Manlio Bellomo, The *Common Legal Past of Europe*
translated by Lydia G. Cochrane

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decisive: "Ecclesia sibi usurpavit ratione peccati totam iurisdictionem" (The church usurps to itself all jurisdiction by reason of sin).[77] Many popes came in for repeated and sharp criticism of their acts and their legislative initiatives when they meddled in all areas of the law with the argument and the excuse of avoidance of sins.

It is certain that this occurred. If we turn to the Liber Extra of Gregory IX, promulgated in 1234, we have direct proof of the church's overstepping the line: in the field of criminal law, because the church claimed jurisdiction in such illicit acts as adultery and rape (X.4.7; X.5.16), bigamy (X.1.21), calumny (X.5.2), injurious libel (X.5.36), false witness (X.5.20), physical violence (X.5.36), and even homicide (X.5.12) and theft (X.5.18); in the field of private law, because there were legal institutions that the church considered particularly dangerous for the soul (because particularly conducive to sin) such as commodatum, or the free loan of chattels (X.3.15), deposit of funds (X.3.16), buying and selling (X.3.17), loans and usurae (usury; X.5.19), lending on gages and other securities (X.3.21), and donations (X.3.24). Still in the field of private law, because the family, which fell under private law, was the ideal community for the moral and religious education of the individual, in the image of the Holy Family (Joseph, Mary, and the Infant Jesus), the church felt that certain structures such as consanguinity, kinship, and affinity (X.4.14) required regulation, as did some family-related activities. Hence the church not only felt justified in prohibiting adultery, bigamy, marriage between close relatives, and divorce (X.4.19), but also in fixing the time (X.4.2) and the forms of marriage rites, providing a specific regime governing the wealth of offspring who entered the clergy (X.3.25), and regulating donations between a father and his children and between husband and wife (X.4.20).

As is obvious, there was a wide spectrum of activities and norms within canon law that occupied spaces typical of legal institutions already regulated by Roman and Justinian law. But if superimposed areas of jurisdiction created many practical problems, they also helped to solve some. The rigidity of a discipline more than seven centuries old gave support to the church's laws, lending them basic, concrete legal concepts; at the same time that rigidity was corrected, tempered, and bent to contain new norms marked by the supreme authority of the church that served to make that authority coherent with the fluid events of extraordinarily creative centuries.

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Ius proprium in Europe

Summary: 1. Foreword: Setting the Scene; 2. Italy: Communal Legislation: Piedmont and Savoy; The Papal State; The Guidicati of Sardinia, The Regnum Siciliae: Municipal Custom and Royal Law, The Assisae of Roger II; the Liber

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[77] Cino da Pistoia, Lectura, in Auth. Clericus post Cod.1.3.32(33), de episcopis et clericis.1.omnes qui, no. 2 (Francofurti ad Moenum 1578, reprint, Turin: 1964), fol. 18vb.

Constitutionum of Frederick II; 3. Europe Outside Italy; 4. The Iberian Peninsula: Fueros, Usatges, and Royal Laws; The Siete Partidas; 5. France: Pays de droit coutumier: Local Laws and Royal Law; The Great Coutumiers; Pays de droit écrit: Municipal Laws, Intermediate Laws, Royal Laws; 6. Germany: Municipal Laws; Counts, Dukes, and Princes; The Emperor's Laws; The Sachsenspiegel

1. Foreword: Setting the Scene

The two universal laws, the law of the ancient Roman Empire and of the church (the ius civile and the ius canonicum), designated together as utrumque ius, were completed between the twelfth and the fourteenth centuries. During that same long period all of Europe lived under a broad variety of heterogeneous local legal systems. We may give the generic name ius proprium to each of these systems.

There was no uniformity in local normative legal systems (iura propria) to correspond to the unity of the utrumque ius (ius commune). Rather, the extraordinary diversity of the various legal systems makes one suspect that the true face of medieval jurisprudence was uniquely, or at least principally, characterized by disorder, municipal rivalry and vengeance, and clashes between interest groups and social strata, all of which operated within the juxtaposition or opposition of several tiers of law emanating from the community, rural or urban (consuetudines), from the decisions of free or autonomous cities (statuta), or from the will of a sovereign or a powerful territorial lord (royal laws or the laws of a prince, duke, or count).

This is the image repeatedly presented in one school of thought in recent historiography whose members have devoted their energies to a frenetic and desperate search for the specific and particular legal systems, studied and reconstructed in isolation as a complete and exhaustive picture of a single legal system (ius proprium), without seeing its similarities with other European iura propria and without investigating its connections with the discipline, the principles, or the doctrines of the Ius commune.[78]

This historiographical approach was carried to its sterile point of arrival by a long wave of polemical and negative evaluations of the Ius commune that, for

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[78] This view is still strongly held in a deeply rooted scholarly tradition in Germany. For this school of thought, juridical historiography is divided into "Roman law," "German law," and "Canon law." Not only are there separate university chairs for these three disciplines, but even on a scholarly level the prestigious review named for Friedrich Carl von Savigny, the Zeitschrift der Savigny-Stiftung für Rechsgeschichte, is divided into three sections, Romanistische Abteilung, Germanistische Abteilung, and Kanonistische Abteilung. This helps to keep the three fields of study separate and to support the image of three "separate histories" of Romans, Germanic peoples, and ecclesiastics in German lands. Such a separation makes it plausible to study a system of law as "territorial" without qualifying it as ius proprium -- that is, without any regard for the terms and the valences of its dialectical relationship with the ius commune. Rare exceptions aside, this is what happens, and it encourages the idea and the conviction that every scholar must keep to his or her own sector, because the others are not considered pertinent to it.

understandable historical reasons, were given or implied in relation to the Ius commune by humanist jurists of the fifteenth and sixteenth centuries, by the theologians and jurists of the "Secunda Scholastica" in the sixteenth century, by natural law theorists in the seventeenth century, by Enlightenment thinkers in the eighteenth century, and by the backers of the eighteenth- and nineteenth-century codification movements who, out of faith or self-delusion, believed in the order and uniformity that a "code" would impose.

When any attempt was made to compare the ius proprium and the Ius commune, only the "contents" of the various precepts were examined, which led to the obvious conclusion that the contents did not coincide and that the ius proprium and the great legislative corpuses of the Empire and the church regarded and portrayed relationships differently.[79] Thus in this view the Ius commune was simply considered positive law.

Some scholars have deduced from this that local legal traditions imbued with the spirit of the ancient barbarian populations "resisted" Romanization;[80] others have thought, more simply, that the phenomenon of the utrumque ius was secondary and relatively insignificant, and that Roman and canon law formed a modest "residual law" that was applied only when a local system of law lacked a measure to cover a specific, practical legal problem.[81] Still others, speaking with conscious conviction or without sufficient reflection, have approached the Ius commune as if it were a terrain in which all manner of "archaeological" finds were possible, while others who shared that conviction but professed a total disinterest in juridical archaeology have carefully avoided the whole subject.[82]

Some expressions have become clichés: local law was "opposed" or "counterposed" to the Ius commune; local law was a "particular law" or a

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[79] For recent and clear example of this historiography, see Ugo Nicolini, "Diritto romano e diritti particolari in Italia nell'età comunale," Rivista di storia del diritto italiano, 59 (1986): 13-172.

[80] For example, this is one of the chief characteristics of the textbook, Jésus Lalinde Abadía, Iniciacon historica al derecho Español, 2d ed. (Barcelona: Ediciones Ariel, 1978).

[81] Historians of the law usually use the term "residual law" with caution, or else it is implicit. It is explicit, however, in Giovanni Tarello, Storia della cultura giuridica moderna (Bologna: Il Mulino, 1976), vol. 1, Assolutismo e codificazione del diritto, 29 n. 11: "Per 'diritto comune' s'intende un diritto residuale" (By Ius commune we understand a residual law) -- a serious statement that does not come close to representing or expressing the complexity of the Ius commune.

[82] On this point, see Manlio Bellomo, "Personaggi e ambienti nella vicenda storica del diritto comune," in Il diritto comune e la tradizione giuridica europea, Atti del convegno di studi in onore di Giuseppe Ermini, Perugia 30-31 October 1976, ed. Danilo Segoloni (Perugia: Libreria universitaria; Rimini: distrib. Maggioli, 1980), 37-50, esp. 48ff. For specific bibliography, see Ennio Cortese, "Storia del diritto italiano," in Cinquanta anni di esperienza giuridica in Italia, Proceedings of the Congresso nazionale organized by the Università di Messina and Casa editrice Giuffrè, Messina-Taormina, 3-8 November 1981 (Milan: Giuffrè, 1982), 787-858, esp. 850ff.

"territorial law," and because local law was usually applied in the law courts before the Ius commune, it follows that it had greater weight than the Ius commune (following the common but erroneous notion that a "practice" without theory is always of greater authority for understanding the past).

Entire academic schools of thought have been founded on these basic convictions. For years scholars insisted on a "hierarchy" among norms, and although this notion has attenuated, it has not completely disappeared.[83] They have concentrated on determining how the scale of precedence was disposed in the schemes each particular city or realm; what they found was that judges were expected to apply first the law of the particular system (the communal statute or the royal law in the case of the Regnum Siciliae or Castile and León), second, the customary laws, and finally, if no ruling could be found on either of the first two levels, the Ius commune, equity, or some other law (such as the Siete Partidas on the Iberian Peninsula).

Some scholars in more recent times who have shared the intent to demonstrate how far "practice" was from the Ius commune (on occasion they refer to it as diritto dei professori, Juristenrecht, or droit savant) have exaggerated the historical importance of judicial practices and of the consilia (records of courtroom proceedings and other related materials) connected with them. Today, although we clearly must acknowledge that the consilia are extremely valuable as testimony, it is equally clear that we need to be sensitive to their jurisprudence and their juridical significance. We need to examine the inner mechanisms, techniques, and methodologies used to formulate opinions and found their validity (or at least their defensibility) in some specific types of norms (always those of the Ius commune) and not in others, but we also need to examine the significance of the consilia themselves as a means for defining the political and social role of the jurists who wrote them. When such aspects of the question are considered, the consilia demonstrate the contrary of what certain scholars have thought: in reality these questions prove that the Ius commune was used massively and constantly in the consilia out of the conviction that only in the Ius commune must one, and therefore could one, find the arguments that were needed for trials.

It should immediately be noted that studies of this sort have enriched our knowledge: investigations guided by the intellectual joy of discovery have uncovered evidence of legal theory buried in the surviving documentation; analytical reconstructions have been made of the "hierarchy" of norms in particular systems; specific legal practices have been reconstructed. It is also clear that the overall vision that has resulted from such studies is identical in all the points of view just surveyed, since they all deny the Ius commune any important role as a law capable of a real effect on local legal practice or doctrine,

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[83] A large number of studies have been published that follow this line of thought, promoted by Ugo Nicolini. On this topic, see Manlio Bellomo, Società e istituzioni in Italia dal Medioevo agli inizi dell'età moderna, 5th ed. (Catania and Rome: Giannotta, 1991), 381 and 381 n. 43.

and their historiographical evaluations underestimate the multiple valences and capacities of the Ius commune.

The problem, it seems to me, is thus to understand whether the reconstruction of the Ius commune has any significance beyond a cultivated (and basically humanistic) pleasure in rediscovering an intellectual system of the past; whether our historiographical reconstruction of the law in later Middle Ages can be based simply on the selection of particular data from one or more legal systems; whether one can see the Ius commune uniquely as mere positive law; consequently, whether we can hold that the Ius commune was only a secondary and residual law and, as such, was of scarce relevance in the local courts of law; whether or not there was the risk that the decisions taken (for political and social reasons) by whoever governed a community or a kingdom inadvertently became the arguments of a historiographical evaluation the minute it regards the reality of a community or a kingdom with the eyes and from the point of view of the person or persons who ruled or hoped to rule that community or kingdom.

We need to begin from a different perspective. The Ius commune, unlike the many local laws, cannot be considered only as "positive law," even if, admittedly, it was positive law, hence was also residual law. We can evaluate and appreciate other dimensions of the Ius commune that came to be formed out of ideological and cultural beliefs and, thanks to the concurrent existence and influence of localized values, dimensions that arose or were adapted in concrete situations as instruments for the safeguard of corporative and group interests. We need to try to understand not only why tens of thousands of copies of the Corpus iuris civilis and the Corpus iuris canonici were produced and circulated but also why entire of generations of students "became pilgrims for love of learning,"[84] and like "pilgrims" they made their way to the learned cities -- Bologna, Padua, Perugia, Montpellier, Toulouse, Orléans, Salamanca -- to attend schools of ius commune and become doctors in utroque iure, even at the price of considerable economic sacrifice and mortal danger (many in fact died far from their homelands). These are facts that we cannot ignore, nor should we considered them extraneous to the problems of the ius proprium. By ignoring them or holding them to be irrelevant we would have to claim that in the past thousands of young men were stricken with an inexplicable and widespread madness when they sold (or had their fathers sell) entire fiefs and mortgage their entire patrimony in order to buy -- as they did -- costly books of Ius commune and travel in terra aliena -- which they also did -- to study the Ius commune in the European universities of their time. Furthermore, we would have to assert that once their studies had ended and they were functioning as judges or lawyers, these thousands of young men did their very best to forget everything that they had learned, lived

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[84] This expression is in the Constitutione Habita of Frederick I Barbarossa: "Omnibus qui causa studiorum peregrinantur scolaribus . . . hoc nostre pietatis beneficium indulgemus." See the edition of this text by Winfried Stelzer, "Zum Scholarenprivileg Friedrich Barbarossas (Authentica 'Habita')," Deutsches Archiv für Erforschung des Mittelalters, 34, 1 (1978): 125-65, quote 165.

solely on ius proprium, and used and applied only ius proprium, and that other young men who became cultivated and reserved jurists were content to spend a genteel and provincial old age cultivating an abstract, elegant, and scholarly jurisprudence. It is because it ignores the relationship between the ius proprium and the Ius commune that French historiography refers to the Ius commune as droit savant and that German historiography calls it Juristenrecht or das gelehrte Recht, all ambiguous and at least partly misleading expressions. Even worse, Anglo-American legal scholarship has no word at all.

This is not the perspective from which I intend to view local normative systems -- the ius proprium. The fact that the ius proprium existed and that its contents differed from those of the Ius commune cannot mean, to put it simplistically, that the laws of Justinian and the laws of the church were everywhere essentially unheeded, that they were marginal to everyday practice in the law courts and notaries' studies, or that they were marginal to the legal civilization of Europe.

The panorama is extremely vast; I shall limit my remarks to tracing a few of the pertinent lines of thought in continental Europe, beginning with Italy and continuing to the Iberian Peninsula, France, and the German-speaking lands of central Europe.

2. Italy: Communal Legislation

At first, between the eleventh and the twelfth centuries, custom ruled everywhere. It governed the life of the communities scattered through the countryside (consuetudo loci), of isolated monasteries (monastic custom), and of towns and cities. Still, there was occasional awareness or memory of the ancient Roman laws, still to be restored, or of the patchy Lombard or Carolingian laws, especially as collected and recorded in the Liber papiensis (where they were arranged chronologically) and the Lombarda (which divided them by subject matter). Nonetheless, even if he did remember them, anyone drawing up a cartula or taking part in a lawsuit thought of custom first. Notaries (scribae) thus used expressions that would be incomprehensible to a modern jurist such as "secundum consuetudines legum Romanorum" (according to the customs of the Roman laws).

Toward the middle of the twelfth century, beginning in the lands of Lombard Italy, the situation began to show signs of radical change. The changes soon spread until they mingled with more radical legislative initiatives of the Italian communes (the statutes) that reflected the degree independence won by the various local governments.

The first traces of this change take us to Milan and Bologna. An anonymous private citizen in Milan, the Lombard capital, wrote a tractatus in order to set down on parchment the customs of the city; also in Milan a feudal judge whose name has come down to us, Oberto dall'Orto (Obertus de Horto) first wrote down feudal customary law. This was the so-called "Obertine redaction" of the Libri feudorum.

In Bologna the city's orally transmitted customary laws were reported to have been written down in curia Bulgari -- that is, within the complex of buildings and courtyards in which Bulgarus lived and taught. The literal meaning of curia is "court" or "courtyard," but in this case the term indicates the function as a private "judge" exercised by Bulgarus. Thus the redaction of customary law, albeit "private," was connected with practical legal needs.

The redaction of custom tended to shift from private to public initiative, for example in Milan in 1216, where fragments of the old tractatus were collected and incorporated into official legislation in a document whose title nonetheless recalls its consuetudinary origin: Liber consuetudinum (Book of Customs).

This became current practice in the communes of north-central Italy. During the thirteenth century, it became more customary than it had been under the consoli of the earlier communal governments for the city leader, the Podestà or the Captain of the People, to have the customs that already had been removed from the uncertainty of oral transmission by private initiative brought into a single corpus and copied in one book (codex). The same document typically included the measures (statuta) passed by the city's general assembly and the regulations laid down by the heads of the commune and accepted by the people, called brevia from breve, the oath sworn by both the city magistrates and the assembly to guarantee respect and obedience to the laws.

During the thirteenth century there were increasing numbers of city statutes, enlarged by new dispositions. The first statuta in Volterra appeared between 1210 and 1224; in Treviso between 1207 and 1263; in Padua between 1222 and 1228; in Verona in 1228; in Venice between 1226 and 1242; in Reggio Emilia between 1242 and 1273. In Bologna lengthy and organic statutes were drawn up between 1245 and 1267 for the Comune del podestà and in 1288 for the Comune del Popolo, and so on. Recasting and updating the statutes was carried on such a dizzying pace that proverbs sprang up: "Legge di Verona non dura da terza a nona" (Verona's laws last only from terce to nones); "Legge fiorentina fatta la sera disfatta mattina" (Florentine law made in the evening, unmade in the morning). One acute and critical observer, Boncompagno da Signa (d. 1235), gave a precocious and unsentimental analysis of the changeable city norms, writing that "these municipal laws and these plebiscites fade like the moon's shadows, and like the moon they wax and wane at the legislators' whim."[85]

Although the statutes purported to be "city laws" par excellence, for many decades they were limited in their range. What is more, they met with opposition and hostility on the part of broad segments of the city population, who saw little reflection of themselves and their interests in them. Not all the residentes of a city were considered part of the commune civitatis, hence "the communal statute,

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[85] Boncompagno da Signa, Rhetorica novissima, I.1, ed. Augusto Gaudenzi, in Bibliotheca Iuridica Medii Aevi (Bologna, 1882, reprint Turin: 1962), 2:253: "Sed iste leges municipales atque plebiscita sicut umbra lunatica evanescunt, quoniam ad similitudinem lune crescunt et decrescunt secundum arbitrium conditorum."

considered alone . . . appears as an act of will of a corporation"[86] -- that is, of people who owned property and cultivated their agrarian and landholding interests. Any city dweller not included in the commune civitatis continued to fall under the jurisdiction and tutelage of the bishop. Furthermore, the many corporative bodies of the arts and trades, major and minor, generated their own statuta and relied on them for defense of their vital interests rather than on the statutes of the commune under the Podestà. They did not relinquish this power to make their own rules even when they had their own commune, the Comune del Popolo, toward the late thirteenth century. At the same time, one of the many corporations, the collegium of the jurist "doctors," used its monopoly on knowledge of Justinian's laws and the universal law of the church as a formidable instrument for political and social control of city life and a means for increasing and safeguarding their unique power and reaping immense professional profits.[87]

In Italy of the communes, then, custom was interwoven with the statutes and its fate was mingled with theirs. Exceptions were few: in Pisa, to note one, the normative texts of the Constitutum legis were kept separate from the Constitutum usus (which contained customary laws promulgated by the city government, hence given a new and different title of validity). Customary norms that continued to be transmitted and observed without being written down and, above all, with no modification of their nature -- as events in Pisa showed -- also remained separate.

In addition to city laws and taking precedence over them, there were in certain regions of northern and central Italy laws produced and imposed by the authority of a prince or ruler.

Piedmont and Savoy

In Piedmont and Savoy, Aosta and Vaud were both conspicuous for their imposing bodies of customary law. But from much earlier days -- the times of Pietro II, from 1266 to 1269, and of Amedeo VI, the "Green Count," in 1379 -- the central government had aimed at providing an overall, unified set of laws for the entire land; a law that, unlike city customs, hoped and claimed to be a general (or common) law. In reality the most significant results of these efforts came only Amedeo VIII and his promulgation (in 1430) of a body of laws set out in the five books of the Decreta seu Statuta.[88]

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[86] Enrico Besta, "Fonti: legislazione e scienza giuridica," in Antonio Pertile, Storia del diritto italiano dalla caduta dell'Impero romano alla codificazione, ed. Pasquale del Giudice, 2 vols. (Milan: Hoepli, 1923-25), quotation vol. 1 pt. 2, 502.

[87] Bellomo, "Personaggi e ambienti."

[88] For the Decreta and its relation to common law, see Isidoro Soffietti, "Note su deroghe apportate al Codice giustinianeo da parte di legislatori sabaudi," in Studi in onore di Giuseppe Grosso, 3 vols. (Turin: Giapichelli, 1968-70), 3:631-49. See also Soffietti, "Una norma dei 'Decreta seu Statuta' del duca Amedeo VIII di Savoia sul canone enfiteutico," Rassenga degli

The Papal State

The same sorts of things occurred on the two levels of the ius proprium in the Papal States, which cut across several regions and occupied a large part of the center of the Italian Peninsula from Latium north and east, passing through Umbria to the Marches and including a part of Emilia.

On the lower, or city level there were customary laws and city statutes as in Lombardy, Liguria, the Veneto, and Tuscany. Above the local norms (but as a law subsidiary to them) a broad-ranging corpus of laws, divided into six books, was promulgated in Fano in 1357 under the supervision of Cardinal Egidio d'Albornoz, the papal legate for Italy in the years in which the pope resided in Avignon. The title of this document was Liber Constitutionum Sanctae Matris Eclesiae, but it was also known as the Constitutiones Marchiae Anconitanae or simply Constitutiones aegidianae.[89] Some two centuries later, when Cardinal Rodolfo Pio of Carpi made additions to it that were promulgated by Paul III in 1544 as Additiones Carpenses, this collection of laws was still showing signs of life.

The Giudicati of Sardinia

Sardinia's history was intimately connected with that of Europe, despite the judgment of many historians, the inadvertent neglect, and the deliberate omissions that have attempted to relegate that large Mediterranean island to the fringes of the major events of the period.

In Sardinia as elsewhere, cities and towns had their own customary laws that were in part channeled into broader statutory texts, the symbol and expression of the vitality and the autonomy that the urban community had won and could enjoy. This was the case, for example, in Sassari and Cagliari.

Furthermore, as in the Duchy of Savoy (Piedmont and Savoy) and the territories of the church (the Papal States), there were attempts in Sardinia to create a unified legal system for local populations, but the project was realized only in a part of the island. The giudicati (small kingdoms -- regna -- headed by a monarch called a iudex) of Cagliari, Logudoro, and Gallura gave little sign of any such intentions, but in the giudicato of Arborea, Mariano, who reigned as iudex from 1353 to 1376, drew up a first project for a general law, which was followed by a complete corpus of laws promulgated in 1395 by Eleonora d'Arborea, Mariano's daughter. The thorough coverage and the maturity of this Carta de logu de Arborea enabled it to reach beyond the borders of the giudicato

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Archivi di Stato (1974): 1-12.

[89] There is a lengthy and fully documented work on Egidio d'Albornoz and his Constitutiones: Paolo Colliva, Il cardinale Albornoz, lo Stato della Chiesa, le "Constitutiones Aegidianae" (1353-1357) (Bologna: Real Colegio de España, 1977). In appendix to this work, see also "Il testo volgare delle Costituzioni di Fano dal ms. Vat.lat. 3939."

of Arborea to become a territorial law for all of Sardinia. Thus Sardinia had local laws on the two levels of the city and the region.

The Regnum Siciliae: City Customary Law and Royal Law; The Assisae of Roger II; the Liber Constitutionum of Frederick II

One of the most interesting historical settings for these problems and a part of Italy in which they showed great variety was the Regnum Siciliae. The kingdom that took its name from the island of Sicily reached from Campania in the west and the Abruzzo in the east to extend south through Basilicata, Puglia, and Calabria to Sicily. Within the kingdom, founded by Roger II in 1130 and later ruled by other Norman, Swabian, Angevin, and Aragonese kings, there were cities and towns with a rich civic tradition and a prosperous economy. Among them one should mention Bari and Trani on the Adriatic coast and Otranto, on the edge of the Ionian Sea; on the Tirrhenian coast, Naples, Amalfi, and Salerno; on the island itself, Palermo, Messina, Catania, Siracusa, and Trapani, a city famous for and made wealthy by the production of salt and the manufacture of coral objects.

Some cities, Amalfi for example, had seen their relations with the East shattered and their trade ruined by the installation of the Normans to the south of them and the construction of a Norman kingdom partially blocking Amalfi's long-standing connections with Byzantium. In spite of this, Amalfi made good use of the extraordinary potential that it had gained from its varied administrative and notarial experience that grew out of its traditional economic activities, and the city gave birth to entire "dynasties" of notaries and able administrators. Other cities -- Bari, Messina, Palermo -- had periods of intense development due in part to their strategic locations and their excellent seaports.

These cities demanded of the monarchy freedom to live according to their own ancient customs, a political course that the crown opposed and, when it could, tried to quash.

A first recognition of city rights was obtained by some of the cities of Puglia between 1130 and 1140, only a few years after the consolidation of the kingdom, when they surrendered to the new sovereign, Roger II, they drew up explicit pacts, validated and documented by carte di resa (charters of surrender), in which the king promised to respect the local customary laws after the cities submitted to the crown. In 1140, however, the same Roger II violated these pacts and forced the judges of the kingdom to apply the laws of the realm (the Assisae) first, referring to customary norms only when they did not "most manifestly" differ from the sovereign's laws.

The cities of Puglia continued their dynamic development during the last decades of the twelfth century, when two Pugliese judges, Andrea and Sparano, redacted the customary laws of Bari -- Andrea those in the Roman tradition and Sparano those of the Lombard tradition.

In Messina the first attempt to write down the city's customary laws (undoubtedly on the initiative of a private citizen, a judge or a notary) dates from the first two decades of the thirteenth century. After 1220, however, Frederick II,

who was also Holy Roman emperor, began to exercise his sovereign powers as king of Sicily. He established a harsh policy of the containment or repression of local freedoms and local autonomy, and one particular law in the Liber Constitutionum of 1231 that he promulgated, the Constitutio, Puritatem, was to pose great problems of interpretation for later historiography.

This constitution established a rigid gradation among the normative sources of the regnum. Judges were to apply the laws of the kingdom first; if the royal law failed to provide a norm corresponding to the case under examination, the judges were directed to turn to the city customary laws, but only if such laws had been expressly held just and admissible (bonae et approbatae) by the king. Finally, if the judges found no applicable norm either among the sovereign's dispositions or among the bonae et approbatae customary laws, they might avail themselves of the Ius commune. This, according to an explanation in the text but perhaps added after its publication and placed at the end of the constitution, was comprised of Lombard law and Roman law.

Historians who have grappled with the problems posed by Puritatem have not always dealt with both aspects of the problem. The text should be examined from the point of view of the local legal systems of which the statute was an expression, but also from the point of view of the universal political entity of the Empire, of which the Ius commune was a projection. Furthermore, some historians have considered the local laws and the Ius commune only within a perspective that reduces them all to simple positive law. By considering Roman law only as positive law, they have thus concluded that the Ius commune was only a subsidiary law. Then, with a bold leap justified by a similarity between the gradations in the law imposed by Puritatem and the hierarchies of law present in many communal statutes of central and northern Italy, they have drawn the further (but hasty) conclusion that in all cases the Ius commune was a subsidiary law, the study of which is thus all the more useless for comprehension of the complexities of local municipal statutes, since men of that time -- whom one legal historian refers to as gli omarini di media cultura (the little men of middling learning) -- had only the vaguest knowledge of the Ius commune.[90]

Although it is true that if we hold to the perspective of positive law, a gradation among sources of law leads to an acceptance of the notion that the Ius commune was (in that perspective only) a subsidiary law, it is also true that the problem is wrongly posed in those terms because they are both limited and limiting.[91] A partial truth is not the truth. What is missing here is the other

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[90] Carlo Guido Mor, "Considerazioni su qualche costituzione di Federico II," Archivio Storico Pugliese 26 (1973): 423-34, now reprinted in Il "Liber Augustalis" di Federico II di Svevia nella storiografia, ed. Anna L. Trombetti (Bologna: Patron, 1987), 293-303, quotation 294.

[91] For an example of this approach, see Hermann Dilcher, "Kaiserrecht und Königsrecht in staufischen Sizilien," in Studi in onore di Edoardo Volterra, 6 vols. (Milan: Giuffrè, 1971): 5:1-21, available in Italian translation as "Diritto imperiale e diritto regio nella Sicilia sveva," in Il "Liber

perspective, the one that enables us to view the Ius commune not as a positive law but as a law that "eternally" (it was thought) radiated juridical logic, juridical concepts, and the terminology and mechanisms of legal reasoning -- in short, the jurists', hence the judges', modes of being. Thus what seems secondary when one follows one interpretive line becomes essential and bears its full load when one follows a different and broader approach. This is true whether we are looking at events in the Regnum as they related to levels of law in the Constitutio, Puritatem or whether we examine what went on in any other part of Europe when a specific legal system imposed hierarchies of laws for the guidance of the judge. As we shall see, this happened in Europe even in regions of northern France where Roman law was by no means in force as positive law but where it persisted as ratio scripta and informed every act and every opinion of the agents of justice because it penetrated the jurists' reasoning mechanisms and because its language was the vehicle for all ideas.

After the death of Frederick II in 1250, both during the course of the tumultuous events that ended the Swabian phase of the Regnum and when Charles I, the first Angevin king, came to the throne in 1266, the cities once more began to weave the fabric of their liberty and their self-government.

Cities in both parts of the Regnum gave free rein to such initiatives after the Sicilian Vespers in 1282, an event that for roughly a century and a half separated Sicily (ruled by the Aragonese) from the continental Mezzogiorno (under Angevin French rule). The cities were abetted by the crown's lack of interest, by its weakness, and by the rapacious greed of Aragonese sovereigns such as Alfonso, called the Magnanimous (d. 1458), who were willing to recognize the cities' laws, old (that is, customary) and new (capitula) in exchange for substantial payments in gold coin -- Florentine or Aragonese fiorini or Sicilian onze. Cities were also helped by the administrative policies of the Angevin crown, which saw that the kingdom would flourish by keeping a balance between the sovereign's central authority and the local liberties of the demesnial cities (i.e. cities directly subject to the crown). In any event, in the late thirteenth, the fourteenth, and the fifteenth centuries the cities of the kingdom were intent on having a law of their own, first by the redaction of customary law, then by capitula to which the sovereign, according to his interests, gave or withheld his placet. This sort of activity was intense in the demesnial cities that depended directly from the crown with no intermediate feudal lord. Although from time to time some cities and towns passed under the power of a feudal lordship, many remained as part of the king's demesne, as King Martin of Aragon the Younger took care to remind the

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Augustalis", 305-24, esp. 319. The example is telling because Dilcher's approach leads him to confuse the Ius commune with the "laws of the coronation" of 1220 and to write, among other things, one phrase that is incomprehensible at best: ". . . leggi dell'incoronazione del 1220 -- che, secondo il diritto romano erano da considerarsi ius commune . . ." (laws of the coronation of 1220 which, according to Roman law, were to be considered Ius commune).

Parliament of Siracusa in 1398 as part of a royal "census" of the demesnial cities.[92]

The compilation of customary law (consuetudines) was begun through private initiative. When the city adopted a private collection and made it its own, it sought to legitimize it by requesting confirmation from the king, who, if he so desired, then conceded the collection of customs "as a privilege."

The so-called "Ancient Text" of the Consuetudines of Messina go back to the latter half of the thirteenth century. This widely known text served as a model not only in the neighboring areas of north-east Sicily but also in places as far away as Trapani. Trapani, in fact, took the Testo Antico of Messina as its own law in 1331, and because there is no direct documentation of the original version we know the oldest Messina customary laws through the Consuetudines of Trapani or by their reuse in even later and in part fragmentary texts.[93]

During the fourteenth century increasing numbers of privileges were requested and granted for city Consuetudines. Thus Palermo, Catania, Siracusa, Noto, Patti, and a number of other demesnial cities and towns, great and small, all enjoyed royal "privileges."[94]

The situation was different in the feudal cities. There, although the city-dwellers used customary law to defend a stability that served them as a guarantee of their liberties, the redaction of custom took place within "pacts" that led to complex, difficult, and often violent relations between the local community and the feudal lord.

Royal legislation formed a counterpoint to the variety of the local legal systems. It too was ius proprium in respect to the Ius commune, but it served a broader and more homogeneous territory than the consuetudines and the municipal capitula, thus it appeared as a territorial law endowed with a general authority that the municipal legal systems could not have. In the Regnum Siciliae as elsewhere (and earlier than elsewhere) we can see the phenomenon of the dual levels of the ius proprium that we have already seen in Savoy, in the Papal State, and in the Sardinian giudicati. We shall see that it was fairly widespread north of the Alps as well.

The oldest royal legislation is the Assisae (Assize) promulgated by Roger II for Ariano di Puglia (now Ariano Irpino, in Campania) in 1140. These were

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[92] Francesco Testa, Capitula Regni Siciliae, 2 vols. (Panormi: 1741-43), 1:132-33.

[93] See Lucia Sorrenti, "Le vicende di un 'testo vivo': un'antica redazione delle Consuetudini messinesi nel manoscritto Messina, A.d.S. 52," Quaderni Catanesi 15 (1986): 127-212.

[94] With only a few exceptions (see above, note 16), little scholarly work has been done since the studies of Vito La Mantia, many of which were collected in La Mantia, Antiche Consuetudini delle città di Sicilia (Palermo: A. Reber, 1900). On these studies, see Manlio Bellomo, "Problemi e tendenze della storiografia siciliana tra Ottocento e Novecento," in La presenza della Sicilia nella cultura degli ultimi cento anni, Atti, 2 vols. (Palermo: Società Storia Patria Palermo, 1977), 2:989-1004, esp. 990 n. 4.

a small number of norms named for the assembly (assise) in which they began their official life. The king's will was what counted: the assembly, informed of his pleasure, served only to make known and publicize that will. William I (the Bad) and William II (the Good) also promulgated constitutions, in large measure now lost.

In Melfi in 1231 Frederick II promulgated his famous body of laws, referred to in the sources variously as Constitutiones or Constitutiones Regni but more commonly known as the Liber Constitutionum or Liber Augustalis.[95]

This legislative work, which may have been in large part drawn up by Frederick's secretary, the cultivated Pietro della Vigna, is divided into three books. It is an "open corpus," however, to which novellae constitutiones of Frederick's were added, either as an integral part of the work or separately in appendix. Not all of Frederick's later legal enactments found a place in the Liber Augustalis, however, a fact that shows selectivity at work and that ultimately gives special value and significance to the legislative texts that were included and demotes the excluded texts to a secondary or occasional status. In short, the Liber Augustalis contained the notion (which was to be typical of nineteenth-century "codifications") that the materials it subjected to unified treatment were to underlie the entire normative system throughout the land. This is, incidentally, an idea that was realized during those very same years, in sharp rivalry with the Liber Augustalis, in the Liber Extra of Pope Gregory IX, a work that gave the church a universal normative system and whose exclusiveness we have already seen. This rivalry created an internal ambiguity in the Liber Augustalis: although it undeniably was promulgated by Frederick II in his authority and dignity as Rex Siciliae, it nonetheless expressed the will of a man who was also emperor of the Holy Roman Empire. Francesco Calasso rightly emphasized the positive aspects and the constructive results of this ambiguity: expressions heavily freighted with meaning as strong projections of the maiestas and the sacrality of imperium were inappropriate to the reality of a more modest royal legislation.[96] This ambiguity places the Liber Augustalis squarely at the center of the sources of the ius proprium, and it attributes a value, a dignity, and a quality to that ius proprium lacking in other local normative regimes.

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[95] For the various editions of Frederick II's constitutions, see Constitutiones Regni Siciliae. Liber Augustalis, Neapoli 1475: Faksimiledruck mit einer Einleitung von Hermann Dilcher (Glasshütten / Taunus: D. Auvermann, 1973). The introduction to this work, which appears in Italian translation in Il "Liber Augustalis", 123-43 (see n. 13), gives information on the best editions of the constitutions. There is an English translation by James M. Powell, The Liber Augustalis or Constitutions of Melfi Promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231 (Syracuse: Syracuse University Press, 1971).

[96] Francesco Calasso, "Rileggendo il 'Liber Augustalis'," in Atti del Convegno Internazionale di Studi Federiciani (1950) (Palermo: 1952), 461-72. This study has been reprinted several times, most recently in Il "Liber Augustalis", 53-64.

Although the Liber Augustalis remained in force for centuries, it was not studied in the specialized juridical schools. It did not even figure in the curriculum of the Studium in Naples that Frederick II himself founded in 1224. This fact seems most singular if we judge it by the logic of those who see the sources of the ius proprium (royal decrees, customary law) in the Regnum Siciliae and the norms of the Ius commune uniquely as "positive law." Moreover it is a fact that has always been ignored or eluded in all historical studies of the Constitutio, Puritatem and left out of their overall view of the problems connected with the laws of the Regnum.

If we follow the current historiographical logic we cannot explain, on the one hand, why Frederick II imposed the Liber Augustalis as the primary and general law of the Regnum while relegating the Ius commune to the lowest level of "subsidiary law" nor, on the other, why he took the Ius commune (Roman and canon) as the primary, even the only, law when he reorganized the law school of Naples in 1224. He backed the of these schools and carried on an intensive and at times bitter political campaign to limit the influence of Bologna; at the same time, however, he tried to transplant to Naples Bolognese methodology and the study of the Bolognese texts of common law, rallying to his cause such southern jurists as Roffredus Beneventanus and others who had studied in Bologna and had personal experience with the teachings of northern schools either in Bologna or influenced by Bologna.

Such an approach is a dead end that will lead only to an impasse. It follows the reductive conviction that royal law and Ius commune were merely positive law, with the corollary that the only problem worthy of attention is an investigation of the ways in which a judge fulfilled his duties by a search for the norm appropriate to the case before him. I do not believe that Frederick II ever had such a modest view of his own maiestas, nor do I believe that even when he lowered himself to take on the figure and the functions of a king, Frederick II had any doubts about being always and in all times and occasions, also and above all an emperor. Thus thanks to Frederick's global concept of imperium, the Ius commune -- which the judge could do without and was even obliged to do without if an appropriate principle could be found in royal law -- recovered its sacred character and its value as a paradigm and a model for the autonomy of the law, an image superior to legality, and an extreme limit set to any thoughts of insubordination on the part of the judges of the kingdom.[97]

The same was true of the precepts of Holy Scripture. Although it is quite true that the judge could not apply them in preference to local, royal, or customary norms, he still had to keep them in mind at all times. Although from the twelfth century on law was distinct from both theology and ethics and each had its specific terrain, the distinction by no means involved an absolute separation,

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[97] The last point is clearly stated, and with the same general viewpoint expressed here, in Federico Martino, Federico II: Il legislatore e gli interpreti (Milan: Giuffrè, 1988).

except perhaps for people of weaker conscience or in dubious affairs or the shady maneuvers of obscure minor lawyers.

This vision -- a vision that permeates the Liber Augustalis and gives it life and significance -- makes the corpus of laws of Frederick II stand out clearly from analogous collections (or "codifications") of the time. The only compilation that bears comparison with it was its rival, the Liber Extra of Gregory IX (1234). The pope's attempts to modify Frederick's legislative initiative, which was clearly forthcoming by 1230, become essential for understanding not only the motivations behind the Liber Augustalis and the significance of that document but also, given that the two situations were parallel, for understanding the positive valence of the Liber Extra, which reached beyond the domains of positive law and the guidance to be given to a judge to radiate throughout the entire realm of jurisprudence. In that broader arena the law was regarded as a norm to be applied, for which respect was compulsory, but it was also regarded as a source and corpus of human justice, a basis for theoretical elaboration, and an instrument for political power and for the pursuit of the economic and social interests of individuals, groups, and entire segments of society.

Thus, to cite just one example, if we must agree that Charlemagne's universal order fell apart because that first emperor of the Holy Roman Empire had no clear idea of imperium and dominium,[98] it is just as undisputable that Frederick II had a very clear grasp of those same notions. These were ideas founded on and incorporated into the dispositions and doctrines of the Ius commune thanks to the rediscovered importance of the ancient Roman law and Justinian law. They were a part of the European legal tradition of the first half of the thirteenth century, when the glossators' school had reach its height in the works of Azo, Hugolinus, and Accursius, some time before 1231 and the promulgation of the Liber Augustalis. They were the only possible roots from which the project of a "general law" for the exercise of imperium could spring -- which was the point on which Frederick II and Gregory IX clashed.

3. Europe Outside Italy

Outside Italy -- the center from which the great European legal civilization of the later Middle Ages radiated -- the most frequently recurring typologies of the ius proprium were substantially analogous to the Italian ones, even when they were marked by variants and differences and set off by a different terminology.[99]

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[98] See Robert Boutruche, Seigneurie et féodalité, 2 vols. (Paris: Aubier / Montaigne, 1959-70), vol. 1, Le premier âge des liens d'homme à homme, consulted in Italian Translation, Signoria e feudalesimo (Bologna: Il Mulino, 1971), vol. 1, Ordinamento curtense e clientele vassallatiche, 169.

[99] On particular law in medieval Europe, see Sten Gagner, Studien zur Ideengeschichte der Gesetzgebung, Studia iuridica upsaliensia, 1 (Stockholm: Almqvist and Weksell, 1960), esp. 288ff. For a more recent and more analytical work, see Armin Wolf, "Die Gesetzgebung der entstehended

Local custom always played a prominent role, and accompanying it (or placed above it) there were statutes, royal laws, and compilations of laws and customs. Nonetheless, as with Italy, the ius proprium as a whole cannot be seen either as an all-absorbing and exclusive phenomenon, at most permeated by rivalry among local legal systems, or as a self-contained phenomenon, excluding its constant relationship with civil and canon Ius commune.

That relationship existed in part because of the circulation of the various Western anthologies discussed in chapter 2, but also because some provisions of the ius proprium were identical, in whole or in part, to dispositions in civil or canon law that, thanks to specific application of the same principle since ancient and even extremely ancient times, had become ingrained in local practice. It was also a relationship that existed throughout Europe -- albeit at the lowest subsidiary level -- as the Ius commune permeated every nook and cranny of local positive law. It was a relationship that existed, primarily and above all, for another reason: without the theoretical focus provided by the Ius commune; without the doctrines and concepts that were its most significant patrimony; without the terminology of the Ius commune, which was adopted, respected, or bent to represent functions that differed from the original ones but which was always kept in mind as a fundamental instrument of expression; without the principles and the values incorporated in the Ius commune -- without this entire "structure" of thought, form, culture, and mind-set, we can understand neither the letter nor the spirit of the local laws. Indeed, we must think that such a "structure" was essential in the act and in the moment when jurists (or simple lawyers) composed the texts of the ius proprium.

4. The Iberian Peninsula:Fueros, Usatges, and Royal Laws; The Siete Partidas

On the Iberian Peninsula the fueros were the most prominent form of local law. Fuero is a term that has a number of meanings in the sources,[100] one of which is particularly interesting for our purposes because it touches directly on custom and on the ways in which customary law was preserved and passed on in everyday legal practice. This meaning was thus the result of a process of selection that included consideration of the number and the frequency of the cases in which

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Territorialstaaten," in Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, ed. Helmut Coing, 3 vols. in 8 (Munich: Beck, 1973-87), vol. 1, Mittelalter (1100-1500): Die gelehrten Rechte und die Gesetzgebung, 517-803. This is the best overall work as yet available, even though it lacks the perspective of the relationship between jus proprium and jus commune stressed in the present chapter. Nonetheless it is a highly useful work, valuable for information on the editions of normative and other texts cited in the present chapter and for its bibliographical information, to which the reader is referred.

[100] See Enrique Gacto Fernández, Derecho medieval, Temas de Historia del Derecho (Seville: Universidad, 1979), 61-62.

certain customary norms needed to be used in a trial (not to be confused with the "mode" of procedure -- the stylus -- in reaching judicial decisions).

During the eleventh century many Spanish cities had judges who, for professional purposes, owned brief summaries of customary law known as fueros breves. These collections grew and were consolidated, and between the eleventh and the twelfth centuries more complete versions appeared -- the fueros extensos -- which for two centuries continued to be added to, modified, and at times translated from Latin into Romance dialects.

In the demesnial cities and towns these texts were granted a seal of authenticity and validity through appropriate recognition by the monarchy. Since it was the king who "conceded" to the demesnial cities the free use of local customary laws, town and city councils could present the fueros extensos, endowed with the royal "privilege," to the urban population as significant conquests over the monarchical authority. In feudal cities and towns the fueros were validated by a pact, called concordia, drawn up with the lord of the land. In both cases, finally, some fueros originated from dispositions registered by being inserted into a "population charter" or licentia populandi granted by a feudal lord or the king for the settlement of a relatively uninhabited area or a city that he had just conquered.

Among the fueros extensos those of Madrid, Toledo, Alcalá de Henares, Avila, and Cuenca in Castile (New Castile), Jaca and Saragossa in Aragón and Navarra, León and Salamanca in Asturias and León all deservé mention. Some of these fueros were known and applied far beyond the localities whose names they bear. One such was the fuero of León in Asturias and Galicia; another, the fuero of Toledo in much of Old Castile.

Besides the fueros (breves or extensos) there were usatges or usanciae in circulation, as well as costums or consuetudines, the contents of which (unlike those of the fueros) were not selected according to the needs of courtroom use. Such texts were typical of Catalonia, where their most striking examples were the Consuetudines Ilerdenses of Lérida, widely used from the thirteenth to the fifteenth centuries, the Usatges of Tortosa, the Consuetudines gerundenses of Gerona, and above all two sets of laws from Barcelona confirmed by royal privilege, the Usatici Barchinoniae of 1251 and the Consuetuts de Barcelona vulgarmente dites lo "Recognoverunt Proceres" of 1284.

As in the Regnum Siciliae and in other large territorial entities in Europe, during the later Middle Ages Spain had kings who were particularly keen on claiming and enjoying royal prerogatives. Such kings also manifested their monarchical power in the legislative sphere by conceiving projects for unified bodies of law that often remained a dead letter but that nonetheless encouraged both the idea and the reality of a dual level of the ius proprium. The minimal or lower level was the one of the free cities and the feudal territories and the laws that pertained in them and that the crown attached to itself by acts of privilege. The higher level, which offered a greater potential for territorial expansion, was occupied by the legislative provisions of the sovereign. These were often isolated

acts promulgated to cover limited instances, but they might also be ample, carefully articulated documents that on occasion even imitated ancient and time-tested models in their external form.

Like its classical model, Justinian's Code, the Fuero Juzgo (Forum Iudicum), a translation into Castilian of the seventh-century Lex Visigothorum, was divided into twelve books. The translation was made in the thirteenth century by command of Ferdinand III, who in 1230 became king of León and Castile, in practical terms the largest portion of the Iberian Peninsula and an area that stretched from the Atlantic to the north to the Mediterranean in the south. The sovereign's aim was to unify the laws of his new and larger realm under the sign of a glorious common tradition; in reality the Fuero Juzgo met with mixed fortunes and was accepted as city law only in some parts of the land (in León, Murcia, and Andalusia).

Under King Alfonso X (the Wise; d. 1284) more ambitious and more significant attempts were made both to bring put order into the laws of the various cities and towns and to create a royal law for the entire kingdom of Castile and León. The first of these aims led to the promulgation, in 1252-55, of a Fuero Real in the Castilian language. This was a royal legislative text that compared the principal municipal systems and that brought together and consolidated identical dispositions, simplifying and amalgamating similar ones, and attempting by this means to offer a homogeneous and uniform local law and impose it on the royal cities. The Fuero Real was conceded, by "privilege," to a number of demesnial cities -- Burgos (1256), Madrid (1262), and Valladolid (1265) -- but it was never applied as broadly or as firmly as the sovereign had hoped.

The second aim led to the emergence in the thirteenth century of a Libro de las Leyes, also in Castilian, conceived of as a general law for the entire realm. Formed over several decades by successive additions, it grew from an original nucleus or first draft known as the Libro del Fuero or Especulo (1256-58) but its definitive redaction is known as Siete Partidas from its division into seven books. This was a cultivated work that used passages from ancient philosophers (Aristotle, Seneca, and Boethius) and theologians (Thomas Aquinas), fragments of the Libri Feudorum, and, above all, many extracts from Justinian's Corpus iuris civilis and from the laws of the church. It was above all a legislative text, conceived and promulgated by King Alfonso the Wise as the general law of the kingdom.

Beyond the problem of their specific application in judicial decisions, the Siete Partidas constitute one of the most important royal legislative initiatives and highest level of the ius proprium. The reasons for the partial failure in practice of this compilation were also the reasons for its special significance in the overall fortunes of the Ius commune in Europe. The Siete Partidas attempted to transfer to a royal compilation the qualities and functions inherent in Roman law and canon law that had reigned over Europe for over a century -- an attempt that is all the more obvious for its perhaps vain hope of extrapolating from those highest laws and selecting the fragments that were thought the best, seeming almost to

want to go one step further and integrate and harmonize provisions that came from the two quite different normative corpuses of the Roman law and the canon law. Neither the challenge nor the operation succeeded in the thirteenth century because it was the utrumque ius (Roman law and canon law) that had and was to retain the function as Ius commune, thanks to its deep-rooted, sacred, and authoritative valence in a political and cultural world in which the ideology of a unified and Christian empire (the ideology of Dante Alighieri) underlay and governed the legal and cultural potential of a complex of norms that were thought of and experienced as "common law" for all the faithful in Christ within the confines of the Empire. Thus in spite of all efforts, the "royal law" proposed as a "general law" for a regnum was and remained ius proprium in relation to the utrumque ius. Decisive critical reappraisal would be need -- from juridical humanism, the "Secunda Scholastica," and natural law theories -- before the validity and the role of Roman and canon Ius commune could be shaken. When that happened it was in an age (the fifteenth to seventeenth centuries) in which national states were reinforcing their unifying structures in order to encourage the breakdown of certain relationships and the emergence of the highest level of iura propria, the royal laws. It was also an age in which the common law was changing.

For the thirteenth and fourteenth centuries, the historiographical problem is thus to grasp the relationships between the royal law and the Ius commune and to understand how the latter was the reference point for all that was vital in the law. It is a problem that also crops up if the royal law of Castile and León is taken as positive law and if one tries to ascertain what gradations in the normative resources were imposed on the judges. According to the Ordenamiento of Alcalá (1348, 1351) of Peter I (the Cruel), judges were to apply the royal laws of the Ordenamiento first, then local customary laws (provided they were long-standing and still in force), and the Siete Partidas in last resort. Comparison with what was happening elsewhere in Europe -- in particular in Italy, in the Regnum Siciliae and the communes -- shows parallels that make it tempting to identify the Siete Partidas with what was elsewhere Roman and canon Ius commune, hence to substitute its laws for Roman and canon law and to understand it as "common law," assigning to it a value, dignity, and function equal to those of the Ius commune.

5. France: Pays de droit coutumier; Local Laws and Royal Law; The Great Coutumiers

In the Middle Ages, there were a number of political entities of various sorts and sizes in the vast area of Europe that centered on what is today France and that projected into Switzerland to the south-east and Flanders (Belgium) to the north-east. France (much smaller than the modern nation) and Paris, its capital, were surrounded by large territorial units: to the north, Normandy, to the west, Maine, Anjou, and, on the Atlantic coast, Brittany; to the south, Gascony on the Atlantic

coast and Languedoc and Provence on the Mediterranean; plus the land-locked territories of the Dauphiné, Savoy, Burgundy, and Franche Comté.

There are details in the overall situation in French lands that are difficult to follow and reconstruct, but the general lines of development can readily be summarized. Above all, there was a distinction between northern and southern lands, which were divided, with some deviation, by a sinuous line following the forty-eighth parallel. As early as the twelfth and thirteenth centuries (clearly so from the mid-thirteenth century), northern French lands were pays de droit coutumier and the lands of the south pays de droit écrit. In the north, Roman law was not the "law" that had force of positive law, but was valid only if a judge wanted to take it into account as ratio scripta for its power of suggestion and as a "reasonable" aid to making a difficult judicial decision when the law was in doubt; in the south, Roman law was positive law and the "written law" to be taken into account in all circumstances, although in its practical application certain specific priorities pertained.

The split between the two parts of France was accentuated by the famous decretal, Super speculam, published by Pope Honorius III. This decretal stipulated that Roman law was no longer to be taught in Paris, which provided the king of France with a way to depreciate the law of the Empire (whose prominent opponent he was), evoking a principle of full sovereignty later expressed as "rex superiorem non recognoscens in regno suo est imperator" (a king who recognizes no superior is emperor in his own kingdom). It provided the pope with an opportunity to further that same policy in the context of the opposition and rivalry between the two universal social orders, the church and the Empire.

The two portions of France and the independent lands contiguous to them thus came to have dissimilar experiences: custom played a fundamental role in the northern regions (the pays de droit coutumier) but a more modest role in southern lands (the pays de droit écrit). Wherever they were located, major cities always had their own laws as a projection and proof of their autonomy.

In the pays de droit coutumier municipal law came in two forms, either as a written version of customary laws (coutumes) or as normative systems of a different sort (chartes de franchises) added to local customary law for the purpose of integrating or correcting it but always distinct from custom.

Independent of the coutumes there were a great many normative initiatives that, because they regarded the internal life of the urban community, furnished a ius proprium of the first (or lower) level. The legislation willed and promulgated by the cities -- in general, chartes de franchises -- was designated as chartes de communes, chartes de consulats, and privilèges urbains, according to the origin and particular juridical title of each document. For example, we find chartes de communes in Beauvais in 1182, in Laon between 1189 and 1190, in Amiens in 1190, and somewhat later in Lille (1286) and Rouen (1382); Nîmes (1254) and Bordeaux (1261) had privilèges. One demesnial city after another had its charter. I might also note that, in Flanders in particular, city charters were often backed

by strong efforts on the part of the municipal governments to claim and guarantee the city's autonomy.

The situation was radically different in the vast territories subjected to seigniory, feudal and nonfeudal. There the initiative for providing a local legal system to the inhabitants of a land came not from the local communities but from the lord, who from time to time made provisions, according to need, his own overriding interests, and his spirit of Christian charity (if he had any). Significant examples are the dispositions emanating from lay lords such as the duke of Burgundy or the duke of Brittany, from ecclesiastical lords of such famous abbeys as Sainte-Geneviève and Saint-Germain-des-Prés, or from the bishops of major dioceses such as the bishop of Metz (whose provisions were called atours).

The local coutumes, the chartes de franchises, the privilèges, and the atours might on occasion be included within or fused with the great regional and multi-regional coutumes. Thus by the phenomenon of the "regionalization" of customary law the most important coutumes were disseminated throughout broad geographical zones much larger than any one city's territory. This is what happened with the Coutumes of Normandy, Brittany, Touraine, Anjou, and Burgundy.

These sets of local norms stood in contrast to the sovereign's ordonnances, which at times limited and constrained local law but at other times supplemented and enriched it. In France as in the Regnum Siciliae, the kings were active legislators in certain specific sectors, according to circumstance, need, and opportunity. Witchcraft and heresy, for example, were targeted in the Ordonnances of Paris of 1228; Jews figured in an Ordonnance of 1230 "pensata ad hoc utilitate totius regni" (considered for the utility of the entire kingdom);[101] the life of local communities was regulated by a Réformation de moeurs dans la Languedoc et la Langeudoil of 1258; dueling and court testimony were the subject of an ordonnance of 1258; relations between the crown and the municipal administrations and the reorganization of the latter were the object of such measures as the Ordonnance de l'administration municipale de bonnes villes of 1256-61; the sphere of action guaranteed to craft and trade corporations was treated in measures such as the later Ordonnance de Chartres of 1467.

In the interest of putting order into the great variety of measures from different times and places, the contents of the great regional coutumes and the royal ordonnances were collected and reelaborated in compilations usually known as coutumiers. In Normandy there were two important coutumiers: the twelfth-century Très ancien Coutumier, given both in Latin and in French translation, and the Grand Coutumier of between 1254 and 1258, written in Latin, whose title, Summa de legibus Normandie, indicates the semi-doctrinaire nature of the work.

The most important compilation and reelaboration, however, was the coutumier known as the Coutumes de Clermont en Beauvaisis. Its author was a

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[101] Ordonnances, I, 35. See also François Olivier-Martin, Histoire du droit Français des origines à la Révolution (Paris: Donat-Montchrestien, 1948, reprint Paris: CNRS, 1984), 120.

cultivated judge who, in his youth, had also been a poet and a writer and who was active in the court of the count of Clermont, brother to the king of France, Louis IX. The judge's name was Philippe de Beaumanoir, and the work, composed in 1283, was also known as the Coutumes de Beaumanoir.[102] Philippe did more than simply write down customary laws: as he reworked and noted down local norms and principles he made selections of their contents and, inevitably, he reshaped them, making broad use of a cultural background based in a knowledge and a study of the Roman law and the canon law.

The Coutumes de Beaumanoir were broadly enforced in the pays de droit coutumier of northern France. Hence even in those lands the Ius commune had a significant impact and full use was made of its cultural valences, its reasoning mechanisms, and its general principles, as well as many of its specific solutions.

Another compilation, the Etablissement de Saint-Louis (1272-73), was a reworking and a condensation of both large portions of important coutumes (those of Orléans, Touraine, and Anjou) and two sets of royal ordonnances. Thus once again an initiative was launched to put order into a congeries of multiple and discordant normative sources, but with the further aim of contributing to the legislative unity and the sovereignty of the kingdom -- not so much in the name and under the sign of a Roman and canon Ius commune that was thrust aside because it was the positive law of the Empire as in the name of a national law that came out of the fusion of ancient traditions, popular and local customary laws, and more recent provisions willed by the sovereign and marked with his supreme authority.

This was a tendency that spread geographically and continued in time. Among the other great coutumiers we should recall at least the Ancien coutumier de Champagne (late thirteenth century), the Très ancienne coutume de Bretagne (1312-ca. 1325), the Stylus curie Parlamenti of Guillaume Du Breuil (ca. 1330), the Grand coutumier de France of Jacques d'Ableiges (ca. 1388), and the Vieux coutumier de Poitou (ca. 1417).

The Pays de droit écrit: Municipal Laws, Intermediate Laws, Royal Law

In the pays de droit écrit of the south of France, cities actively compiled their laws in ways that made the resulting documents resemble the statuta of the Italian communes. Many cities were prominent in this movement: besides Montpellier, there were the Consuetudines of Toulouse confirmed by Philip III in 1283 and the Franchises et coutumes of Besançon of 1290; Lyons had its Libertates of 1320; Avignon had Statuta proborum virorum in 1243; Arles added to its older Carta consultatus of the twelfth century a more recent Statuta et leges municipales (1162-1202); Aix-en-Provence had its Constitutiones of 1234-45 and the later Statuta facta post pacem, drawn up in 1268 and enlarged and revised until 1480.

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[102] Available in English as The Coutumes de Beauvaisis of Philippe de Beaumanoir, trans. F. R. P. Akehurst (Philadelphia: University of Pennsylvania Press, 1992).

On the second level the ius proprium was made up either of regional ordonnances in force within a single county or duchy, or royal ordonnances promulgated for the entire realm of France, as in the case of the 1230 ordonnance concerning Jews. Among the ordonnances of counties and duchies we might note those of Franche Comté (the capital of which was Dôle) on the organization of justice and legal procedures (1386) or on the burghers (1393); those of Savoy (capital Chambéry) and part of Piedmont, discussed above, which ranged from the Statuta of Count Pietro II of 1264-65 to the Decreta or Statuta Sabaudie of Duke Amedeo VIII of 1430; those of the county of Provence (capital Arles), the Statuta "Super officialibus" of Charles I of Anjou of 1245 and after.

Unlike the pays de droit coutumier, these territories held to the principle that the Roman and canon law must also be held valid as positive law to which a judge could and should have recourse when he could find no applicable norm in the royal law, the local statuta, or the city or regional coutumes. They also differed in that the normative contents of the customary laws derived from a tradition of acquaintance with and use of Roman law that could be traced back to the fifth and sixth centuries, thus, in part, to Roman law of the Theodosian Code. For this reason the dispositions in the statutes were often similar in content to the Roman and canon law.

Finally, famous schools of Roman law were concentrated in the pays de droit écrit. Montpellier, from the twelfth century, and Toulouse were highly famed as learned cities, and in their schools, as in Italy, only the laws of Justinian and of the church were studied. Cultural exchanges with Italy were extremely frequent, thanks both to Italian professors who taught in Montpellier (as did Placentinus, d. 1194) and to French students who studied in Italy -- especially in Bologna, where there was a sizable contingent of students from Provence, as attested by one of the few collegia for students, founded in 1257 by a Bolognese professor of canon law, Zoën Tencararius, after he had become bishop of Avignon.

6. Germany: Municipal Laws; Counts, Dukes, and Princes; The Emperor's Laws; The Sachsenspiegel

In central Europe north of the Alps the Holy Roman Empire -- which had become "Germanic" through its ruling dynasties and as a result of the mechanisms for electing the emperor -- was divided and fragmented into a number of political entities: Austria, which centered on Vienna; to the south, Styria, Carinthia, and the Tyrol; toward to west, Bavaria, Baden-Württemberg, and Hesse; returning east then north, Saxony, Bohemia, Moravia, Poland, East Prussia; to the north, the lands of Jutland (Denmark) that faced the great Scandinavian Peninsula.

The sources use the synthetic name of Alamannia for this conglomeration of lands and political systems. In this central area of continental Europe there were prosperous cities with a well-developed civic life; cities that lived by their ancient customary laws and were governed by city councils that had played a vital

role in urban development since the twelfth century. Furthermore, the cities' customary laws were enriched by and they intertwined with the corporative rules of a variety of powerful professional, trade, and other associations. At times the trade corporations (Zünfte) created conflict, but in general they contributed much to the rich potential of urban life.

The dynamics of the relationship of the German cities and their surrounding territories were different from those of the Italian and Provençal cities. In Italy every city commanded a surrounding agrarian and economic space, great or small, that was articulated into a suburbium or suburbia, smaller dependent cites and towns, and modest villages; in Alamannia municipal jurisdiction reached no further than the city limits. Beyond the city walls there was the countryside, and the countryside was ruled by feudal and nonfeudal seigniory. Hence German lands gave rise to the proverb, "City air makes man free," since it was only within the city's walls that one could shake off submission to a feudal, territorial, or landed lord.

Another difference between German and north-central Italian lands was the relationship between the cities and the highest authority. In Germany, as in most of Europe (southern Italy included), local norms had to obtain recognition or a title of validity from the emperor or from a lord (prince, count, or whatever). Thus, to cite a few examples, Frederick I Barbarossa conceded the "privilege" of recognition to Augsburg in 1156, to Bremen in 1186, to Lübeck in 1188, and to Hamburg in 1189. Frederick II granted similar "recognition" to Nuremberg in 1219, Lübeck (again) in 1226, and Vienna in 1237 and 1247. Prince Berthold gave an analogous privilege to Freiburg in Breisgau before 1180, as did Duke Henry I of Brabant to Brussels in 1229 and Duke Otto of Bavaria to Innsbruck in 1239.

Here as elsewhere the municipal law, validated by privileges, might be transferred and transplanted to other cities. Thus in 1261 and 1295 Breslau adopted the law of Magdeburg. This situation was not peculiar to Alamannia since analogous cases can be found in other regions of Europe, for example in Sicily, where, as we have seen, the entire "Ancient Text" of the Consuetudines of Messina passed to Trapani to become that city's law.

In Alamannia as elsewhere, there were two levels of local law. Aside from the city statuta and superior to them was a territorial law of broader application. In certain times and places this occurred within a single political entity; on other occasions (in France, for instance) it involved an entire territory and a variety of political entities within that territory. In the first case such provisions emanated from a count, duke, or prince, as with the Pfahlbürghergesetze of Frankfurt am Main promulgated in 1333 and 1341. In the second case, the emperor established a law for the lords and the cities of Germany. There were many of these, some of them of great importance. Frederick II was responsible for two famous measures, the Confoederatio cum principibus ecclesiasticis of 1220 and the Statutum in favorem principum (German "princes," of course) of 1231-32. These

laws were aimed at organizing, defining, shaping, and limiting the powers of the lords, ecclesiastical and lay, over the lands under their dominium (lordship).

An even more famous example is the so-called "Golden Bull" (a name that dates from the fifteenth century), the technical title of which, Omnem regnum, came from its first words. The Bull was promulgated in 1356 by Charles IV after he had been crowned emperor by the pope in Rome and had returned to German lands. The measure established the procedures for the election of the emperor and granted particular powers, by privilege, to certain princes, seven of whom became the "great electors" of the emperor and the only persons entitled to participate in imperial elections. These seven were the ecclesiastical princes of Mainz, Trier, and Cologne and the lay princes of the Rheinpfalz (the Rheinland and the Palatinate), Saxony, Brandenburg, and Bohemia.

As in French lands under customary law, there were private jurists in Germany who collected and elaborated customary legal materials. We have seen in the pays de droit coutumier anonymous works such as the Grand Coutumier or the Summa de legibus Normandie (1254-ca. 1258) and collections written by jurists of solid learning and high local renown such as the famous Coutumes de Beaumanoir (1283) written by Philippe de Beaumanoir. A similar work in Alamannia, the Sachsenspiegel, or "Saxon Mirror," of Eike von Repgau, enjoyed such extraordinary success that its author was taken to be a more important jurist than he in fact was.

Eike von Repgau's Sachsenspiegel (Saxon Mirror), which was dedicated to Count Hoyer von Falkenstein, followed the structure of the Decretals to organize laws of various provenance, some of which were regional or municipal and others feudal or seigniorial. The original nucleus of the work probably dates from the years around 1235. Between 1265 and 1270 the work was translated into German, and it circulated well beyond the borders of Saxony to become the "law" on which all the judges of Germany based their decisions. It also attracted annotations (glossae) to clarify its contents. The "Saxon Mirror" became a model for other compilations in the German language, and it inspired a number of lesser works, among which one should mention at least the Deutschenspiegel (Augsburg, 1274-75) and the Schwabenspiegel (Swabia, 1275-76).

To move beyond municipal and territorial law, except for the few imperial provisions that specifically regarded the structures of the Empire or the relations between the imperial crown and the cities or the local lords (or, exceptionally, other limited matters such as river navigation or notaries), the Ius commune, civil and canon, was not recognized as having the force and authority of "positive law" in German lands. At least this was the case until the late fifteenth century, when Roman law was received with a formal act in 1495. After that act Roman law became the "law" whose use was obligatory in the imperial Supreme Court, the Reichskammergericht. This means that for centuries -- until 1495 -- the situation in Alamannia was similar to that of the French pays de droit coutumier.

This is not to say that Roman law was not known and studied intently by young Germans who subsequently made use of it in the activities of their office.

We know it to be a fact that as early as the twelfth century German students were always present in sufficient numbers in Bologna to warrant the formation (in the thirteenth century) of a large corporation of students from German lands, the "German Nation" (Natio teutonica). In the following century this Natio grew so large that it became the membrum precipuum of the entire universitas of students from north of the Alps, and it had its own lengthy and detailed statuta, written in the mid-fourteenth century.

We also know that toward the late twelfth and early thirteenth centuries some clerics who had come to Bologna from Germany to study law (which meant the Ius commune, civil and canon) took such an interest in the legislative texts of Justinian and of the church that they acquired excellent copies of them which they took home with them when they returned to Germany. We know that this occurred in Bamberg, where codices from the twelfth and thirteenth centuries (some containing the apparatus of Azo) can be seen in a perfect state of conservation. One emperor, Charles IV, stands out for an act that would be incomprehensible if both the crown and legal practitioners had not had a marked interest in the Ius commune, Roman and canon. It was in fact Charles IV who founded the Studium Generale of Prague in 1348. Other institutions followed: the University of Cracow was founded by Casimir the Great in 1364; Rudolf IV, the archduke of Austria, founded the University of Vienna in 1365; the University of Pécs was founded in 1367, the University of Heidelberg in 1386, and so forth.

Everywhere university curricula included the lectura of Justinian's Corpus iuris civilis and of the great legislative compilations of the church, the Corpus iuris canonici. Furthermore, although it is true that at times these universities were ephemeral (the University of Cracow disappeared in the fourteenth and fifteenth centuries, for example), that fact should be evaluated in the general framework of the university schools of the time. A comparison with other universities, Italian and French, shows that they too did not always last.

There is another point: when someone returned to his homeland after years of a difficult separation, after having spent notable sums to study the Ius commune in terra aliena (in Bologna, Padua, Perugia, and elsewhere), and perhaps after having escaped perils, even mortal ones, he found it an obvious and natural course to put to use what he had learned. Thus we need to think that the costly and hazardous adventure of law school studies was preordained to be a preparation for a professional activity that relied on valuable acquisitions that could be made only in a specialized school. There are many examples of just this. Among them there is one example -- albeit a late one -- that has particular relevance because it gives concrete evidence of how the Ius commune contributed to a typical experience of ius proprium. In the late fifteenth century the burgomaster of Hamburg, Hermann Langenbeke, was a doctor in utroque iure who had studied civil and canon law and had taken a degree in both disciplines (in utroque iure) at Perugia. When he returned to Hamburg he turned his hand to reorganizing and reshaping the customary laws and the statuta of his city. The unifying text that

he compiled, in German, followed an outline that made use of the ways of focalizing theory and the methodological techniques for the distribution of subject matter that he had learned from his schooling. He then enriched his text with marginal annotations in the fashion of the glossators (the earlier authors of glossae) and of the commentators (the more recent authors of additiones). This was the origin of the Hamburger Stadtreformation of 1497, a reorganization of the city laws of Hamburg and a typical example of local law shaped by a jurist formed in the schools of the Ius commune.[103]

[103] The episode is recounted in Wolf, "Die Gesetzgebung der entstehended Territorialstaaten," 611, but without the interpretation given here.