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Per pugnam sine iustitia: An Age Without Jurists

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1. The Gradual Disappearance of the Professional Jurist

At first sight it would seem to require a great effort to imagine an age without jurists. The idea becomes more comprehensible, however, if we heed Emperor Theodosius II and a passage in the constitution "De auctoritate Codicis" that prefaced the Codex of 438. The emperor says of jurists that "there are seldom any who have full command [scientia] of civil law," adding, "among so many dreary, bungling lucubrations it is difficult to find anyone who has received solid and complete doctrines."[39]

In the Western Roman Empire in A.D. 438 events had not yet reached the precipitous climax of the deposition of Romulus Augustulus in 476. Thus Theodosius was speaking of the lands that are now Europe.

We know that at the time there were vast stretches of thinly populated territories on the European continent, that civil life had shrunk to within a few cities, and that in rural areas, which were sometimes dominated by a town or an urban settlement, tradition governed the pace of work unless the peace was disturbed by bands of brigands on occasion joined by miscreant monks of dubious morality, utter vagabonds, and savage forest-dwellers. We know that the average life-span was short and that people were considered lucky to live beyond the age of forty; that illiteracy was the rule; that even a king -- Theodoric, for example -- found it difficult even to write the first letter of his name; and that everywhere hunger, brought on by famine, destitution, or ravaging armies, and death by sporadic epidemics or devastating plagues made simple survival the most urgent problem.

Only a few cities could lay claim any splendor: Ravenna was first among these, followed by other cities of the coasts of the Adriatic (Rimini, Ancona) or the Ionian Sea (Otranto). Cities outside Italy included Marseilles, Arles, and

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[39] Theodosius, Const., "De auctoritate Codicis": "Tam pauci raroque extiterit qui plena iuris civilis scientia ditaretur, et in tanto lucubrationum tristi pallore vix unus aut alter receperit soliditatem perfectae doctrinae."

Toulouse in southern France, Lyons in Burgundy, Toledo, Saragoza, and Seville on the Iberian Peninsula.

Rome was in full decline. The Senate, reduced to a shadow of its former power, was withering away, its horizons narrowed to local and provincial matters. The time when the voices raised in the Senate represented the most vital forces in the entire Empire was only a memory. The cultural elites were in total collapse. In 533 there were perhaps three professors (one of them a jurist), all poorly paid if at all, if we can take Cassiodorus' word for it.[40]

2. Anthologies and Epitomes in the West: Doctrine and Legislation

In the early years of the sixth century some notice crops up of barbarian kings ambitious to link their names not only to the usual military victories but also to the important act of the promulgation of a "law." There were few if any jurists to put the royal designs into action, so the personnel available did the best it could. Some legal anthologies had survived, and they were refashioned for a variety of reasons -- to provide a summary of their contents or to replace a document out of sheer necessity because its pages had worn thin. Thus Alaric, the king of Visigothic Spain and a talented ruler, chose one of these anthologies and in 506 "promulgated" and imposed it as the "law" in his kingdom.

According to that remote point of view, this lex was the Roman law of the Visigoths -- the Lex Romana Visigothorum; nonetheless it was an odd "lex" from our point of view fifteen centuries later. For one thing, without concealing anything of its original physiognomy or its character as a private anthology, it was made up of snatches of the Sententiae of Paul and fragments of the Libri responsorum of Papinian, mixed in with a few imperial constitutions, either from before the Theodosian Code (and, on occasion, included in that Code), or after it. For another, it included a summary of all the Institutiones of Gaius -- the Epitome Gai. Finally, the "legislative" texts (with the exception of the summary of Gaius), were supplemented by explanatory annotations -- additions interpreting the various provisions (and indeed called interpretationes) -- that we would now consider statements of doctrine rather than laws.

In short, examination of this document shows the limited idea that a king might have had of his own "law," even in a kingdom as extensive and important as the Visigothic. It was an idea extremely remote from our own.

The situation was no different in other lands of Western Europe, where norms were always stitched together in this fashion. Nor was there any difference between the way a "legislative" text such as the Lex Romana Visigothorum was put together and other anthologies that remained in the state of private

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[40] See Pierre Riché, Education et culture dans l'Occident barbare, VIe-VIIIe siècles (Paris: Editions du Seuil, 1962, 2d ed., 1980), 114 and n. 152, available in English as Education and Culture in the Barbarian West, Sixth Through Eighth Centuries, trans. John J. Contreni (Columbia, S.C.: University of South Carolina Press, 1976).

compilations such as the Lex Romana Burgundionum, the so-called Lex Romana Raethica Curiensis, the Epitome Sancti Galli, the so-called Edictum Theoderici, the Epitome fuldensis, and others. In many cases it is difficult to establish whether the manuscript in question conveys a lex or whether it incorporates and documents the work of a private individual. One example of a puzzle of this sort is the Epitome Sancti Galli, also given as Lex Romana Curiensis.

Thus if there were "jurists" in Western Europe, they were capable of little more than knowing how to read, comprehending what they read as best they could. They did not bother to weed out what they did not understand; nor did they take the trouble to reflect on the materials they handled or to wonder whether an anthology could become "law." Nor could they have thought that their contemporaries would hold their labors in very high esteem since they were well aware that most people were ignorant and illiterate, tormented by hunger and cold, and decimated by violence and epidemics.

3. The East: The Great Legislative Compilation of Justinian

Compared to the West, the East was flourishing. It had splendid cities such as Constantinople (Byzantium), the capital of the Roman Empire of the East; it had famous centers of scholarship endowed with rich libraries such as Alexandria, Caesarea, Berytus (now Beirut). Many anthologies were made on these eastern Mediterranean shores combining selected fragments of imperial edicts with passages taken from older Roman juridical doctrine. These were compilations of modest scope, usually written in Latin, although on occasion, as with the Scholia Sinaitica ad Ulpianos Libros ad Sabinum, they were written in Greek. The existence of the great libraries made possible the compilation of such modest anthologies. The jurists' persistence in producing works of that sort is documentary evidence of a legal culture with little learning and of one that relied on inferior authors. Perhaps it is no coincidence that these compilations are anonymous.

Nonetheless, what even a king as powerful as Alaric found it impossible to do in the West Emperor Justinian managed to do in the East, beginning in 529. Admittedly, Constantinople still had a center of scholarship that functioned efficiently enough to hold firm to an idea of the law that resembled the Roman view of the law in its basic outline and its methodological approach. Thus the constitution Omnem drew a distinction between Berytus, "which has rightly been called 'mother of the laws'," [41] and Alexandria and Caesarea, which it judged more negatively: "We have heard that even in the most splendid cities of

[41] Justinian, Const., "Omnem," par. 7, "In Berytiensium pulcherrima civitate quam et legum nutricem bene quis appellet."

Alexandria and Caesarea and in others there are certain inexpert men who divagate and transmit an adulterated doctrine to their disciples."[42]

Thus Justinian had available a number of professors whom he could bring together to form a commission: Tribonian, who directed the legislative project; Constantine, a professor in that "most splendid city of Berytus"; Theophilus and Cratinus, who were active in the capital city, and still others. Nothing of the sort would have been imaginable in Western lands (Italy, Germany, the British Isles, France, Spain). This was the context in which Justinian's famous compilation of laws could be finished in only a few years.

The first step was to publish a "book of constitutions" that brought together in one Codex imperial edicts from a variety of epochs up to the reign of Justinian himself.

Next, in 533, a lengthy collection of iura was made, the Digesta (Digest, or Pandects), giving in fifty short "books" a condensed version of passages from ancient Roman doctrine. These were reproduced in the state in which they could still be known, and they often were full of post-classical interpolations and showed signs of having been manipulated and abridged.

In 534 a more complete revised version of the Codex (Code) divided into twelve "books" was produced. In that same year a textbook of jurisprudence in four "books," the Institutiones (Institutes), was elevated, by promulgation, to the level of "law." There were instances of similar operations in the West, for example, in the insertion of the Epitome Gai into the Lex Romana Visigothorum. These reflected a conception of the relationship between the legislative power and the authority of doctrine that permitted no distinction between the sphere of the creation of laws and the sphere of theoretical elaboration of the law.

Next came the Novellae Constitutiones (the Novels), which listed the decrees that Justinian promulgated until his death in 565. These were compilations made by at least two private individuals, one known as the Epitome Juliani, which included 122 constitutions, by Julianus, who was probably a professor at Constantinople; the other, anonymous and called Authenticum, gave the full text of 134 constitutions.[43]

Given the way in which they were compiled, the motivation behind the undertaking (it was linked to the utopian project of reviving the unity and splendor of the Roman Empire), and a broader cultural context that had already deteriorated

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[42] Ibid., "Audivimus etiam in Alexandrina splendidissima civitate et in Caesariensium et in aliis quosdam imperitos homines devagare et doctrinam adulterinam tradere."

[43] Today Justinian's laws are usually consulted and studied in the late nineteenth-century German editions, the Corpus Juris Civilis: Institutiones, ed. Paul Krüger (Berlin: Weidmann, 1867); Digesta, ed. Paul Krüger and Theodor Mommsen, 2 vols. (Berlin: Weidmann, 1872); Codex, ed. Paul Krüger (Berlin: Weidmann, 1877); Novellae Constitutiones, ed. Rudolph Schöll and Wilhelm Kroll (Berlin: Weidmann, 1880-1895). The Digest is available in English as The Digest of Justinian, ed. Theodor Mommsen with the aid of Paul Kreuger, trans. and ed. Alan Watson, 4 vols. (Philadelphia: University of Pennsylvania Press, 1985).

in the East and had collapsed in the West, Justinian's legislative texts were like a jewel case guarding precious gems and removing them from use. They barely succeeded in conserving and safeguarding scattered and precious fragments of Roman law; despite the intentions and the illusions of Justinian and his commissioners, they only served to pass on an awareness of that law to later ages.

4. The Emperor's Lost Dream

Justinian's legislation found life impossible everywhere. In the East it was in large part extraneous to local customs and even to the ideology of empire. Never applied, in 740 it was formally replaced by a short collection of precepts (in only 144 chapters), Ecloga tòn nomon, a work published in the context of a clumsy attempt at legislation on the part of Emperor Leo III.

In the West Justinian's legislation was equally extraneous to the regna that had been constituted on the ruins of the Roman Empire. It was unknown in the Kingdom of the Visigoths (what is now Spain and part of southern France) in spite of an ephemeral conquest of the eastern portion of the Iberian Peninsula. It was unknown in the Kingdom of the Burgundians, in France under the Salian Franks, and in Germanic lands under the Alemanni and the Bavari.

It arrived in Italy in 554, when the Byzantine armies, after twenty years of devastating battles, reconquered the Italian Peninsula and united it once more with the Eastern Empire. It was the bishop of Rome, Pope Vigilius, who "supplicated" Justinian to pass a law to put his compilations into force, which he did with the promulgation of the Pragmatica Sanctio pro petitione Vegilii. Very few people in Italy had the time or the opportunity to become acquainted with that decree, however, because, beginning in 568, northern and central Italy were thrown into turmoil by the Lombard invasion and occupation and because more Greek than Latin was spoken in the regions that remained loyal to Byzantium and connected with it, and the people there viewed with hostility laws deriving from a Rome that they remembered as a harsh and rapacious capital.

We know that only a very few copies of the Institutiones continued to be known, occasionally read, and modestly annotated. The Codex was dismembered: the last three books (dealing with the administration of the Empire) fell into neglect; the text of the first nine books was abridged into an extremely rare and incomplete Epitome Codicis. The Digesta and the Novellae were totally lost, save for a few extremely rare fragments of the latter.

Thus in the sixth century, in the very years of its promulgation, the corpus of Justinian's laws moved into a long night that to some contemporaries must have seemed to herald its death. Today we know that its long night lasted roughly six centuries and that the long wait safeguarded the life of those laws.

5. The New Condition in the West

Western Europe came to be inhabited by a number of new and "barbarian" populations. Anyone who was not "Roman" was a "barbarian." The term's negative connotations came from a comparison of customs, always to the disadvantage of the "barbarians." When each of these peoples had become established in a territory of its own -- at times after long wanderings -- it felt the need of a "law" to give order to its social life. Two motivations joined to define this need and the means for satisfying: first, a desire to retain the "true" form of ancient oral customs that risked becoming contaminated or polluted by contact with Roman populations; second, a desire for a written text that would both preserve the ancient norms and make them known to the "Romans." For "barbarians" and "Romans" alike, the life of society was ruled by custom in unwritten norms known by experience and transmitted from one generation to another. Each of these norms was thought to remain identical to an original kept in folk memory, but in fact oral methods of conservation and oral transmission modified them incessantly, either by deliberate acts or by inattention and error.

The attempt to crystallize the contents of such customs in written form was thus only indirectly presented as the projection of a ruling power; it was more directly linked to the will of a community working to save its own patrimony of customs.

If we keep in mind that customary law was always highly uncertain in Europe between the sixth and the eleventh or twelfth century, that specific testimony was often needed to verify a precept (inquisitio per testes), and that written redactions of "Roman" customs were often lacking, we can better circumscribe the field within which the barbarian "laws" operated and better evaluate their historical importance. In reality the barbarian "laws" gathered together only a small part of a much vaster and more variegated store of popular usages. They left many customs unrecorded, and their frequent revisions and successive additions to them were insufficient to complete them. Among the "laws" of this sort that might be mentioned here were the Lex Visigothorum promulgated by King Recesvinde in 654 for the Kingdom of the Visigoths in Spain (also called Forum judiciorum or Fuero Juzco); the Lex Burgundionum (also called Lex Gundobada or Gumbata) promulgated by King Gundobad between the last years of the fifth century and 501; the Lex Salica, in force throughout much of what is now France and continually revised from a nucleus that dated from around 511; the Lex Ripuaria; and, for Germanic lands, the Pactus Alamannorum, which we can date between 584 and 629, the Lex Alamannorum of between 712 and 725, and the Lex Baiwariorum of 743-44.

Analogous historical processes were taking place in Italy. In 643 the seventeenth Lombard king, Rothari, published an Edictum and stated in its preface that he had been led to this act because the exercitales, the arms-bearing men (hence the greater part of the young male population), felt a strong need for it. They wanted was to have the genuine Lombard customs (cawarfidae), whose purity was threatened, to be set down firmly (adfixae) in a certain and authoritative written text. In reality a transformation was already taking place,

accelerated by the use of the Latin language to translate the consuetudinary norms into legislative terms. The very idea of publishing the contents of customary norms in the form of royal edicts, thus changing their juridical title, contributed notably to changing them. The redaction of laws continued with Grimoald in 668 and, in particular, with the many Edicta of Liutprand from 713 to 735.
Liutprand was the first Lombard king to be converted to Catholicism, with the result that there was a constant tension in his legislative acts between the more intransigent and primitive point of view of some of his people attached to the pagan tradition and the point of view of the crown and the parts of the population that supported the monarchy and openly favored the Christianization and Romanization of everyday customs and habitual rites. This tension was particularly evident in a few specific cases. One example was trial by duel. single combat was an institution for the settling of difference typical of populations who saw physical force as the most adequate means for resolving conflicts of interest. In some cases, the "judge" in the "trial" (who was not a jurist) was not expected to investigate what had occurred or to try to find the reasons for it, which were discussed, tested, and weighed in accordance with preordained formal schemes. Thus such "judges" were not charged with "judging" in any usual sense but only with being present at a contest and declaring the "right" of the combattant who, by his physical strength, skill, or luck, was the winner in the field. There was nonetheless a tendency, which surfaced in vague terms and was more often discernible more in the statements of a king than in actual events, for the sovereign to invite the "judges" to take into account the "laws" (that is, the Edicta) or customary norms, to verify that they had been respected, and, in case of violation, to oblige the contesting parties to respect them or, after evaluation of the damages, to oblige the party responsible for the violation to make reparation.

Further Lombard edicts were emitted under Rachis in 745 and 746, under Aistulf from 750 to 755 (the Regnum langobardorum), and later with the leges, capitula, and pacta of princes and dukes in Benevento, Naples, and Spoleto, even after the Franks under Charlemagne had taken over the Regnum.

6. Oral Laws: Custom; the Verbum Regis and the Carolingian Capitularies

The laws of the "barbarian" peoples, and among them those of the Lombards in Italy, were like an archipelago of tiny islands in the vast sea of custom. Moreover, in a society that had almost totally lost its centers for primary schooling and where illiteracy was rampant, it would have been difficult for contemporaries to know the written text of those laws. Only a few of the clergy, studying in extremely modest monastic or episcopal schools, learned the elements of writing and could manage to read the liturgical texts. "Grammar" had been deeply corrupted and both barbarian and Latin words had undergone deformation. Even architecture was in decline. Everything was moving precipitously toward the highly mobile and uncertain turmoil out of which the new vernacular tongues

(the romance and national languages) arose in the various lands of Europe between the tenth and the twelfth centuries.

Even someone who knew how to read and write would have found direct acquaintance with a copy of the Lombard edicts extremely difficult. The later Lombard compilation called the Liber Papiensis had a limited circulation as well.

This was the situation that Liutprand sought to remedy. First he prohibited the scribae (roughly, notaries) from compiling cartulae (written acts documenting a juridical transaction) without direct vision and an actual reading of the text of the law, Lombard or Roman; next, he established that cartulae could be written if the legislative text was known at least from the report and testimony of someone who had actually seen it; finally, he established severe penalties for nonobservance of these measures.[44] This edict clearly shows that the very idea of a "law" was by and large beyond the ken of populations that had lived for centuries by orally transmitted customs, and for whom it seemed (and in fact was) a great novelty to rely on a written text, search out a copy of it, or at least have sure evidence of it from a trusted person who might have seen such a copy.

The orality of customary law, which was widespread in most sectors of European society from the sixth to the eighth centuries, emerged on higher levels during the Carolingian age from the eighth to the tenth centuries. In the later period, however, orality was combined with an attempt, in part new, to conceive of the "law" not as a text to certify popular custom but as the expression of a sovereign's will. Although it may have been a pale reflection of the Roman and Byzantine concept of imperium, this tendency dissolved and was lost in the practical process of the creation of oral norms. The "laws" of Charlemagne (768-814) and his successors, which were called capitula or capitularia, were always oral. What counted was the spoken will of the king, the verbum regis. Those who were privileged to hear the sovereign's commands could make notes, and they might write a "text" for themselves and for others that gave proof of the verbum regis. That text did not in itself constitute the law, however, hence the wording of the text could be modified, if the content of the precept was not altered -- a condition that was violated, maliciously, by error or inadvertence, or perhaps when it proved convenient. As a result, current attempts at historical reconstruction are necessarily uncertain, as uncertain and as diverse as the extant texts, not one of which permits knowledge of the true, genuine, original verbum regis that launched such a varied textual tradition.

7. The Concept of the Jurist: Significance and Limitations of a Generic Activity

That both customary and imperial norms were oral, that written texts of the barbarian laws were exceptional, that there were variations in content in orally transmitted norms or norms for which a written version was not readily available

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[44] Liutprand, Edicta, 91, ed. Friedrich Bluhme, in Monumenta Germaniae Historica Leges (Hannover: Hahn, 1869), 4:144-45.

are all phenomena that we need to take into account when we consider the concept of the jurist in the early Middle Ages in Europe. Formally speaking, in this early period, the "jurist," as that professional category came to be defined in the twelfth century, did not exist and could not have existed.

There were no "jurists" in royal courts in which royal advisors worked modestly to enable some barbarian kings to give "laws" to their kingdoms. The written redactions of the laws that have come down to us show that the authors of those texts did not have a cultural heritage adequate to the task, either from the point of view of a command of grammar and syntax or from the legal point of view, and that they encountered grave difficulties when they transliterated into Latin -- the language that was used and had to be used -- terms from languages totally different from Latin. Obviously, this did not prevent some redactors of edicts from understanding their times well or from interpreting and lucidly synthesizing the particular motivations of the civilization to which they belonged.

It was on the level of an activity that we might call legal that the concept of the jurist did not exist. It is true that the term iudex recurs in Liutprand's Edicts, but if we recall that for Liutprand the iudex was the person who certified the outcome of a judiciary duel, we will have to define this Latin word in conformity with the ideal representations that the populations in question assigned to it and according to the practice to which it corresponded. With the possible exception of the royal courts (which, in Italy, meant the royal court at Pavia), "judges" were simply "those who judge"; people who, in real life and at a specific moment and a particular time in their lives or their daily activities, found themselves in the position of having to adjudicate. Such men were not professionally engaged in that activity, and when there was no one person charged with the responsibility of "judgment" an entire group -- men able to bear arms, members of the landed aristocracy, or the clergy -- could act as "judge."

Such a "judge" had little acquaintance with the customs of the place in which he lived, and if he had memory of them it was because he had become one of the persons who had lived longest in that locality (putting him among the antiquiores loci). He often had doubts, or doubts were suggested to him by the litigating parties affected by his decision, about the content of consuetudinary law or even about the existence of a specific norm. In such cases the "judge" might suspend the "trial" and call on the testimony of others among the older and more trustworthy men from the same place or a nearby place -- that is, he might open an inquisitio per testes (investigation through witnesses) to ask such men what information they could offer on the precept that required clarification, thus guiding his decision.

These "jurists" did not "interpret" a norm or a law. Or rather -- which amounts to the same thing -- the possibilities for interpretation were so broad and gave so much liberty to the "judge" as to lose all sense of specificity or of following rules that might take textual form into account, look for substantive meaning, or seek the internal logic of the norm or of similar norms. It is difficult to imagine that the "judges" in Lombard or other European lands, many of whom

were illiterate, were capable of posing sophisticated problems of that sort. It is easier to imagine them as respectable persons occupied in the exercise of arms (milites), in carrying out the responsibilities of religion (the clergy), or more generally in pursuing the peaceful labors of a landowner and proprietor of fields and houses -- persons, in short, who, out of necessity and because of the respect they enjoyed in the community, took on the trappings of a "judge" and were indeed "judges" for a day or for an hour. If they were judges it was in a sense unfamiliar to us, not as "men of law" but as "men of justice."

The role of the notary was similar. Actually, other terms are frequently used in the sources -- scriba or scriptor, for example -- to designate someone who knew how to write and could put his efforts to the service of anyone who wanted to document an intended transaction in writing -- a barter exchange, a donation, a sale, a debt to be incurred, and so forth. These scriptores had modest talents when it came to composing a text; their occasional unclear phrases show hesitant grammar and spelling. Their capacities as "jurists" were even more modest, if not nonexistent. They did not know the "laws," to the point that Liutprand threatened them with severe penalties when they failed to become acquainted with them or at least seek information from someone who knew them, and they took the precaution of declaring that they were "following the customs of the Roman laws" (secundum consuetudines legum Romanorum). Furthermore, they were totally ignorant of both the concrete concepts that had been elaborated by Roman legal science and the concepts incorporated into the various barbarian norms (gewere, wadiatio, thingatio, etc.). This led them to jumble together in one act legal concepts or terms whose names they recalled, for instance designating the same transaction as a donation, a sale, or a barter exchange.[45]

8. The Law Is Not an Autonomous Science

Furthermore, there could be no "jurists" where there was no autonomous "legal science." The law, in fact, was seen as identical to the arts of reasoning and expression, on the one hand, and with ethical standards, on the other.

This is a consistent point of view in both reflection and practice throughout the early Middle Ages (sixth to eleventh centuries). First and foremost, it is embodied in the Etymologiae of Isidore of Seville (d. 636), a brief compendium of the culture of the age. This ideal encyclopedia of all sapientia was based on three basic disciplines known collectively as the "arts of the trivium" -- grammar, or the rules of discourse, dialectic, or rules of reasoning, and rhetoric, which gave structure, form, and elegance to exposition. Law was regarded as subsumed under these branches of encyclopedic knowledge: technical terms and their primary meanings belonged to grammar; explanation of those terms and their logical concatenation belonged to dialectic; their explication was the province of rhetoric.

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[45] For examples, see Francesco Calasso, Il negozio giuridico, 2d ed. (Milan: Giuffrè, 1959), 91-96, 106-107.

The law also meant rules for living, hence every precept (by custom, by edict, or by legislation) must operate in the realm of ethics, which gave discipline to life and was the earthly projection of divine order.

Thus throughout Europe men of the early Middle Ages were constantly involved in evaluating the actions that created custom, and in evaluating them according to divine laws, deciding whether they were just or unjust, and discussing them (dialectically, if need be) when doubt arose or when opinions diverged or clashed. Furthermore, they were motivated to do so not only because such acts had consequences of a terrestrial and social sort but also because they involved merits and responsibilities capable of saving (or losing) the human soul in the after-life.

In short, the juridical realm took on a more varied coloring and became equated with the realms of ethics and theology. This was why ecclesiastics rose to prominence. The institutional responsibilities that they assumed made them the custodians and interpreters of the Ten Commandments and the Gospels, the holy texts and the earthly standards for divine justice, and their daily contact with the faithful, heightened by confession, required ongoing judgments of human actions. Within the communities of the time it seemed natural to turn to the parish priest, the bishop, the monk, or the canon not only for soul's salvation but also for protection of one's more terrestrial interests or for help and moral support in mundane business affairs (an opinion on the "just price" of a sale or the "just" choice of an heir, for example). It also seemed natural that the member of the clergy to whom one had turned for guidance would then be the person who took pen in hand to note on parchment the choices, decisions, and agreements of parties to a legal transaction.

The man of the church was thus a divine judge and a terrestrial judge; he was a theologian, a "jurist," a rhetorician, and a "notary"; he knew and judged harmful human acts and illicit thoughts as "sins" but at the same time as "illegal" civil or criminal behavior.

This overall vision was crystallized and reinforced not only by the vast circulation throughout Europe of St. Isidore's Etymologiae but also by the renewed energy that the Carolingians infused into the cultural tradition of Western Europe, in particular in the age of Charlemagne and of the empire that was reborn (in 800) as "Holy" and "Roman." It was perhaps Alcuin of York's theoretical organization of the branches of human knowledge into one systematic outline that established the position and significance of that vision. Those branches of knowledge, then more properly called "arts" (which combined scientia -- knowledge -- and sapientia -- wisdom), were divided into two overall categories: artes reales and artes sermocinales. The artes reales (the quadrivium) were mathematics, geometry, astronomy, and music; the artes sermocinales (the trivium) were grammar, dialectic, and rhetoric. Together they made up the seven artes liberales.

9. The Presence of the Church

It was in ecclesiastical circles that investigation of human nature, human behavior, and social order found it possible to exist and develop. This investigation was an all-out effort that included what the classical jurists, the Roman legislators, the "Fathers of the Church" (the Latin and Greek patristic tradition), and the normative organs of the church had had to say about all aspects of individual and collective life; it also was taken into account in the new pontifical decrees (decretales) and the decisions (canons) of the great assemblies of the church, the provincial and ecumenical councils.

Collections of norms from a broad variety of sources came into being in Europe, text of which circulated, in whole or in excerpts, in a number of ways, and at times these excerpts were collected and gave rise to new and different collections. The most prominent of these were the Collectio canonum Anselmo dedicata of the ninth century (ca. 882-896); the Lex romana canonice compta, revised on several occasions between the ninth and the tenth centuries; later (in the eleventh century), the Decretum of Burchard of Worms and the Panormia, the Tripartita, and the Decretum of Ivo of Chartres.

It is difficult to establish where many of these collections were written or by whom. The oldest among them generally circulated as anonymous anthologies, and according to where they happened to take hold, they were added to, abridged, rewritten, or reorganized. At times they were faked for the demands of the faith or of politics: one example of these is a collection attributed to a monk in Mainz, Benedictus Levita, a text made up of broadly counterfeited canonical sources and barbarian and Roman norms presented as Carolingian "laws."

In general, we can guess that these compilations came out of centers for study or at least for reading and meditation, thus we should look toward great monasteries standing in rural isolation or perched on a hillside -- Montecassino, Casamari, Nonantola, Bobbio, or Cluny -- toward the great cathedral churches -- Chartres, Ravenna, Metz, Aachen, Worms, or Mainz -- or toward important collegial churches energized by the presence and the activity of some learned canon. The vast network of city and country parishes had little to do with this movement, and most of the smaller dioceses were more likely to be caught up in city politics and in a difficult struggle with the local count and his court than occupied in the task of peaceful elaboration of doctrine or even a minimal interest in elementary instruction.

Thus we have very few points of reference in a continent that was sparsely populated, fragmented, and divided by nearly insuperable geographical barriers. Although such points were few in number, however, they were homogeneous, not only thanks to the universality of the church and its general structures but also thanks to the diffusion of the Benedictine Rule (and, to a lesser extent, the Rule of St. Columban) and to the mobility and "social" availability of the Latin clergy who -- unlike their Byzantine counterparts -- sought the relations offered by the collective life (in particular, through the activities of the canons) and integration into the community life of the monasteries.

When the twelfth century ushered in a new age, a term was needed to designate those who knew how to read and write and those who did not: the first were always called clerks (clerici), even if their garb and their state were not religious; the second were called laity (laici). This distinction expressed a notion that had been current for centuries and that combined faith and sapientia, the responsibilities of the religious life and a dedication to both the spiritual and the civil life.

10. Per pugnam sine iustitia

Thus as late as the tenth century Europe was still guided by two fundamental lines of thought that had permeated and guided civilization on the continent since the fifth or sixth centuries. Anyone in normal daily life who thought himself harmed in his interests or who foresaw that a ruinous act was about to bring him harm had only two ways to defend himself or win his cause: the force of arms, or the force of a reasoned justice founded in the human heart and animated by faith in Christ. Obviously, these two lines of recourse were not exclusive to the early Middle Ages, since in other epochs (and even in our own) they have been a temptation for someone in search of a defense. In those distant centuries, however, they had a prominence and a clarity that the historian must note.

When in 731 the anonymous but discernible drafter of additions to the Edictum of Liutprand wrote the lapidary phrase, "per pugnam sine justitia," at the close of the one hundred eighteenth capitulary,[46] his point of reference was an ineluctable alternative: he knew that a right could be defended per pugnam (with armed force), which one should avoid, or per iustitiam, which was more desirable. To say per iustitiam was not the same as saying per legem, however. In that epoch "legality" was not known as a value, and the "law" was not looked to as an accepted, just, and rational way to prevent or resolve conflicts between individuals and order the life of the community. When, sporadically, a "law" did surface among so many customs, it only expressed the idea that the "law" must guarantee a free search for justice, either through the individual efforts of a judge or a notary or through the collective consolidation of customary acts, or else the "law" was an accidental, occasional, episodic but authoritative and written expression of the "justice" discerned in a particular instance (but this was a new concept that was consciously developed only in the twelfth century). Iustitia always held the central position. Men's instincts and their violence must be held in check and governed by the binding force of the supreme commandments of faith. Terrestrial norms were considered either as a corruption of iustitia or as a marginal actualization of iustitia. That was why it was impossible for an autonomous and distinct scientia iuris rooted in those norms to develop.

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[46] Liutprand, Edicta, 118 (ed. Bluhme, 156): "Quia incerti sumus de iudicio Dei, et multos audivimus per pugnam sine iustitia causam suam perdere..."

11. A Century of Great Crises and Radical Reforms: 1000 - 1100

Around the mid-eleventh century signs of change were everywhere. In 1054 the church split into the Eastern and the Western churches, a schism that was to last for a millennium, that still exists, and that promises to continue. The break helped to accelerate change, but it was also a highly visible symptom of profound changes already in operation. A comparison between successive decades can be illuminating.

During the first half of the eleventh century Rome was still the preferred abode of a rough and ignorant clergy given to simony and corruption. Pope John XIX (d. 1032), whose first concern was not his pontifical duties but improving the fortunes of his "house," the powerful Tuscolani family, was emblematic of the state of the clergy.[47] Strong reformist sentiments developed during the pontificate of Nicholas II (d. 1061). Among the champions of reform was Humbert de Moyenmoutier, who wrote an important treatise, Contra simoniacos in 1058. The most prominent reformer, however, was Cardinal Hildebrand, born perhaps in Rome, perhaps in Soana, near Grosseto. In 1073 he became pope as Gregory VII, and in 1075 he published a famous text, the Dictatus Papae, whose twenty-seven propositions outlined the prerogatives of the pope and of the hierarchy subordinate to him. Thus the most important act of this movement for reform, which came to be called "Gregorian" after the pope who was its most ardent proponent, was launched at the highest level of Christianity and from Rome.

Radical currents radiated from Rome throughout Europe. In many ways they were the most evident symptom of a reawakening, but they synchronized with other, equally far-reaching movements for renewal that preceded or coincided with them. These were broad movements that were reforming canonical life by defining new "orders" of reformed canons such as the "Olivetans" of the church of Sts. Peter and Paul of Oliveto, or the "Mortarians" of the church of Santa Croce of Mortara. Monastic life was also being recast, thanks to the reinterpretation and spread of the Benedictine Rule that had begun with the Cluniacs at Cluny, in Burgundy, as far back as 910 and that was continued by the Camaldolese (from Camaldoli, near Arezzo) after 1012, by the Vallombrosans (from Vallombrosa, near Florence) after 1030, and by the Cistercians (from Citeaux, in Burgundy) after about 1098, and to the decisive break with the feudal world urged by the Cistercian Rule of St. Bernard.

A historical reconstruction of the precise relationships between parallel phenomena is a difficult, if not impossible, task. It is even more difficult to state that one particular event was the determining cause of another. Nonetheless, one thing seems evident: in every field of human activity signs could be seen of a will for renewal; in only a few decades an extremely fluid state of affairs had

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[47] Luigi Salvatorelli, Storia d'Europa, 4th ed. rev., 2 vols. (Turin: UTET, 1961), 1:326.

opened the way to a new era. Historiography usually calls the centuries of this new era the "Renaissance of the twelfth century,"[48] or, more generally, the "Medieval Renaissance."[49]

12. Signs of a New Legal Science in the Roman Tradition

The ancient Roman legal tradition slowly began to influence law. An aptitude and a capacity for looking at everyday events and defining them juridically became part of the new cultural heritage and encouraged specialization in an activity that, thanks to intense and constant repetition, lent substance to the new professions of the practice and the theory of the law.

There are at least two works that testify to the new attitudes of the eleventh century, the Expositio ad Librum Papiensem and the Exceptiones Petri.

The first of these works was anonymous and was probably written in Lombardy around 1070. It was constructed as a series of annotations added to the Liber Papiensis and taken from the Lombard Edicta and the Capitulare italicum. For the first time in centuries, the names of "jurists" appear in these annotations: Bonfiglio, Bagelardo, Guglielmo, Sigefredo, Ugo, Walcausus. They cite Justinian's legislative texts frequently and at length, and there are indications that the author or authors were acquainted with the Codex, a work that had been forgotten for more than five centuries and was known only indirectly from a greatly abridged text that circulated only sporadically, the Epitome Codicis, or from an only slightly fuller version, the so-called Epitome Codicis aucta. The Expositio posed questions about dubious legal points and included references to disagreements among jurists.

The consistency of these annotations and the significance of their contents suggest the presence of jurists and legal circles already intensely pursuing specialized tasks. Exegesis was important not only (and not so much) for the interpretations it arrived at concerning individual norms but also (and even more) for the methodology that was its point of departure. At least three theoretical directions provided criteria for textual analysis, three directions that are known by the name given to their followers.

First there were the antiquissimi, who belonged to a past age but whose thought was mentioned on occasion for a specific contribution that it had made to the comprehension of a specific aspect of a norm. Then there were the antiqui and the moderni, who were distinguished by the method that they employed and believed in rather than by chronology, since they all lived at roughly the same time and were all part of the new generations of the second half of the eleventh

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[48] See Charles Homer Haskins, The Renaissance of the Twelfth Century (Cambridge, Mass.: Harvard University Press, 1927; New York: Meridian Books, 1960).

[49] See Francesco Calasso, Gli ordinamenti giuridici del Rinascimento medievale, 2d ed. (Milan: Giuffrè, 1949).

century. The antiqui held that a norm could be interpreted only by comparing it to other norms in the same collection or by an appeal to principles common to a homogeneous body of precepts (edicts, capitularies, and so forth). As a consequence, they held that where no norm was provided or where the norm was dubious one should turn to the context of the dispositions in question and draw from them -- and only from them -- the needed norm or the most likely indication. The moderni, on the other hand, thought it possible and proper to return to Roman law either to understand Lombard edicts or Carolingian capitularies better or to fill in their eventual lacunae. They declared, in justification of their method, that this was possible "because the Roman law is the general law for everyone" (quia lex romana est generalis omnium), thus treating Roman law as meriting special attention. A bright future awaited this underlying premise.

A number of circumstances during roughly the same period (the eleventh and early twelfth centuries) shows proof of a return to the study and the use of Roman law in the form it had assumed in the compilations of Justinian. In some areas of Italy -- in Tuscany, and in particular in Arezzo -- the technical quality of notarial acts showed a clear improvement. There were some composite works in circulation that presented the salient points of Justinian's compilation in simple terms. Furthermore, legal concepts began to reappear, not only in the theoretical works of jurists involved in constructing the new science of jurisprudence but also as essential working tools to enable practitioners to define adequately the terms in a legal transaction, conflicting interests, or situations that required surveillance.

The second work that manifested the new spirit was for all intents and purposes anonymous, since the author indicated in one of the variants of its title has not yet been identified. The work circulated either as Exceptiones Petri or as Exceptiones legum romanarum. The copies that have come down to us contain notable textual variants: at times the work is given as dedicated to a certain Saxolinus (a Tuscan, "Florentine civitatis magister"); other versions give a certain Odilo of Valence (a Frenchman, "Valentine civitatis magister"). As a result, historiographical debate on the work's land of origin, although lengthy and bitter, has not produced any sure results, and we still do not know whether the work originated in Tuscany or Provence, although it is certain that it was used in both regions. Fragmentary documentary evidence of the work has turned up in various parts of Europe, and we can assume that these were either partial copies of the larger work or modest original sketches that joined with others to form the full written version of the Exceptiones. There are many of these partial documentations: an "Ashburnham Book," a "Tübingen Book," a "Graz Book," a "Vercelli Book," and an "Admont Book."[50]

The eleventh century ended and the twelfth century began in a new cultural climate. Legal norms and the behavior they regulated inspired constantly

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[50] For the contents of this text and its editions in both the full and the abridged versions, see Manlio Bellomo, Società e istituzioni in Italia dal Medioevo algi inizi dell'età moderna, 5th ed. (Catania and Rome: Gianotta, 1991), 205-20.

increasing amounts of concentrated thought. At the same time juridical theory helped to give a new quality and a new dignity to the work of practitioners, notaries first among them. A new era was beginning for them too.