*ego Henricus imperator augustus [...] dimitto sancte catholice ecclesie omnem investituram per anulum et baculum et concedo in omnibus ecclesiis, que in regno vel imperio meo sunt, canonicam fieri electionem et liberam consecrationem*'.

[12] On this, see Böckenförde, 2007, p. 37.

[13] *Diversorum patrum sententiae sive collectioo in LXXIV titulos*, ed. J. Gilchrist (Vatican City 1973); cf. Kéry 2013, pp. 204–210.

[14] Anselmi ep. Lucensis, *canonum*, ed. F. Thaner (Oeniponte 1915, repr. Aalen 1965).

[15] *Die Kanonessammlung des Cardinals Deusdedit*, ed. V. v. Glanvell (Paderborn 1905, repr. Aalen 1967).

Bishop Bonizo.[16] In these and other collections the supremacy of the papal Curia over local churches and the autonomy from secular power are clearly reiterated. Outside Italy, Yves, bishop of Chartres from the year 1090 to 1116, previously a student of Lanfranc, in turn produced as many as three collections between 1094 and 1095. One of these, the *Panormia*,[17] was circulated widely throughout Europe. The collection known as *Britannica*,[18] which includes for the first time in many centuries almost 100 passages from the Justinian *Digest*, may perhaps be attributed to Yves, who was in Rome in the year 1090 for his episcopal consecration. In any case, he used this collection when writing the *Panormia*; it is therefore correct to maintain that the revival of the fundamental text of Roman law is linked to Rome and to the spirit of the Gregorian reform [Cortese 2002].

In the prologue to the *Decretum*, Yves indicated several criteria to reconcile the discordance between canons: separating norms of immutable divine law from secular law; general norms from dispensations; precept from advice; universally valid rules from decisions of a local nature; and others.[19] Using these criteria he made it possible to preserve and make use of canonical tradition as a whole [Kuttner 1960], without having to resort to dubious and fragile expedients, such as occurred earlier in the age of falsifications. These very criteria, founded essentially on the principle of distinction, would become, as we shall see, the mainstay of legal science in the twelfth century.

The Church reform of the eleventh century was of the utmost importance in Church history [Fliche 1924], and its influence on Europe was long lasting, not only at a religious level, but also in the sphere of canon and secular law. The reform may be considered an outstanding victory against custom – feudal ties, simony and concubinage being deeply rooted in society at the time – and this happened through the work of a small minority of supporters who were going against huge ecclesiastical and secular interests. The victory was also made possible by the support of the faithful who spurred on the religious and spiritual regeneration.

The successive development of canon law in the twelfth and thirteenth centuries is intimately connected to some of the choices made in the age

[16] Bonizo, *Liber de vita christiana*, ed. E. Perels (Berlin 1930).

[17] Ivo of Chartres, *Panormia*, in PL 161, col. 1042–1344. Ivo's *Decretum* is published in PL 161., col. 47–1022. The *Tripartita* is still unpublished; Kéry 2013, pp. 244–260.

[18] This is a canon law collection in a London manuscript, likely to have been written in Rome in the years following 1089.

[19] *De consonantia canonum*, in Ivo, *Decretum*, PL 161. 47–60; Cf. Brett, 2007, pp. 51–72.

of reform: among these was the centrality and supremacy of the pontificate with reference both to normative powers and to the widely employed instrument of the appeal to Rome, the autonomy of the Church from secular authority, the breaking of the bonds of servitude of the feudal and vassal systems, and finally ecclesiastical celibacy. The legal and institutional tradition of the Catholic Church would be directly influenced until the twentieth century.

No less important were the consequences of the reforms on the historical development of secular law. If it is an overstatement to say that the evolution of Western legal tradition is fundamentally attributable to what has been referred to as the 'Papal Revolution' of the eleventh century [Berman 1983], there is no doubt that the events that formed the modern European states and their legal systems are directly or indirectly connected and in part depend on the institutional structures adopted by the Church during the decisive decades of the reform.

PART II

The Age of the Classical *Ius Commune* (Twelfth–Fifteenth Centuries)

After the end of the ancient world and the beginning of the new era, many centuries later to be named the Middle Ages, a pivotal sign of discontinuity occurred in the decades of transition between the eleventh and the twelfth centuries, when society, intellectual life and institutions underwent a radical transformation and acquired new and original features. An astounding series of innovations were to take place almost simultaneously: reforms within the Church and the monastic orders, demographic development, the increase of land under cultivation and the concomitant introduction of new agricultural methods, the revival of trade and craftsmanship, the rebirth of cities, the rise of urban and rural communes, the transformation of feudal relationships, the establishment of monarchic sovereignties in southern Italy, France and England, and last of all (but certainly not least) the emergence of a legal science, through the founding of an institution, the university, devoted specifically to the training of lawyers.

The phase of early medieval customs had ended: the new European society demanded different rules and methods to successfully manage public and private legal relationships. Only appropriate legal education could insure such rules and methods: for this reason, the role of the professional jurist was to acquire fundamental importance both in civil society and in the Church. On the continent professional jurists were trained in the universities, whereas in England training took place within the new legal system of *Common Law* introduced by the Normans. From this time on, no European legal order has been able to function without trained jurists.

This is a momentous phase in European history, the driving force of which came to a large extent from Italy. Indeed for almost five centuries, Italy held a leading role in the economic, intellectual and artistic history of Europe and the Mediterranean, and it is not unfair to say that until the sixteenth century the history of Italy made its mark on the history of the whole of Europe.

The new legal science, which we will shortly be examining, was first developed in a single centre of studies, founded in Bologna and subsequently