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CHAPTER 2

Antecedents: the early Middle Ages, c. 500 – c. 1100

THE CHARACTER OF THE PERIOD

11 The Roman empire had been the political form of the ancient Mediterranean civilization of southern and western Europe, North Africa and Asia Minor. When it fell, three new civilizations grew up: the Graeco-Christian Byzantine empire (in which the ancient Roman empire scarcely survived); the Arab-Islamic world; and the Latin-Christian West, made up of the old Roman population and the Germanic peoples who had just settled there. In western Europe, imperial authority had declined in the fifth century, and the old Roman state had been divided among several Germanic tribal kingdoms. In the centuries which followed, the Frankish kings of the Carolingian dynasty, the Germanic kings of the Saxon dynasty and their successors all made attempts to restore the previous supra-national authority of Rome. But these were without exception in vain.

The differences between the new Roman-Germanic society of the West and the ancient world were not just political. The upheavals which had brought about the fall of the Roman state had also affected the economy. In the western societies of the early Middle Ages, urbanization and the circulation of money had hardly begun, and agriculture remained more or less at subsistence level. The new culture of the West was different too. It was dominated by the Roman church and the Latin language; it did borrow from the remnants of Antiquity, but it simplified them drastically. The early Middle Ages, which were a primitive period in European history, lasted until about 1100. At that point a new movement radically transformed society and allowed it to attain the level of the two other great cultures, Byzantium and Islam. When the early Middle Ages drew to a close, the western world was in the course of total change:

the economy expanded and diversified; cities reappeared; the advances made in rational thought and in the universities were consolidated. The organization of the church and secular power became more complex; feudalism was in decline.

ROMAN LAW

12 The disappearance of the Roman state and the growing influence of the Germanic peoples were decisive for the evolution of Roman law. The old Roman legal order was not entirely eclipsed but, with the decline of the institutions of Antiquity, it lost its predominant position. The principal changes were these: under the empire the whole population had been subject to Roman law, but now only the *Romani*, the descendants of the old indigenous population, were subject to it. The Germanic tribes retained their own customary law. In this period Roman law became more and more remote from its classical model, owing to the disappearance of the main components of ancient legal culture, namely the tradition of the major schools of law, the learning of the jurists, imperial legislation and case law. Besides, the West no longer remained in intellectual contact with the Greek East, which in its day had greatly contributed to the development of the classical Roman law. To these circumstances may be added the intellectual impoverishment of the western world. Roman law was reduced to being a provincial customary law, the 'Roman vulgar law' which prevailed in Italy and the south of France. Vulgar law was used to some extent in the rudimentary compilations made, on the orders of Germanic kings, for the benefit of their Roman subjects.[1] The compilations of Justinian (*d.* 565) were the most important legacy of Roman law. Yet Justinian's legislative work did not come into force in the West. And it remained unknown for the first centuries of the Middle Ages, owing to the isolation of the West and the failure of Justinian's attempts at reconquest of the territories invaded by the Germans.

The *Corpus iuris civilis* of Justinian (the name goes back to the twelfth century) is one of the most celebrated legislative projects in

[1] The *lex Romana Visigothorum* or *Breviarium Alarici* was a compilation of Roman law promulgated by Alaric, King of the Visigoths, in AD 506. For centuries after the fall of the empire it was one of the main sources of knowledge of Roman law in the West. The important *lex Romana Burgundionum* should also be mentioned; its date is not earlier than the reign of King Gundobad (*d.* AD 516).

history. It represents the ultimate expression of ancient Roman law and the final result of ten centuries of legal evolution. At the same time the *Corpus iuris* was to be a message to future lawyers. Justinian had aimed to compile a substantial selection of the works of the classsical jurists and imperial legislation. The texts chosen were revised, systematically arranged, and then published and promulgated. The *Corpus iuris* is made up of four collections: the most important, on account of its scale as well as its quality, is the *Digest* or *Pandects* (to use the Greek name) completed in AD 533. This contains excerpts from the works of the jurists, the principal craftsmen of Roman law. The second collection, the *Codex*, brings together imperial constitutions and rescripts. A first edition was completed in AD 529, a second in AD 534.[2] The *Codex* is supplemented by the *Novels* (*Novellae Constitutiones*), a collection of laws promulgated by Justinian himself between AD 534 and AD 556.[3] Finally, the *Corpus iuris* also contains the *Institutes* (*Institutiones*), intended as an introduction for the use of students and promulgated in AD 533. This work (not least its title) derives largely from the *Institutes* of Gaius, a work compiled about AD 160. In the eastern empire, Justinian's compilations remained in force: they were commented on in teaching and in scholarship. But in the West their historical role began only towards 1100.[4]

THE GERMANIC NATIONAL LAWS

13 Before the invasions, the Germans were ruled by the primitive law of their tribes, which was based on immemorial customs handed down by a purely oral tradition. In their new kingdoms, these national laws were sometimes set down in writing, under the influence of ancient models: these were the *leges nationum Germanicarum* (or in German, *Volksrechte*).[5] Yet the compilations were no more than clumsy attempts to express in Latin a primitive law which

[2] Only the text of the second edition has come down to us.

[3] As imperial constitutions, the *Novels* clearly had the force of law, and it is natural that they would have been later incorporated into the *Corpus iuris*. But there was no official compilation, and they have come down to us through private collections. The best-known Latin collections are the *Authenticum*, whose date and origin are uncertain, although its name recalls the fact that it was for long thought to be an official or 'authentic' collection, and the *Epitome* of Julian, who was a professor of Byzantine law. Many of Justinian's statutes were issued in Greek or in both Greek and Latin.

[4] See below, section 29.

[5] They are also described with some disdain as *leges barbarorum*.

was devoid of all general principle and consequently any analytical tradition. These compilations contained mainly rules of criminal law, taking the shape of detailed scales fixing fines and compensation in the case of homicide and various injuries, as well as rules of procedure and the (still primitive and irrational) law of evidence. Such rules faithfully reflected the archaic agrarian society from which they derived; the best known is the *lex Salica*, the law of the Salian Franks, the oldest version of which dates back probably to the last years of the reign of Clovis (*c.* AD 507–11). In it are to be found 'malbergic glosses', old Frankish legal terms which appear in the Latin text and are so called because they are the ritual words pronounced on the 'malberg', that is the hill on which the court (*mallus*) sat.

Important compilations of Germanic laws outside the Frankish kingdom should also be mentioned, such as the Edict of King Rothari of AD 643 in the Italian lands conquered by the Lombards. In England the Anglo-Saxon kings from King Aethelberht of Kent (*d.* AD 616) also promulgated an important series of 'statutes' (*dooms*), but in contrast to other compilations these English ones were composed in the vernacular.

The Germanic kingdoms of the continent – Franks, Ostrogoths, Visigoths and Lombards – united peoples of Roman and of Germanic origin. The *Romani* remained subject to Roman vulgar law, the Germans to the law of their own tribe. This is the principle of the 'personality' of law: whatever his place of residence and whoever the sovereign of that place, an individual remains subject to the law of his own people of origin. So in the vast Frankish empire of Charlemagne, in addition to the *Romani*, there were several Germanic nations ruled by their own law. In order to overcome the inconvenience arising from this complexity, Charlemagne attempted to impose a kind of legal unity, but without success. It was not until a later period that the principle of personality of law was abandoned in favour of the principle of territoriality, under which the customary law of the region was applicable to all those living in it regardless of their ethnic origin. This development is to be connected both with the dwindling of old tribal loyalties and with the emergence of a new sense of political unity, which was now based not on ethnic ties but on adherence to the sovereign of the region.

FEUDAL LAW

14 From the eighth century, feudal law developed and spread first through the Frankish kingdom and subsequently through other western lands. It is an original system of law, which was not connected with any nation in particular and was created in the Middle Ages quite independently of Roman law or Germanic national laws. Its general characteristics are none the less Germanic rather than Roman: the importance of personal relations and landed property; the absence of any abstract conception of the state; the lack of writing and formal legislation. Feudal law was a complex body of legal rules which, above all in the area of landed property, was sustained for several centuries. It took shape and developed for four centuries without the intervention of any significant legislation, and without any teaching or legal scholarship. Its development depended on customs, and occasionally on the involvement of a sovereign who was concerned to regulate a question of detail or to innovate on a particular point. The *Leges feudorum*, the first account of feudal (in fact Lombard) law, did not appear until the twelfth century.

LEGISLATION: GENERAL POINTS

15 The Roman emperors were great legislators. In promulgating their constitutions and in addressing their rescripts, they were conscious of taking an active part in the formation of law. By means of their legislation the emperors clarified, made more specific, and interpreted rules of law; they also gave new direction to the legal order. This legislative activity collapsed at the same time as did the Roman state in the West. Naturally the Germanic kings lent their authority to the process of writing down and promulgating traditional laws, and sometimes took the opportunity to innovate, but their primary aim was to set out the old law of the tribe. The decline of legislation at this time is not to be explained solely by the disappearance of the empire; it is also bound up with the conceptions of the Germanic peoples about royalty and law. In their view, law was not a social technique which could be manipulated and adapted just as the central authorities wished, but an eternal[6] reality, a fixed and

[6] Hence the expression *ewa* (cf. the German *ewig*, the Dutch *eeuwig* meaning 'eternal') for the old law.

timeless guiding principle which could be clarified and interpreted but not fundamentally altered. It was recognized that the king had the power to declare the meaning of the law and to develop legal principles, while respecting the existing, unchallengeable foundations, but even he could not in any way alter the ancient law. It is therefore unsurprising that, right through the early Middle Ages, genuine statutes are encountered very rarely indeed, and even subsequently sovereigns were slow and indecisive in resuming legislative activity.

LEGISLATION: THE CAPITULARIES

16 Although the climate was unpropitious, the Frankish kings made important legislative efforts in the eighth and especially the ninth centuries. The restoration of the Roman empire in the West made legislation ('capitularies') possible. The capitularies[7] consist of various types of legal disposition, corresponding in today's terms to statutes, orders, directives and regulations. Contemporaries already regarded the capitularies as an important element in legal practice, as the collections made during this period show. They contain very disparate material: little civil law, but numerous dispositions on criminal law, procedure and feudal law, as well as administrative directives, orders and regulations dealing with military organization. The capitularies therefore reflect the attempts of sovereigns to order society, to improve administration and, under Christian influence, to protect their poorest subjects (*pauperes*) against their most powerful ones (*potentes*).

Kings both protected the church and intervened in ecclesiastical affairs. This led them to promulgate numerous *capitularia ecclesiastica* (as opposed to *capitularia mundana*). Although these capitularies deal with ecclesiastical questions, they emanate from the Frankish kings and not from the ecclesiastical authorities, who held their own councils and promulgated their own decrees. After the coronation of Charlemagne, the entwining of the interests of church and state was a distinctive and a fundamental element in the organization of

[7] A royal constitution (*capitulare*, plural *capitularia*) was made up of several chapters (*capitula*) and this legislation owes its name to these 'chapters' (the title means little, since statutes, ordinances and charters were often made up of articles or 'chapters'). The term *capitulare* appears for the first time in the reign of Charlemagne (cap. de Herstal, in AD 779). Prior to this the terms *decretum*, *edictum*, *praescriptio* and others were used.

medieval society. This went back in fact to the first Christian emperors, who had already intervened in the affairs of the church.

Capitularia legibus addenda are a separate category: these were capitularies complementary to national laws which aimed, in conjunction with them, to establish legal unity within the empire. They are to be contrasted with *capitularia per se scribenda* ('self-justifying capitularies'), independent dispositions which were not ancillary to national laws.

Apart from their brevity (the average length is from ten to twenty articles), the capitularies differ significantly in form. Some are duly dated and begin with a solemn preamble, while others can be dated only approximately and contain neither initial protocol or eschatocol. Sometimes the text is not made up of sentences but simply of rubrics whose exact meaning can only be guessed: for instance 'on fugitives, to whom one persists in giving hospitality'. This is the case with *capitularia missorum*, which are the verbal instructions of sovereigns to *missi dominici*, the royal messengers sent through the country to supervise the application of law or to introduce new rules. The essential point of their mission was explained to them orally, and what has come down to us of these capitularies is no more than an *aide-mémoire*. The ideas of the time regarded the word of the king as the essential constitutive element which gave a document the force of law. This fits with the very ancient idea that the spoken word prevails over the written, not merely in legislation but also in contract and in evidence. The superiority now accorded to the written word is the outcome of an evolution which does not go back beyond the end of the Middle Ages.[8]

Capitularies, although they were promulgated by the king did not derive from his sole authority: the king did not legislate until he had obtained the support of a consensus, that is the agreement of the *populus Francorum* (the leading men of the kingdom), which was supposed to represent the Frankish people. The king always referred expressly to the consensus, but its true importance depended on the political situation and the balance of power. When the sovereign was a powerful leader like Charlemagne, consensus was practically guaranteed in advance, whereas in the time of his grandson, Charles the Bald (whose political position was at times extremely insecure) the wishes of the aristocracy could not be ignored.

[8] This phénomenon is closely associated with cultural development; in the past people listened much more than they read, and even reading was done aloud.

Under the Merovingians, capitularies still played a modest part. The great period of capitularies coincides with the Carolingian dynasty which came to power in AD 751: it is the ninth century, and above all the reigns of Charlemagne (who after his coronation as emperor was deeply conscious of his legislative role), Louis the Pious and Charles the Bald. But already by the end of the ninth century capitularies had disappeared, first in the eastern kingdom, later in the West.[9] The fact that they were proclaimed for the whole kingdom[10] and applicable throughout it meant that they formed a law superior to the various tribal laws and were thus a factor in legal unification. On the European continent legislation on a kingdom-wide scale disappeared after the capitularies; fresh attempts are to be found only in the twelfth century. In England, on the other hand, the national monarchy still promulgated important *dooms* in the tenth and eleventh centuries. The political unity of England explains why the situation there was quite the reverse of that in Europe, where at the same time the political division of kingdoms was taking place.

The importance of capitularies was recognized very early on, and collections intended for court practice and other legal purposes were compiled. These unofficial collections, which almost all date from the ninth to eleventh centuries, merely repeat the capitularies in their original form, and provisions are left in historical rather than systematic order, even though a systematic arrangement would have had certain advantages. Two collections became well known: that of Ansegisus, abbot of St Wandrille (AD 827), in which an article from one capitulary is sometimes transposed to a different context when the author thinks this more logical; and that of 'Benedict the Levite' (AD 847–52), a pseudonym under which the author brought together various legal sources (mainly ecclesiastical texts) in a collection which was intended to complement and continue the work of Ansegisus. Several of the documents in the collection of the Levite are either false capitularies or authentic sources which have been falsified; the falsifications largely relate to questions of the ecclesiasti-

[9] In the Frankish kingdom of the West (prefiguring France), the last capitularies date from AD 883 and 884; in the eastern kingdom (later, Germany) no capitulary was promulgated after the division of the empire (Verdun, AD 843); in Italy capitularies are rare after AD 875, and the last dates from AD 898.

[10] Some capitularies were promulgated both for the Frankish and for the Lombard kingdoms; others were applicable only in one or the other of the two kingdoms (which were united in AD 774 by a personal union).

cal hierarchy, which was probably one of the main preoccupations of the author.

JURISPRUDENCE

17 During the first centuries of the Middle Ages legislation had only a secondary importance. Jurisprudence as such did not exist: there is no trace of legal treatises or professional legal teaching. The collections of capitularies, which are sometimes found in the same manuscripts as the texts of national laws, were written for the use of practitioners and were not subject to doctrinal exposition in commentaries or manuals. Some rudiments of Roman thought were known through such texts as the *lex Romana Visigothorum*[11] or the *Etymologiae* of Isidore of Seville, a small encylopaedia which distilled the knowledge of Antiquity. But these isolated traces of ancient legal culture were not studied or analysed. In any case the law schools and lawyers who would have been capable of such work had disappeared. The sources of the period reveal ignorance of Roman law, and sometimes of the law of the capitularies, even among those whose professional activities in principle required them to be acquainted with them. Thus it is, not surprisingly, extremely rare to find a qualified and independent author expressing any critical opinion; but precisely this should be the role of any jurisprudence. An exceptional figure of this kind was Agobard of Lyon (*d.* AD 840) who dared to attack the ordeals and the personality principle of the application of law. Even canon law, which enjoyed considerable prestige,[12] inspired no study or theoretical commentary: the authors of collections contented themselves with bringing together the existing rules, and the promulgation of new rules by the pope or by the councils (especially the Frankish councils) was most infrequent.

The law therefore remained essentially an oral law, whose principal source was custom. The law of the kingdom was not unified but varied from tribe to tribe (initially) and from region to region (in later centuries). Apart from the capitularies, the only supra-national law was the law of the Latin church, which was authoritative

[11] See above section 12, note 1.

[12] Dionysius Exiguus in AD 489–501 compiled a collection which was recognized in the Frankish kingdom under Charlemagne. It was known as the *Dionysio-Hadriana*: Hadrian I presented it in AD 772 to Charlemagne in Rome, and in AD 802 at Aix-la-Chapelle he proclaimed it the canonical and authoritative collection for the empire.

throughout the West but important only in church affairs, largely of an administrative nature. None of these sources of law was the object of study or scholarly commentary.

THE COURTS AND PROCEDURE

18 The courts of the early Middle Ages bear no resemblance to those of the late Roman empire, as the following points show. The hierarchy of courts, with the possibility of appeal to Rome, had disappeared and was replaced by a system of local jurisdictions, the *mallus* of the county (*pagus*) in the Frankish kingdom. There was no centralization nor any procedure for appeal. The professional official judges of the late empire gave way to casual judges without legal education or particular qualifications, such as the Merovingian *rachimburgii*. From the reign of Charlemagne, however, resort could be had to permanent judges (*scabini*, aldermen) who, although they were not professional magistrates, at least provided greater stability in the administration of justice. The Frankish monarchy succeeded at least partly in realizing its policy of centralization and uniformity by entrusting important cases, submitted to the king as supreme judge, to a court official, the count of the palace (*comes palatii*); and by having the *missi dominici* supervise the workings of local jurisdictions in the name of the king.

The development of feudal law produced a parallel system of feudal courts, juxtaposed to the old court organization of different areas (*pagi* – counties – and smaller districts). The vassals of a lord sat in the feudal courts under his presidency and resolved disputes about their fiefs (e.g. succession) or among themselves (e.g. disputes between vassals or between a lord and his vassal). With the manorial system[13] there also came 'seigneurial' courts with jurisdiction over the subjects of the manors. To complete the picture, the church courts and (at a later period) the municipal courts should also be mentioned. This variety and fragmentation of the organization of justice (if it may be called organization) lasted to the end of the *ancien régime*.

The procedure adopted by the courts and tribunals of the early Middle Ages was of course very different from the procedure *extra*

[13] This is a type of agricultural concern based on the great estate. It has an economic and a public order aspect, since it is exploited economically, but also ruled and administered by the lord and great landowner.

ordinem of the late empire. Cases were now heard in public in the open air near a sacred place, perhaps a mountain, tree or spring. The people took an active part in the administration of justice, and expressed agreement or disagreement with the proposed verdict; the procedure was oral, with very limited use of written documents; no minutes or pleadings were in writing, and no records were kept; the case was essentially a dispute between the parties, in which the role played by the legal authorities was limited to formal control and simple ratification of the victorious party. The most striking expression of this conception of procedure is without doubt the judicial duel, which is nothing but an institutionalized combat designed to resolve the dispute.

Modes of proof were for the most part irrational. Justice made use of divine and supernatural powers, as in the case of judicial duels and other ordeals, and also in the oaths taken by one party and his supporters. Rational proof by means of documents and witnesses was not excluded, but proof by confronting the witnesses for either party with each other was undeveloped and highly formalistic. When the witnesses of the two parties refused to retract their testimony and the judges consequently found themselves in an impasse, a duel was the only possible outcome. In any event, the judges did not undertake any critical examination of the parties or witnesses which might have exposed a contradiction. By contrast with this purely mechanical confrontation of witnesses for and against, the royal *inquisitio* came much closer to an inquiry into the actual facts. The *inquisitio* was a Carolingian innovation, which consisted in having the inhabitants of an area interrogated under oath by royal agents. It mainly related to questions of landed property in which the king or the church had an interest. This *inquisitio* (which is no relation of the Inquisition instituted in the thirteenth century to repress heretics) is the historical origin of the jury system in both criminal and civil procedure.

EVALUATION

19 Each age has the law it deserves. It is therefore natural that the West in the early Middle Ages had a law adapted to the new political, economic and intellectual situation; and so a system of administering justice which was fragmented, but adequate for the needs of an agrarian and military society. The law of the period was

inevitably lacking in complexity, devoid of theory and general principles, imbued with irrational and sacred elements, and knew nothing of learned jurists or professional practitioners. It goes without saying that one of the great changes which took place in western society from about 1100 was the development of a new type of legal order. None the less the imprint of the great events of the early Middle Ages was not completely erased in the following centuries and can still sometimes be detected. The legal dualism characteristic of continental Europe – that is, the coexistence of Roman and Germanic laws – corresponds to the cultural dualism of the Roman-Germanic world of the early Middle Ages.[14] In some countries such as England (where the legacy of Roman civilization was entirely lost) as well as in the regions east of the Rhine which escaped Romanization, canon law was the only Roman element in legal practice. On the other hand, in the Mediterranean countries, notably Italy, Roman law remained the foundation of the legal order (even though the contribution of the great Lombard nation should not be underestimated; in northern Italy the *Lombarda* for a long time exercised a considerable influence on legal practice). France is a special case: in the south, which corresponds roughly to what is now the Languedoc, Germanization was superficial (*Herrensiedlung*) and the main principles of Roman law were maintained; in the north, on the other hand, the territories which were later to become French-speaking, the invasions were followed by a massive occupation by Germanic tribes (*Bauernsiedlung*) and Roman law was lost. Consequently, until the end of the *ancien régime* France was divided. In the north, the region of customary law, the law was based on Germanic and feudal oral custom; while Roman law remained in the south, the region of written law ('written' because it was set down in the *Corpus iuris* and in the works of the learned jurists). The persistence of different matrimonial regimes illustrates this legal division: in the region of customary law, the Germanic regime of community of property was followed; in the south, the dotal system of Roman law was maintained.

Some features of the archaic law of this period disappeared as a more advanced society developed, but have been appreciated again

[14] This is the basis of the expression 'Roman-Germanic family' proposed by the comparatist R. David, *Grands systèmes de droit contemporain* (Paris, 1969), to describe western European law (which is itself one of the major systems of law alongside the Common Law, the law of socialist states, and religious law).

in more recent times. The oral and public character of the administration of justice, for example, was suppressed to a large degree in early modern times. Yet nowadays importance is once again attached to the democratic and non-bureaucratic character of such principles.

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