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### CHAPTER 3

## *Europe and Roman-Germanic law, c. 1100 – c. 1750*

### CHARACTER OF THE PERIOD

21 At the end of the eleventh century, western European society finally left behind the archaic feudal and agrarian structures which had characterized the early Middle Ages. Important advances were made in the course of this transformation of the West. The sovereign nation state became the dominant form of political organization, and its symbol was the absolute monarch of early modern times. The society of the late Middle Ages, in which the various social orders had managed to obtain a share of power by means of a system of representative 'estates', was no more than a passing phase in the evolution of the state, as was the political independence of the great cities at that time. The emergence of national authorities was at the expense of the empire, and it obstructed German attempts to restore the universal power of the Roman empire. The same development also meant that the power of feudal lords diminished to the same degree that central governments asserted and reinforced themselves.

The organization of the church had a similar centralist tendency. Here power was concentrated at a supra-national level, and allowed a bureaucratic and hierarchical church to take shape under the direction of the papacy.

The closed and essentially agricultural manorial economy was replaced by a market economy. This was sustained by the development of international commerce and industry, an intense circulation of capital, and the development of a banking system: in other words, a renewal and transformation of economic activity in general, assisted by the rise of numerous cities. In spite of the dampening effects associated with corporatism and mercantilism, free enterprise was the driving force of the new economy. The scale of capitalist enterprise in the late Middle Ages was still modest, as it was

restricted by the economic power of cities or independent city republics. From early modern times, however, capitalism could mobilize the resources of an entire nation and work on a world scale. This economic expansion is reflected in urbanization: the population of the large cities of the Middle Ages was still of the order of 100,000, yet in early modern times it reached a million. The social consequences were clear. The commercial success of urban businesses now set the pace for economic development in the country; social emancipation also extended beyond the cities into the country. The cities and their liberated citizens, by exerting this two-pronged pressure, therefore made a decisive contribution to the abolition of serfdom. And as agriculture became commercialized, the social and economic structure of the old manor disappeared.

There was also a profound intellectual development. The general cultural level rose markedly, and this is reflected particularly in increased literacy and increased written use of the vernacular languages; rational thought also continued to gain ground. It was at this time too that universities came into being and spread throughout Europe. They carried with them an intellectual discipline based on the great philosophical and legal works of Graeco-Roman Antiquity. Ancient thought was the object of intense study, which culminated during the Renaissance; it was subsequently supplanted by modern scientific method, which was experimental and had freed itself of dogma and arguments based on authority.

### BEFORE AND AFTER 1500: CONTINUITY

22 This chapter deals with the period until about the middle of the eighteenth century. It therefore ignores traditional periodization and the conventional break – about 1500 – between the Middle Ages and modern times.<sup>1</sup> It is true that traditional periodization corresponds to important changes: the fracturing of the unity of the medieval church, the rise of absolutism, great discoveries. The effect

<sup>1</sup> Many historians, dissatisfied with traditional periodization, argue that a break just as important as that around 1500 should be made around 1100, and consequently propose to distinguish between the early and late Middle Ages. Others go further and divide the history of Europe after Antiquity into three phases: archaic (until 1100), Old Europe (until the eighteenth century), and the industrial period. This periodization is followed especially in the *Zeitschrift für historische Forschung. Halbjahrschrift zur Erforschung des Spätmittelalters und der frühen Neuzeit*, launched in 1975, in which the second period is described as the 'old-European period'.

of these changes must not be misunderstood, yet it is all the more important to underline the continuity which existed between the Middle Ages and modern times. The rise of the national sovereign state clearly began during the last centuries of the Middle Ages and reached its apogee in modern times. Criticism of, and attacks against, absolute power became an important political consideration only in the eighteenth century (except in England where they began in the seventeenth century). Dogmatic Christianity also survived the Middle Ages: although the meaning of Christian dogmas was sometimes in dispute, it was not possible to place the dogmas themselves in doubt. Yet this prohibition lost all significance with the diffusion of the ideas of the Enlightenment in the eighteenth century. Economic development was retarded by the limitations imposed by the inadequacy of available sources of energy right up until the machine age and the industrial use of steam. Throughout the *ancien régime*, industrial production and transport had to make use of primitive resources: the physical power of man, animal, water or wind. And the succession of famines and epidemics, a constant characteristic of the Middle Ages, persisted long after 1500.

The fundamental transformations which occurred in these various areas profoundly changed the society of the *ancien régime* in the course of the eighteenth century. The Industrial Revolution brought about a vast increase in potential energy, and laid the foundations for mass production. It was this, together with scientific advances, which shaped the modern technical and industrial age, in comparison with which all earlier history may be called pre-industrial.

The Enlightenment (*Aufklärung*) signified a new mode of thought and a new conception of man and the universe: from now on the foundation was human reason and no longer revealed religion. This movement towards rational ideas and discoveries broke with a thousand years of European history and prepared the way for a new philosophy – and at the same time for a new society, since the old social structures were intimately bound up with religious conceptions of the universe. Monarchy by divine right is an example. The exponents of new ideas attacked absolutist regimes precisely because they were steeped in dogmas which had now been declared to be obsolete and contrary to the freedom of the individual. None the less in Europe the old political system managed to survive until the end of the eighteenth century; the only exception is England, where absolutism received a decisive setback at the end of the seventeenth

century. In some states the durability of the old political structures can be explained because sovereigns favourable to the ideas of the Enlightenment pursued policies of modernization. In other countries, France above all, it was largely political inertia which kept the monarchy in power. Modernization struck late in France, with all the more force, and led to the destruction of the political system of the *ancien régime*, first in France and soon in other European countries too.

#### THE DEVELOPMENT OF THE LAW: OUTLINE

23 In the development of private law there is no dramatic divide between the fifteenth and the sixteenth centuries. Admittedly, it was towards 1500 that the reception of Roman law in Germany took place; some decades later the homologation of customs began in the Netherlands; and the sixteenth century saw jurisprudence dominated by the Humanist School. All these events, however (which will be examined in detail), are simply one stage in a long evolution which goes back to the Middle Ages. The reception was a consequence of the revival of Roman law in the twelfth century, and merely one of the many forms of interaction between Germanic customary law and the 'learned' Roman law which took place over several centuries throughout Europe. Similarly, legal humanism was no more than a new episode in the long history of assimilation of ancient law by European man. As for the reduction of customs to writing, which was first decreed in the fifteenth century in France, it cannot be understood except in the context of a fundamental question which preoccupied the authorities and the lawyers from the Middle Ages onwards: 'was it or was it not necessary to preserve customary law?' To appreciate the significance of this crucial problem in Europe under the *ancien régime*, the following points should be noted.

As soon as customary law no longer met the requirements of society, the need for modernization appeared more and more pressing. It could be achieved either by internal transformation of the 'native' law or by receiving into that law an existing system, which was more sophisticated and better able to meet new demands: in the event, Roman law. In their attempts to modernize traditional customary law and assimilate learned doctrine, European countries tried both methods, and consequently the old European law can be

called a Roman-Germanic system. The coexistence of the two elements, however, and their influence on one another varied greatly from one country to another, as is typical in Europe. Germany is the extreme case of a massive reception of learned law; by contrast, English Common Law is the most radical example of a rejection of Roman law.<sup>2</sup>

After several centuries of diffusion, the learned law had finally established itself in the sixteenth century in the various countries and regions of continental Europe. The development was to be expected in the Mediterranean regions, where learned law had already acquired a predominant position in the Middle Ages, as well as in Germany, where it had been introduced by way of authority. Yet a similar development is to be observed in the areas where homologated customs were in force. Several factors may explain this diffusion of Roman law in the regions of customary law: legal scholarship there was wholly under the influence of learned law; the courts of justice were peopled by lawyers whose university education was based on Roman law; and the customs themselves (once homologated) often recognised Roman law as having a binding supplementary role. The sixteenth and seventeenth centuries, the classical age of political absolutism, also coincided with the classical age of modern Roman law. But the Roman law of that time was essentially an academic legal system, a 'professors' law' barely accessible and intelligible to an uninitiated public. It was employed in practice in secret bureaucratic procedures, which aimed as far as possible to avoid any direct contact with the people to whom the law applied.

The meaning of the law was frequently unclear, and certainty in the law elusive. It was an improvement when customs were set down in writing, first on individual initiative and later by official order, but the written versions were often highly imperfect and had to be supplemented by learned law. But the learned law itself (and this was not the least of the practitioners' difficulties) was at that time made up of a mass of works which were sometimes inordinately long, and which were written by innumerable jurists who were inclined to contradict one another. Although there was also progress in legisla-

<sup>2</sup> But it should be emphasized that even after the reception in Germany, the old Germanic law (Saxon law among others) did not lose its importance in legal practice. In England too the Common Law, while an essential component of English law, was not the only system in force; in parallel courts such as the Court of Chancery and the High Court of Admiralty (and obviously in the church courts) the learned law was applied (see below, section 38).

tion, until the mid-eighteenth century no general codification was achieved. The most successful attempts still restricted themselves to ordinances in specific areas of the law (some important, of course) or simply to collecting statutes promulgated over the various centuries of the Middle Ages and *ancien régime*. The variety of jurisdictions inherited from the Middle Ages had been curtailed by a progressive limitation of the role of the municipal, ecclesiastical and corporate courts in favour of the court system of the modern state, but this limitation fell short of actual elimination. Yet plans for a rational court system under the control of central authority were far from being accomplished in practice, and sometimes met with tenacious opposition: the enlightened reform which Joseph II tried to introduce into the Austrian Netherlands triggered off revolution there.

The eighteenth century marked the end of the old European legal order. Various factors contributed to its disappearance: a refusal to submit to the authorities of Antiquity, notably Roman law; the search for a new legal order based on reason, or on the nature of man and society as conceived and defined by reason; the triumph of the idea of codification; and the will to make the closed and esoteric world of law and justice accessible and democratic.

## CUSTOMARY LAW

### General development

24 Custom was originally the most important of the sources of old European law, and in the following centuries too it played a significant part, particularly in northern France and the southern Netherlands, the regions of customary law. During the *ancien régime* customary law changed profoundly, notably in the following respects. It tended towards a greater unity: in the post-Carolingian age, there were many local and regional customs, owing to feudal fragmentation and the independence of cities. This diversity was progressively reduced by a process of concentration and unification. In England in the reign of Henry II (1154-89) the central royal courts had already created a single national customary law, the Common Law, which was 'common' to the kingdom, and as such contrasted with local customs of lesser importance.<sup>3</sup> In other

<sup>3</sup> The term 'Common Law' nowadays also has other connotations, particularly that of judge-made law, that is, case law based on binding precedent, in contrast to statute law passed by Parliament.

countries the concentration was less radical, and the diversity of customs was reduced but not eliminated. In the south of France, the revived Roman law became the common basis of legal practice at a very early date. In the north, on the other hand, customs were more tenacious, although the prestige and influence of the *Coutume de Paris* led to a relative standardization of customary law, at least in the northern regions. In the southern Netherlands, the homologation of customs brought about the disappearance of many customs and a relative (essentially regional) unification of customary law.

There was also an increasing tendency to set customs down in writing. At first sight this is a contradiction in terms, because the qualities *par excellence* of custom are the adaptability, flexibility and fluidity with which it arises<sup>4</sup> and disappears. Once a customary rule has been reduced to writing, however, the written version takes on a life of its own and a certain permanence; the writing fixes the text and restricts all further modification. These effects had already been felt in private compilations made on the initiative of practitioners, and the official compilation of customs followed by their promulgation with the force of law completed the development. The end product of this operation, known as the recording or 'homologation' of customs, is a hybrid source of law. On the one hand, the written customs are customary law. That is how they are presented, and the fact that they were compiled on the basis of statements by witnesses who had experience of local usages confirms their customary origin. On the other hand, the collected texts were promulgated after revision by the central authorities, and the courts were then bound to apply them to the exclusion of all other contrary custom. Since it is rare (as history shows) for a promulgated version to be adapted or modified later, the established text resembles a statute even more. The homologated customs therefore represent a transitional phase between the true customs spontaneously formed and developed in the early Middle Ages, and the true legislation of the following period.

In the Netherlands, where the authorities were plainly influenced by the French example of the fifteenth century,<sup>5</sup> Charles V decreed

<sup>4</sup> The appearance of a custom was sometimes confirmed by judicial investigation: according to some medieval teaching, two judgments sufficed to prove the existence of a custom. <sup>5</sup> *Ordonnance* of Montil-lez-Tours, promulgated by Charles VII in 1454; the text of the custom of Burgundy had already been promulgated in 1459 by Duke Philip the Good. After a change of method, the official compilation of customs was carried out largely after 1497; and between 1500 and 1540 almost 600 customs, mostly from central and northern France,

homologation in 1531. His order was evidently addressed to the whole of the seventeen provinces, as at this point there was no reason to predict the secession which took place in the reign of Philip II. The accomplishment of the programme of homologation was very slow, and the order had to be reiterated several times, first by Charles V himself, then by Philip II, still later by the Archdukes Albert and Isabelle. There were various stages involved in the procedure of homologation: first, a draft had to be produced by the local authorities; this was examined by the provincial and regional councils or by the courts of justice; it was then revised by the Conseil Privé at Brussels; finally the sovereign confirmed and promulgated the definitive text by decree. With a few exceptions, this process did not envisage any participation by representative institutions such as the state assemblies.

In total 832 customs were reduced to writing and 96 were homologated. Since homologation was conducted effectively only from the second half of the sixteenth century, and since political circumstances made it difficult to carry out royal instructions in the northern provinces at that time, the vast majority of the homologated customs are from the southern provinces.<sup>6</sup> The programme of homologation aimed to improve legal certainty, and this aim was largely attained. Some of the compilations of customs were virtual codes, such as the (non-homologated) version of the Custom of Antwerp of 1608, which contains no fewer than 3,832 articles. But most were much more modest. To fill the gaps in customary law, the learned law (i.e. Roman and canon law) was declared compulsorily applicable, and this is what is meant by the supplementary role of the 'written common law'. Even at the stage of compilation and revision, the learned law had invariably managed to influence the terminology of the texts, and sometimes the actual substance too. A further aim of homologation was unification of the law, but this objective was only very partially attained. In some provinces, mostly rural regions such as Namur, Luxembourg and Frisia, a single provincial *Coutume* was decreed, and all local customs were accordingly abrogated. In Hainaut and in Artois, a provincial custom was

were set down in writing. The vogue for compilation was followed in the years 1555 to 1581 by a reform of customs. The reformed customs remained in force until the end of the *ancien régime*. In the course of the seventeenth and eighteenth centuries very little new compilation was attempted.

<sup>6</sup> Thus in Holland customs were not homologated and, in the seventeenth century, scholarship filled the gap by creating Roman-Dutch law.

superimposed on local customs, while in Flanders and the Brabant a large number of different and independent customs persisted in the absence of a 'common' customary law at the provincial level.<sup>7</sup> In spite of the abrogation of nearly 600 customs, the Netherlands preserved about 100 homologated customs, and more than 800 written ones; homologation therefore did limit the fragmentation of law, but it also contributed to maintaining the diversity of customs up to the end of the *ancien régime*.

Custom became the subject of learned legal studies, which certainly affected its original spontaneity. It was above all the homologated customs which were subject to such studies; although the works of the legists were inspired primarily by the principles of Roman law in which they had been schooled, it was not beneath them to comment on this new 'written law' which had acquired the force of statute. On the continent compilations and accounts of local and regional customary law appeared in the thirteenth century. In the earliest works no trace of learned law is to be detected, but very soon university teaching was reflected – in degrees varying from one author to another – in the use of the learned law. The supple and the somewhat naive character of custom was inevitably lost when it was subjected to a scholarship based to a greater or lesser extent on Roman law. The following sections note the major customary works of France and the Netherlands.

### *The French 'coutumiers' of the Middle Ages*

25 The most celebrated of the French customary works (*coutumiers*) of the thirteenth century is that of Philippe de Beaumanoir, the *Coutumes de Beauvaisis*, written about 1279–83.<sup>8</sup> The author, an official of the royal courts, was a practitioner first and foremost, but had probably been educated at university. His clear and well-informed account deals with the customary law of Beauvaisis as well as the customs of Vermandois and Paris. He also draws on case law,

<sup>7</sup> In Flanders 227 customs were reduced to writing and 37 homologated; in Brabant and Limburg the figures were 124 and 8.

<sup>8</sup> Modern edition by A. Salmon in 2 volumes, 1899–1900 (reprinted 1970), completed by a third volume: G. Hubrecht, *Commentaire historique et juridique* (Paris, 1974). P. Bonnet-Laborderie (ed.), *Actes du colloque international Philippe de Beaumanoir et les Coutumes de Beauvaisis (1283–1983)* (Beauvais, 1983). The work so well characterizes old medieval law that it was even translated into Japanese by Hiroshi Hawawa in 1971; there is great interest in western feudalism in Japan.

in particular that of the Parlement de Paris, and on the learned law, both Roman and canon. Beaumanoir was the initiator of the genre and his attempt at formulating and at the same time systematizing the customary rules was fairly successful. His work was written in French and could be used in everyday legal practice. It helped to impart the terminology, principles, and legal doctrine of the learned law to a wide audience.

Two other important works on custom appeared at the end of the fourteenth century. The first dealt essentially with the *Coutume de Paris*, and the second with the customary law of the north. Jacques d'Ableiges, who was the king's bailiff in various regions, was the author of a work completed about 1388 known as the *Grand Coutumier de France*. The title (a more recent coinage) is misleading: d'Ableiges did not deal with French customary law in general (the variety of the customs anyway made that impossible) but with the *Coutume de Paris* and surrounding areas, which was later to play a major part in the formation of French common law. His sources were the case law of the Châtelet (the court of first instance in Paris) and the Parlement de Paris, but he also drew on his own judicial experience. His work was extremely influential.<sup>9</sup>

Jean Boutillier was also a royal agent with duties in (among other places) Tournai, which was then a French royal burgh, and in which he was legal counsellor and magistrate. His *Somme Rural*, which probably dates from 1393–6, was conceived as an account of the customary law of the north of France and at the same time as an introduction to the learned law for the general reader without university education. The author's intention to write a popularizing work emerges even from the title *Somme rural*, which suggests a general work accessible to those from rural backgrounds. The fact that the book was written in French at once sets it apart from contemporary learned treatises, in which the use of Latin was *de rigueur*. Boutillier used the sources of Roman and canon law, and case law familiar to him both from his own experience and from consulting the records of the superior courts of justice, especially the Parlement de Paris. This introduction to learned law in the vernacular proved useful and popular. Since the customary law examined in Boutillier's work was close to that of the Netherlands, it is not

<sup>9</sup> Modern edition by E. Laboulaye and R. Dareste (Paris, 1868).

surprising that it was equally successful there, and was soon printed there and translated into Dutch.<sup>10</sup>

#### French commentators of modern times

26 In the sixteenth century the tradition of *coutumiers* continued. It culminated in the work of Charles Du Moulin (d. 1566), the most eminent learned commentator on French customary law. Du Moulin was expert in Roman law, to which he devoted several original works which attest his qualities as a Romanist.<sup>11</sup> But he dedicated his main studies to customary law: his grand design was to set out from the principles of the *Coutume de Paris* and to arrive at the unification of French customary law. The significance of Du Moulin's fundamental choice can be appreciated only by considering the relations between customary law and the *ius commune* in other countries in the same period. Germany and Scotland had opted for the introduction of learned law. In principle, this solution would have had the same advantages in France, for the legal techniques of learned law were without doubt superior to those of customary law, and in the southern territories of the kingdom the written law was generally used. Du Moulin none the less opposed the adoption of Roman law as the common law of France, yet he was convinced of the need for a unified French law and intended to base such a unification on the statutes and customs of the kingdom. The common French law was to be formed not on the basis of learned law (the European *ius commune*) but from the common store of French customs: *consuetudines nostrae sunt ius commune* (a phrase from his *De feudis* of 1539).<sup>12</sup>

<sup>10</sup> *Editio princeps*: Bruges, 1479 (numerous reprints); first Dutch edition: Delft, 1483 (also numerous reprints). In the absence of a modern critical edition, the preferred edition is that published at the hand of L. Charondas le Caron (Paris, 1603). On Boutillier, see G. van Dievoet, *Jehan Boutillier en de Somme rural* (Louvain, 1951); R. Fecstra, 'La source du titre des droits royaux de la "Somme rural" de Boutillier', *Revue de Nord* 40 (1958), 235-44; R. Fecstra and M. Duynstee, 'Les "cas brief selon le droit civil". Annexe de la Somme rural de Jean Boutillier empruntée aux "Casus legum" des Decretales', *Revue d'histoire du droit* 51 (1983), 365-400.

<sup>11</sup> See especially works on the law of obligations, which are the basis of some doctrines of the *Code civil* (see articles 1217-25 and its theory of divisible and indivisible obligations). J.-L. Thireau, 'Aux origines des articles 1217 à 1225 du Code civil: l'extricatio labyrinthi dividui et individui de Charles du Moulin', *Revue d'histoire du droit* 15 (1938), 51-109. J.-L. Thireau, *Charles du Moulin (1500-66). Etude sur les sources, la méthode, les idées politiques et économiques d'un juriste de la Renaissance* (Geneva, 1980).

<sup>12</sup> In the same vein see *Oratio de concordia et unione consuetudinum Francie* (posthumous edition, 1576).

Du Moulin's reservations about Roman law were of course essentially political: Roman law was the 'imperial' law, and in Du Moulin's day the Holy Roman Empire under the Habsburgs was the most redoubtable enemy of France. To this objection of principle were added legal objections: customs were admittedly imperfect, but Roman law itself could lay no claim to perfection. The work of the Humanist School had made it possible to see that the *Corpus iuris* was a product of human history, and lawyers were now all the more conscious of its defects. The erudite humanists had also shown how much had been misunderstood by the medieval commentators, who were still highly authoritative in the sixteenth century. Budé made a list of these misunderstandings in his *Annotationes in XXIV libros Pandectarum* (1508). Donellus (d. 1591), in his *Commentarii de iure civili* of 1589-90, even expressed serious reservations about the quality of Justinian's compilations. And if Roman law was not the perfect, intrinsically superior expression of universal reason, why should the heritage of French law be sacrificed to it? Another French jurist, François Hotman (d. 1590), a Huguenot and opponent of absolutism, spoke out to the same effect. His *Anti Tribonianum sive dissertatio de studio legum* of 1567 is both a virulent attack on Roman law, and a plea in favour of a unification of French law based on national customs, studied with the exactness of the learned lawyer, and enriched by medieval legal doctrine.

Du Moulin's main work was his commentary on the *Coutume de Paris*. The text of the *Coutume* had been published in 1510, and the significance of Du Moulin's work is illustrated by the fact that the main modifications and corrections made at the time of the 'reform' of the *Coutume* in 1580 derived from his critical commentary. Du Moulin also made *Notae solemnes* (1557) on the custom of Paris and elsewhere. He still hoped for the unification of French customary law, but his hope was never fulfilled.

Among other renowned learned commentators on French customs should be mentioned Bernard d'Argentré (d. 1590), the commentator on the custom of Brittany; Guy Coquille (d. 1603), who commented on the custom of the Nivernais<sup>13</sup> and wrote an *Institution au droit des François* (1607), in which he expounded the general principles of French law; and Antoine Loisel (d. 1617); author of the

<sup>13</sup> *Coutumes du pays et duché de Nivernais, avec les annotations et commentaires de M. Gui Coquille* (Paris, 1605).

very influential *Institutes coutumières* of 1607.<sup>14</sup> Loisel attempted to separate and order systematically the subject-matter and elements common to the various customs, and to this end he referred principally to the *Coutume de Paris*.

If the work of these authors on custom illustrates how much progress had been made since the first sketches and drafts of the thirteenth century, it also shows how great a contribution to customary literature had been made, over the centuries, by learning based on the *Corpus iuris*.

#### Commentators in the Netherlands

27 In the old Netherlands, particularly the old county of Flanders, local customary law was also set down in *coutumiers* (in Dutch, *rechtsboeken* or 'books of law'). The anonymous *coutumier* known as *Facet* deals with the custom of St Amand-en-Pévèle (in the chate-lainry of Douai) and dates from 1265-71. The original version showed no Roman law influence, in contrast to the additions of the fourteenth and fifteenth centuries.<sup>15</sup> The author of the *coutumier* of Lille, however, is known: it was the secretary of the city, Roisin. Lille was already important in the Middle Ages, and this work, which is known as the *livre Roisin*, was composed around 1280 (the oldest parts date from 1267). It was based entirely on customary law, and learned law appeared only in additions made in the following century.<sup>16</sup> Similarly, two anonymous *coutumiers* from the small Flemish town of Aardenburg are devoid of learned elements: *Welle-lijchede* and *Tale en Wedertale*.<sup>17</sup> These works closely follow court practice and procedure: the summons and the defences of the parties or their advocates (*taelmannen*) are often repeated verbatim, giving a very vivid picture of the practice of the time. The best-known of the Dutch *coutumiers*, the *Rechtsboek van Den Briel*, by Jan Matthijssen (d. 1423), a town clerk, also belongs to the tradition of *coutumiers* without Roman law elements. Matthijssen's work is remarkable above all for

<sup>14</sup> Cf. M. Reulos, *Etude sur l'esprit, les sources et la methode des Institutes coutumières d'Antoine Loisel* (Paris, 1935).

<sup>15</sup> Modern edition by E. M. Meijers and J. J. Salverda de Grave, *Les lois et coutumes de Saint-Amand* (Harlem, 1934).

<sup>16</sup> Modern edition: R. Monier (Lille, 1932).

<sup>17</sup> Edited by G. A. Vorsterman van Oyen (The Hague, 1892).

its complete and exact description of both substantive and procedural aspects of civil and criminal law.<sup>18</sup>

From the fifteenth century, the learned law is to be found in the Dutch *coutumiers*, among them those of W. Van der Tanerijen and Ph. Wielant. Willem Van der Tanerijen (d. 1499) from Antwerp was educated at university, and followed a career as an official and magistrate, especially as counsellor at the Council of Brabant and the Great Council of Mary of Burgundy. Owing to his duties at the Council of Brabant, he had at his disposal the means for describing Brabant customary law in his *Boec van der loopender Practijken der Raidtcameren van Brabant* (1474-6, the last edition dating from 1496). In it Van der Tanerijen pleaded for the diffusion of Roman law, and drew on numerous Roman elements in his account of Brabant law. Some chapters, on obligations for instance, look more like a treatise on Roman law. In the absence of detailed historical studies, it is difficult to tell whether the practice of the Council of Brabant was in fact so strongly impregnated with the *Corpus iuris* as Van der Tanerijen suggests. It is in any case astonishing that this vast and very well-structured work does not seem to have been widely available; until a modern scholarly edition of it was produced, it remained virtually unknown.<sup>19</sup>

The work of Philippe Wielant (d. 1520) of Ghent met with greater success. Like Van der Tanerijen, Wielant was university-educated and had a career (among other things) as a magistrate in the Parlement of Malines (1473), Great Council (1477), Council of Flanders (1482) and finally the Great Council of Malines (1504). His work, however, is closer to provincial customary law, and he managed to identify and formulate its common features better than his contemporaries. Wielant's great ambition was to produce an account of contemporary Flemish criminal and civil law, but to do so without turning his back on his university education in Roman law. This aim emerges above all from the structure of his work, from the terminology employed, and from his approach to procedure. His two principal works were *Practijke criminele*, probably written about 1508-10 and devoted to criminal law and procedure,<sup>20</sup> and *Practijke civile* (1508-19), devoted to civil law and particularly to civil

<sup>18</sup> Edited by J. A. Fruin and M. S. Pols (The Hague, 1880).

<sup>19</sup> Edited by E. I. Strubbe (Brussels, 1952). On Van der Tanerijen, see *Nationaal Biografisch Woordenboek v* (1972), col. 877-81.

<sup>20</sup> Edited by A. Orts (Ghent, 1872).



procedure.<sup>21</sup> Wielant shows himself to be neither in favour of abolishing customary law nor blind to the European diffusion of the learned law. His work aims at a synthesis which preserves the fundamental position of customary law, while assimilating the doctrinal advances of academic law, especially of the Bartolist School. These qualities assured Wielant's works, which were written in Dutch, a wide audience in legal circles, in which few practitioners were sufficiently educated to embark on large Latin commentaries, but in which the learned law could no longer be ignored. Wielant's work was typical of the general direction of the law of the Netherlands during the sixteenth century: customary law was maintained, but at the same time the legal order was open to the contributions of the European *ius commune*. Through translations into French, German and (in particular) Latin, Wielant's work obtained a great circulation beyond the Netherlands. Joos de Damhouder (*d.* 1581), a lawyer from Bruges, published Latin translations of Wielant's two principal works (*Praxis rerum criminalium* and *Praxis rerum civilium*) under his own name, without mentioning that of Wielant.<sup>22</sup> He also wrote a treatise (all his own work, this time) on tutelage and curators.<sup>23</sup>

In the seventeenth and eighteenth centuries, several lawyers in the southern Netherlands wrote treatises or commentaries on the law in force in their provinces. These works were largely based on customs, ordinances and case law, although they were still strongly infused with Roman law. Works deserving mention in this period are those of François van der Zype (*d.* 1650), author of the *Notitia juris belgici* and works on canon law which had an international circulation; Antoon Anselmo (*d.* 1668) author (*inter alia*) of the *Codex Belgicus*; Georges de Ghewiet (*d.* 1745), author of a *Précis des Institutions du droit belgique* and *Institutions du droit belgique*; Jean-Baptiste Verlooy (*d.*

<sup>21</sup> *Editio princeps*, Antwerp, 1558. The first edition that does justice to Wielant's work is that of the advocate to the Great Council, A. van 't Westich (reprinted, with an introduction, by E. I. Strubbe, Amsterdam, 1968). Wielant also produced the *Recueil des antiquités de Flandre*, an essay of institutional history, and a study on Flemish feudal law. In 1503 he devoted a work to the law of the city of Haarlem. D. van den Auweele, G. Tournoy and J. Monballyu, 'De bibliotheek van Mr Philips Wielant (1483)' in *Lias. sources and documents relating to the early modern history of ideas*, 8 (Amsterdam, 1981), 145-87.

<sup>22</sup> For the *Praxis rerum criminalium* Damhouder made substantial additions of his own, which was not the case in his edition of the *Praxis rerum civilium*.

<sup>23</sup> See *Nationaal Biografisch Woordenboek* v (1972), col. 1009-19. On Damhouder, *ibid.*, col. 273-84, and E. I. Strubbe, 'Joos de Damhouder als criminalist', *Revue d'histoire du droit* 38 (1970), 1-65.

1797), author of the *Codex Brabanticus*, an attempt to rationalize and codify the legislation in force in the Brabant, under alphabetically ordered rubrics. He made use of scholarship and also of customary law in his systematization; and his work was the more useful (as well as the more difficult to complete) as the sources studied and ordered in it extended over seven centuries.<sup>24</sup>

#### Northern Netherlands: customary law and Roman-Dutch law

28 There was no shortage of works on regional customs in the United Provinces. But in Holland, by far the most important province, the development was unique and remarkable. Customs had not been homologated there, and so Roman law had greater influence, but traditional customary law was not superseded altogether. The result was a synthesis of Roman law (primarily) and Dutch customary law (secondarily). Until the end of the *ancien régime*, this synthesis had a major influence on the law of the Republic; and nowadays it still subsists in South Africa. The creator of this synthesis, which he outlined in his *Inleiding tot de Hollandsche Rechtsgeleertheyd* (1620, first published 1631), was Hugo de Groot (Grotius), the most eminent jurist the Netherlands have produced in modern times, best known as the leading figure in the Natural Law School.<sup>25</sup>

#### THE EUROPEAN IUS COMMUNE

##### The rediscovery of the 'Corpus iuris'

29 Towards 1100 the West rediscovered the *Corpus iuris civilis* of Justinian. This was not simply a matter of finding the whole text of the compilation again; it meant that from now on the text was studied, analysed and taught at universities. Legal scholars glossed and commented on the authoritative ancient compilations, and gradually built up a neo-Roman or medieval Roman law<sup>26</sup> which

<sup>24</sup> Cf. J. van den Broeck, 'J. B. C. Verlooy, *Codex Brabanticus* (1781)', *Revue d'histoire du droit* 46 (1978), 297-325; J. van den Broeck, *J. B. C. Verlooy, vooruitstrevend jurist en politicus uit de 18e eeuw, 1746-97* (Antwerp and Amsterdam, 1980).

<sup>25</sup> The expression 'Roman-Dutch' was not used by Grotius, and appeared only in 1652 in Simon de Leeuwen's *Paratitula juris novissimi, dat is een Kort Begrip van het Rooms Hollands Regt* (in the 1664 edition the subtitle has become the main title).

<sup>26</sup> In French it has been suggested that by analogy with *Médo-latin*, one might speak of *médio-romain* for medieval Roman law.

became the common basis for university teaching and legal science throughout Europe.<sup>27</sup> Medieval Roman or 'civil' law together with canon law (which was itself strongly influenced by Roman law) made up the learned law common to the whole of the West: hence the name *ius commune*. The Roman component of this written common law was the essential one, for it was the principles, terminology and doctrine of Justinian's law which were the basis for the study of canon law, rather than the reverse.<sup>28</sup>

*Ius commune* is to be contrasted with *ius proprium*, the 'particular' law which was in force in its countless variations in the various countries, regions and cities of Europe, in the form of customs, ordinances and charters.<sup>29</sup> The study of Roman law in the Middle Ages might perhaps have limited itself to purely academic research, like our own approach (for instance) to ancient Egyptian law. But it did not. Over the centuries, Roman legal doctrine permeated legal practice by various paths (which will be examined), and the medieval learned law thereby influenced the development of law to a greater or lesser extent in all parts of western Europe. This reception of a foreign law may be called legal acculturation or a 'legal transplant'.<sup>30</sup> For the West in the late Middle Ages, Roman law was a new and foreign law: decisively so in the northern regions; but even in the Mediterranean regions where, under Germanic and feudal influence, the law had travelled some distance from ancient law.

There is nothing exceptional about the reception of a foreign legal system which is regarded as technically superior. Sometimes this is a sudden, deliberate process; sometimes a slow infiltration, a gradual, imperceptible osmosis. A well-known example of assimilation of the first kind (apart from the reception in Germany at the beginning of modern times) is the decision of the Japanese authorities in the nineteenth century to introduce western (mainly German, although also French) civil law, in a conscious policy of westernization aiming

<sup>27</sup> Except for Russia and the territories occupied by the Turks.

<sup>28</sup> This is the meaning of the maxim '*legista sine canonibus parum, canonista sine legibus nihil*' (*Decretum* c. 7 d. 10). Cf. F. Merzbacher, 'Die Parömic *legista sine canonibus parum valet, canonista sine legibus nihil*' *Studia Gratiana* 13 (1967), 273-82.

<sup>29</sup> The term is no doubt borrowed from *Institutes* 1.2.1.: 'quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis'.

<sup>30</sup> Cf. A. Watson, *Legal transplants* (Edinburgh, 1974).

to free the country from its feudal shackles.<sup>31</sup> In this instance Japan opted for a foreign law, but for a live contemporary one. By contrast, the assimilation of *ius commune* in the Middle Ages depended on the law of an empire and civilization which had vanished centuries ago, and of which the *Corpus iuris* was (so to speak) merely an embalmed relic. Thus the thread of a thousand-year evolution, which had provisionally broken off in sixth-century Byzantium, was taken up again in twelfth-century Italy.

The enthusiasm which characterized the study of the *Corpus iuris* as it spread from Italy into the various societies of the West was simply part of a more general cultural renaissance, one aspect of which was the founding of universities. Besides ancient law, Greek philosophy (Aristotle) and Graeco-Arabian science (medicine, physics, mathematics) were discovered, translated and commented upon. The authority of ancient learning was absolute: what Holy Scripture was to theology, Aristotle was to philosophy, Galen to anatomy, and the *Corpus iuris* to the law. But additional motives and demands sustained the interest in ancient Roman law: expanding cities and principalities needed a legal framework adapted to new administrative structures; and during the investiture contest, each side sought arguments to support its cause in the texts of the *Corpus iuris*.

Three great schools of study of Roman law may be distinguished according to approach and method: the glossators from the twelfth century to the first half of the thirteenth; the commentators in the fourteenth and fifteenth centuries; and the humanists of the sixteenth century.

### *The glossators of Roman law*

30 The *Corpus iuris* studied by the glossators (to whom it owes its name) was the entire Justinianic compilation which had been

<sup>31</sup> Cf. the general observations of W. Wilhelm, 'Bemerkungen zur Rezeption ausländischen Rechts', *Ius commune* 5 (1975), 122-37; A. B. Schwarz, 'Rezeption und Assimilation ausländischer Rechte' in H. Thieme and F. Wieacker (eds.), *Gesammelte Schriften von A. B. Schwarz* (Karlsruhe, 1960); W. Fikentscher (ed.), *Entstehung und Wandel rechtlicher Traditionen* (Freiburg, 1980; Veröffentlichungen Inst. hist. Anthropologie, 2). On Japan, W. G. Beasley, *The Meiji Restoration* (Stanford, 1973); Z. Kitagawa, *Rezeption und Fortbildung des europäischen Zivilrechts in Japan* (Frankfurt, 1970); R. W. Bowen, *Rebellion and democracy in Meiji Japan* (Berkeley, 1981); T. M. Huber, *The revolutionary origins of modern Japan* (Stanford, 1981); Y. Okubo, 'Gustave Boissonade, père français du droit japonais moderne', *Revue historique de droit français et étranger* 59 (1981), 29-54.

rediscovered in the eleventh century.<sup>32</sup> The text which the glossators studied and taught is known as the *Littera vulgata* ('vulgate', in the sense of standard edition) or *Littera Bononiensis* (that is, the version taught at Bologna, the university where the School of Glossators flourished). This medieval edition was fairly close to, but not identical with, the authentic text promulgated by Justinian;<sup>33</sup> but it was certainly adequate for the needs of the time.

Naturally the *Digest* was the most important part. It seems to have been unknown in the West from the seventh century until a sixth-century manuscript reappeared in south Italy in the eleventh century: the *Littera Pisana*.<sup>34</sup> This manuscript was evidently the basis for a copy made about 1070 which, with other manuscripts, was the basis for the standard edition followed by the glossators. The *Codex* of Justinian had not entirely disappeared in Italy in the early Middle Ages but it was known only in a ruthlessly abridged version; as with the *Digest*, the complete texts reappeared only in the eleventh century.<sup>35</sup> By contrast, the whole text of the *Institutes* was not lost in the early Middle Ages, at least not in Italy. In addition the glossators were able to study the *Novels* in the compilation known as the *Authenticum*,<sup>36</sup> the extant manuscripts of which go back no earlier than the eleventh century.<sup>37</sup>

The glossators had to devise methods and principles for assimilating and comprehending the *Corpus iuris*. Their main aim was like that of the scholastic theologians: just as the theologians aimed by the light of human reason to elucidate a Scripture whose authority was absolute, so the jurists attempted to understand the *Corpus iuris*

<sup>32</sup> Cf. section 12 above.

<sup>33</sup> Attempts to restore and reconstitute the original Justinianic text go back no further than the Humanist School; the first editions of the *Corpus* still follow the *littera Vulgata*. It was only in the nineteenth century that modern historical method was in a position to produce a complete critical edition of the supposed original. The critical edition still in use is by Th. Mommsen, P. Krüger, R. Schöll and G. Kroll (Berlin, 1868-95).

<sup>34</sup> So called because the manuscript was in Pisa until 1411 when, following the conquest of that city in 1406, it was taken to Florence where it is still preserved in the Biblioteca Lorenziana. Since then the manuscript has been known as the *Codex Florentinus*, and the text is referred to as the *littera Florentina*. E. Spagnesi, *Le Pandette di Giustiniano. Storia e fortuna della littera Florentina. Mostra di codici e documenti* (Florence, 1983). See S. Kuttner, 'The revival of jurisprudence' in R. Benson and G. Constable (eds.), *Renaissance and renewal in the twelfth century* (Cambridge, Mass., 1982), 299-323.

<sup>35</sup> At least the first nine books; the last three books reappeared later. Hence in the Middle Ages *Codex* meant books I to IX; books X to XII formed a separate group known as *Tres libri*.

<sup>36</sup> Cf. above, section 12.

<sup>37</sup> The *Epitome Juliani*, which was widely known in the early Middle Ages, was little used by the glossators.

with the aid of formal logic. The first task was to grasp the exact meaning of the Justinianic text by explaining it word for word or by paraphrasing the difficult or obscure terms and passages of the *Corpus*: the name of the School of Glossators denotes precisely that the principal activity of these jurists was to 'gloss'<sup>38</sup> the Roman texts.

'Glosses' in the sense of explanations or clarifications sometimes went beyond purely literal exegesis, for example where the meaning of a rule was elucidated by reference to other passages of the *Corpus* ('parallel texts') containing other principles or qualifications which contributed to a better understanding of the text. It follows from the structure of the *Corpus iuris* that the same subject-matter can be dealt with in different places, both in the *Codex* (when it is a matter of an imperial constitution) and also in the *Digest* (when for instance it is the opinion of a jurist). Reference to parallel texts certainly permitted a better overall view on a given question.

These cross-references at the same time brought to light disparities, and sometimes even contradictions, which Tribonian and his colleagues had not succeeded in avoiding in the compilation. Nowadays it seems only natural that a compilation of materials from various sources and different periods should not always display a perfectly coherent whole. For the jurists of the Middle Ages, however, the *Corpus* represented perfection itself, and so contradictions in it could not be genuine but must be merely apparent.<sup>39</sup> The glossators therefore attempted to eliminate these antinomies, particularly by resorting to the technique of *distinctio* (a minute distinction between the different meanings of a particular word).<sup>40</sup> In applying this technique, they were sometimes tempted into excessive subtleties or logical artificialities. Such excesses may explain the unfortunate reputation of the learned jurists, who were accused of

<sup>38</sup> *Glossa* means 'word' (as in 'malbergic glosses') as well as 'exegesis of a word'.

<sup>39</sup> Hence the medieval expression *in hortulo juris nil spinosum* ('there are no thorns in the garden of the law'). Even in the eighteenth century Jean Bouhier (*d.* 1746) subscribed to the declaration by Claude de Ferrière (*d.* 1715) that 'Roman law is founded on natural reason and the principles of equity; it is a ray of divinity which God has communicated to man.'

<sup>40</sup> For example, the constitution c. 4.35.21 *in re mandata* affirms that each man is '*suae rei arbiter*' while d. 4.8.51 *si de re sua* claims that none can be *de re sua arbiter*. The apparent contradiction is avoided by distinguishing the meaning of the two expressions: in the first case each is the master of his own property and can take the responsibility of disposing of it; in the second it is a question of an arbiter called on to judge his own case. Cf. R. Feenstra, 'Historische aspecten van de private eigendom als rechtsinstituut', *Rechtsgeleerd Magazijn Themis* (1976), 248-75.

distorting the law by misrepresenting the true meaning of the texts. On the other hand the same methods had more than merely academic uses, and these lawyers proved themselves formidable advocates even in other areas of law.

One teaching technique which was widely employed was the *casus*. Originally this was a presentation of a fictitious case, in which whatever rule of law was being studied had to be applied. Later the same expression was used to describe an account of a complex question. *Notabilia* and *brocardica*, that is brief, striking aphorisms summing up a rule of law, were also very popular.<sup>41</sup>

The premisses from which the glossators set out imposed certain restrictions. In their view there was no question of casting doubt on the doctrine of the *Corpus iuris*, as it expressed *ratio scripta*, written reason. An assault on the texts was therefore (literally) unreasonable and senseless. Nor did they see the *Corpus iuris* as the product of a given civilization; far from considering it a historical document, they elevated it to the status of a universal and eternal model, a revelation. A further consequence of this attitude was that the glossators did not go beyond the *Corpus iuris*. In their scholarship and teaching they did not deal, for instance, with feudal institutions or with irrational modes of proof, although ordeals were still current in their own age. The *Corpus* did not raise these questions, and the glossators therefore felt entitled to ignore them. Thus Accursius could declare that according to Roman law the emperor was not subject to any jurisdiction, and it is typical that he paid not the least attention to the political reality of the time, which he knew perfectly well: that the authority of the pope undeniably extended to emperors and kings, and that pontiffs had even exercised their authority in practice by pronouncing interdicts, excommunications, and sometimes even orders for deposition.<sup>42</sup> The converse, however, was not true: if the learned lawyers ignored customary law in their studies, they did not hesitate to employ their own arguments on the *Corpus iuris* when consulted by litigants, or when they appeared as advocates.<sup>43</sup>

<sup>41</sup> E.g. *actor sequitur forum rei; locus regit actum; in dubio pro reo*.

<sup>42</sup> Cf. B. Tierney, 'The prince is not bound by the laws. Accursius and the origins of the modern state', *Comparative Studies in Society and History* 5 (1962), 378-400; D. Wyduckel, *Princeps legibus solutus. Eine Untersuchung zur frühmodernen Rechts- und Staatslehre* (Berlin, 1979).

<sup>43</sup> A. P. Schioppa, 'Le rôle du droit savant dans quelques actes judiciaires italiens des XI<sup>e</sup> et XII<sup>e</sup> siècles', *Confluence des droits savants et des pratiques juridiques. Actes du colloque de Montpellier 1977* (Milan, 1979), 341-71.

Legal science acquired a very pronounced abstract character, since it concentrated on the legal system of a bygone age, and did not develop, as is more usual, from the encounters of daily practice and the experience of generations. Yet the researches of the glossators revealed ancient law to the world of the late Middle Ages, and their works of exegesis gave access to the *Corpus iuris*. The School of Glossators thus prepared the way for the jurists who subsequently tried to produce a synthesis of medieval customs, legislation and Roman law.

The scholarly work of the glossators took various shapes. First, of course, glosses. These were originally brief isolated notes inserted between the lines or in the margin of the text of the *Corpus*. Little by little these glosses built up and took on the form of a continuous commentary (*apparatus*). In manuscripts, as well as in old editions of the *Corpus*, the page is laid out with the *textus* in the centre, completely surrounded by the glosses (which often exceed it in length). The great merit of Accursius (d. 1263) was to make a selection from the thousands of scattered glosses which his numerous scholarly predecessors had written. His version rapidly became the standard gloss and was therefore known as the *glossa ordinaria* (c. 1240); the *apparatus* fixed by Accursius represented the culmination of the School of Glossators.

Some glossators wrote original treatises, in which they discussed the law of the *Corpus* as a whole. The *Summa Codicis* of Azo, written about 1208-10, is the best known of these: while he follows the rubrics of books I to IX of the *Codex*, Azo in fact gives a systematic account of the subject-matter of the *Corpus*. This 'summary' was for long the classic Roman law manual which the jurists consulted in conjunction with the glossed *Corpus*.

Little evidence about the first glossators has come down to us. The first name to appear is that of Pepo, who is said in a legal action towards the end of the eleventh century to have referred to the *Codex* and *Institutes*, and to have begun in Bologna *auctoritate sua legere in legibus*. After him, Irnerius undertook the teaching of the whole *Corpus iuris*, again in Bologna. He had been educated in the *artes*, and applied his literary knowledge and skill to the legal texts. Among his pupils, most is known of the 'Four Doctors' (*quattuor doctores*), Bulgarus, Martinus Gosia, Hugo, and Jacobus. Their teaching made Bologna the indisputable capital of legal studies; their influence extended far beyond the circle of their students, and even great

figures of the time such as Frederick I Barbarossa sought their opinions.<sup>44</sup>

### *The commentators of Roman law*

<sup>31</sup> Nowadays the jurists of this school are referred to as 'commentators'; previously they were known as 'post-glossators', owing to the fact that they taught after the glossators and in a sense continued their work. Yet that name wrongly implies that the new school amounted to no more than an unoriginal continuation of the work of its precursor. The name 'commentators' emphasizes that these jurists wrote important commentaries on the *Corpus iuris* as a whole. In addition they wrote numerous *consilia* or legal opinions, delivered on actual questions on which they had been consulted: hence the name *consiliatores* has also been proposed to describe this school. The zenith of the School of Commentators was in the fourteenth and fifteenth centuries; its authors too were mostly Italian. Their aims and methods were these.

The *Corpus iuris* and the Gloss formed the basis of their works. The importance accorded by them to the Gloss was such that it sometimes eclipsed the original texts.<sup>45</sup> The commentators' method was strongly influenced by scholasticism, which had reached its high point in the thirteenth century, and which had imbued subsequent scholarly thought with Aristotelian logic. In particular the commentators adopted the system of argumentation, disputation and polemic typical of scholasticism. They also took up its excesses, and this is the origin of their interminable discussions on trivialities, their excessively subtle analyses of authorities, and their exaggerated reliance on the technique of successive distinctions. The work of the commentators is essentially academic, and this is to be associated largely with university teaching, which was then undergoing a major expansion. Universities had first been founded in Italy and in France, but rapidly spread in Spain, England and then in the other

<sup>44</sup> Of Irnerius' work, only glosses are preserved; of the four doctors', some other rather brief works have also survived. Some short anonymous treatises of the twelfth century are also known; cf. e.g. G. Dolezalek, 'Tractatus de diligentia et dolo et culpa et fortuito casu. Eine Abhandlung über die Haftung für die Beschädigung oder den Untergang von Sachen aus dem zwölften Jahrhundert', *Aspekte europäischer Rechtsgeschichte. Festgabe für Helmut Coing* (Frankfurt, 1982; *Ius commune Sonderheft*, 17), 87-122.

<sup>45</sup> Hence Cynus' aphorism *sicut antiqui adorabant idola pro deis, ita advocati adorant glossatores pro evangelistis* ('just as the ancients adored idols as gods, so advocates adore the glossators as evangelists').

countries of continental Europe (e.g. Louvain 1425). The law conceived in the law faculties was inevitably a learned and academic law, a professors' law.

None the less the School of Commentators differs from the glossators in that its authors took a greater interest in the law outside the *Corpus iuris civilis*, and in their scholarly work even paid attention to the social realities of the time. Thus the commentators had firm views on the sources of non-learned law too, such as customs and ordinances. In spite of their positions in universities, they were realistic enough to appreciate that it was inconceivable in their time (no doubt in the future too) for learned law to become the common law for all Europe. Regional customs, feudal principles, municipal regulations and statutes, and royal ordinances were much too firmly anchored in practice and much too intimately bound up with vested interests to be swept aside and replaced with an academic system from Bologna. On the other hand, the commentators also appreciated that the learned law would play only a trifling part if it remained confined to the narrow artificial context of the *Corpus iuris* and the ancient world. The commentators adapted the learned law to the needs of their time; they worked out doctrines of practical value; they allowed the learned law to complement and enrich the other sources of law without eliminating them; and so they enabled it to play an effective and vital role in legal practice.

Learned law could also provide a method and principles suitable for the scholarly study of non-Roman laws. Here the distinction made by the commentators between *ius commune* (the 'common', cosmopolitan and learned law of the whole of the West) and *ius proprium* (the law 'proper' or particular to a country, region, town or corporation) took on a major importance. Although the commentators recognized and respected the significance of *ius proprium*, they urged that it should be studied and that gaps in it should be filled by the learned law and its method. Their interest in *ius proprium* also led them to deal with real problems, often taken from everyday life. An example is their theory of statutes (which is still applicable in private international law), which was developed from the conflict of laws between statutes and the other municipal laws of Italian cities. It should not be forgotten that these professors were often directly involved in legal practice as judges or advocates.

The typical works of the School of Commentators are in line with this approach to law: the commentators were first and foremost professors, and their teaching remained based on Justinian's compilations. Their courses (*lecturae*) still scrupulously followed the order of the *Corpus*. Most authors gave *lecturae* only on certain parts of the *Corpus*, but sometimes the teaching of a professor extended to the whole of the compilation. *Lecturae*, once filled out with academic debate and discourses on specific problems, sometimes grew into the encyclopaedic commentaries which gave their name to the school. Another genre, treatises, allowed the authors to leave the confines of the *Corpus*: the point of departure was no longer a particular text drawn from the compilation, but a real instance or problem of legal practice to which the jurist attempted to give a satisfactory solution by making use of the learned law. Examples are the treatise of Bartolus on arbiters or that of Cynus on intestate succession. Closer still to legal practice were the numerous *consilia* written by the authors of this period: the *consilium* was a legal opinion, often very detailed, given by one or more professional lawyers on an actual case, at the request of an individual or an institution. Even the courts requested such opinions (and even in the nineteenth century, German law provided a procedure under which the courts could in certain circumstances request an opinion from the faculties of law). It is largely in the mass of extant *consilia* that the experience and learning of the commentators are to be found.

The School of Commentators produced many authors and an impressive volume of their work survives. Mostly Italians, they maintained the traditional pre-eminence of their nation in the area of legal science. French jurists, however, the best known of whom are Jacques de Révigny (*d.* 1296) and Pierre de Belleperche (*d.* 1308), had been the precursors of the Italian commentators in the second half of the thirteenth century. Their doctrines were diffused in Italy by Cynus of Pistoia (*d.* 1336), the first great author of the School of Commentators. After him the school reached its scholarly summit with Bartolus of Saxoferrato (*d.* 1357) and Baldus de Ubaldis (*d.* 1400). The tradition was continued in the fifteenth century by many other Italian jurists, such as Paulus de Castro (*d.* 1441) and Jason de Mayno (*d.* 1519). Italian pre-eminence was such that this school was known as the *mos italicus iuris docendi* ('Italian method of teaching law'), as opposed to the French school or *mos gallicus*, by which is meant the approach of the

sixteenth-century humanists, who were essentially connected with France.<sup>46</sup>

### The Humanist School of Roman law

32 Sixteenth-century jurisprudence was dominated by the achievements of the Humanist School of Roman law. The last school to profess the primacy of the *Corpus iuris*, it none the less adopted an approach very different from that of the glossators and commentators. Its rise was but one manifestation of the renaissance of Antiquity which, from the end of the Middle Ages, profoundly influenced European science, arts and letters. The impulse, once again – but for the last time – came from Italy. The positive stimulus for the Renaissance was a new enthusiasm for the culture of Antiquity. This was a rediscovery of ancient culture more profound, precise and complete than the somewhat naive and blind admiration characteristic of the Middle Ages. The negative side was the often harsh disdain the humanists directed towards the 'Middle Ages', an expression they coined to describe the obscure centuries between the cultural peaks of Antiquity and their own time. They accused the people of the Middle Ages of having bastardized classical Latin through neologisms and stylistic imperfections which were incompatible with the ancient language of culture; and they reproached them for their ignorance of Greek.

The humanist approach to law brought about a revival of studies of Roman law and the civilization which had created it. The original element in the humanist approach was to apply both historical methods, in order to understand the social context of legal rules, and philological methods, in order to determine the exact meaning of Latin and Greek texts. These principles enabled the humanists to expose the erroneous and anachronistic interpretations given by their predecessors. Sometimes they launched violent attacks on the jurists of the Middle Ages, describing them as fools and accusing them of having submerged Roman law under a mass of Gothic and barbaric accretions.<sup>47</sup>

<sup>46</sup> 'Gallicus' here means 'French' rather than 'Gaulish'; this school flourished in France in the sixteenth century. The expression derives from the fondness of the humanists for ancient Latin geographical names (Belgicus for Dutch, Gallicus for French, and so forth).

<sup>47</sup> In some caustic remarks, Rabelais described the medieval lawyers as being 'ignorant of everything necessary for the understanding of law', accused them of 'knowing neither Greek nor Latin but only Gothic and Barbarian', and charged them with being totally unacquainted with the letters and history of Antiquity. In humanist circles, vituperation of the lawyers was *de rigueur*, and Petrarch, Filello, Valla and Politian were all true to the tradition. On Rabelais, see E. Nardi, *Rabelais e il diritto romano* (Milan, 1912).

The positive results of humanism were considerable. Numerous errors committed by the glossators and commentators owing to their lack of historical and philological expertise were corrected, and knowledge of the ancient world therefore became much more precise and profound; the *Annotationes* of Guillaume Budé, for instance, exposed a whole series of misconceptions by the jurists of the Middle Ages. Their approach enabled the humanists to see the *Corpus iuris* as a historical phenomenon of its own time and place, as a human achievement, and not a 'gift fallen from heaven' as Budé said ironically of the naive medieval approach.<sup>48</sup> Yet humanist criticism had its unfortunate consequences. The Bartolists had adapted the Roman law of the *Corpus iuris* to the needs of medieval society. The humanists rejected these adaptations on the ground that they corrupted the original purity of Roman law; and so they reduced that law to the state of an academic relic, a historical monument, a dead law for scholarly study only. It will be recalled that the Latin language had undergone a parallel evolution: in the Middle Ages Latin had remained a living language, owing to constant adaptation and the introduction of new terms and expressions, but the purism of the humanists turned it into a mere academic tool, a dead language.

By demonstrating the historicity and thus the relativity of the *Corpus iuris*, the humanists destroyed the absolute authority which it had until then enjoyed. If Roman law was no more than the product of a given society of a given period, what reason was there to submit to it in another period, or to accord it an authority superior to the laws of modern peoples?

The founder of the Humanist School was Andrea Alciato (*d.* 1550), an Italian jurist who studied in Pavia and Bologna, where he became the pupil of Jason de Mayno; he then taught at Avignon and Bourges, and later at Italian universities.<sup>49</sup> The university of Bourges became the main centre of the *mos gallicus*, owing principally to Jacques Cujas (*d.* 1590). He was the most outstanding exponent of

<sup>48</sup> Sometimes even the humanists fell into gross errors: U. Zasius, for example, thought the word *carocerus* (the symbolic coach of the city of Milan) was a proper name. On Budé, D. R. Kelley, 'Guillaume Budé and the first historical school of law', *American Historical Review* 72 (1967), 807-34.

<sup>49</sup> Among his many works the *Annotationes in tres posteriores codicis libros* (1513), dealing with the political and administrative institutions of ancient Rome, expresses the novel approach of humanist study.

humanism, and he taught in Bourges (with a few interruptions) from 1555 to 1590. Cujas approached his subject with an exceptional mastery of Roman law and philology, which until the work of Th. Mommsen (*d.* 1903) was to remain unequalled. There were also distinguished German and Dutch proponents of humanism. In Germany, Ulrich Zasius (*d.* 1535), a friend of Erasmus, was one of the first legal humanists. In the Netherlands, the University of Louvain rapidly became a centre of humanism, and jurisprudence was also affected by this cultural revival. At the Faculty of Law, Gabriel Mudaeus (Van der Muyden, *d.* 1560) acquired a great reputation. Among his pupils were Jacob Reyvaert (Raevardus, *d.* 1568) and Mattheus van Wesembeke (Wesenbecius, *d.* 1586). Viglius (*d.* 1577) edited the Greek version of Roman law texts and wrote a commentary on some titles of the *Institutes* according to Alciato's method.

Several jurists of the Humanist School were implicated in the religious conflicts of the Reformation and were compelled to go into exile because of their beliefs. This applies notably to the Frenchman Hugues Doneau (Donellus, *d.* 1591) who took refuge and taught in Germany and in the northern Netherlands. He became one of the leading lights of the University of Leiden (founded in 1575), where he became renowned for his immense learning and total lack of any practical sense. (It is related that the eminent jurist did not know how to make out a receipt for the salary paid to him by the Dutch state.) His *Commentarii iuris civilis* in twenty-eight books had great success in Germany and the Netherlands.

The Humanist School made an unprecedented contribution to broadening and deepening knowledge of ancient law and the ancient world. Even in the nineteenth century, Mommsen was able to start from humanist works published three centuries earlier. Practitioners throughout Europe, however, continued to apply Roman law in the Bartolist tradition, since Bartolist commentaries, treatises and *consilia* supplied solutions to real and present problems. Yet the opposition between *mos gallicus* and *mos italicus* should not be exaggerated. Many lawyers - judges, advocates, and scholars - were inspired by both schools. They still based themselves on the practical work of the medieval Italian school, but from the humanists they acquired a broader conception of law, a more philosophical approach, and the taste for elegant development of their ideas and arguments. These lawyers were above all practical, but they took a

lively interest in ancient history and literature.<sup>50</sup> It is quite right, therefore, to speak of the 'Elegant School' to denote the lawyers of the United Provinces who integrated the style and quality of the humanists into their practical work.<sup>51</sup> With other legal historians, we may therefore recognize a third school besides *mos gallicus* and *mos italicus*, made up of lawyers who hoped to preserve the advances of medieval learning but were also disposed to follow the broader lines of the Humanist School, and to assimilate the human and stylistic qualities of classical literature.<sup>52</sup>

This revived academic Roman law was finally supplanted by national codes inspired by the School of Natural Law. The influence of the old schools, however, did not altogether disappear. Traces of the *mos italicus* are still to be found in legal doctrines and in some parts of the modern codes such as the law of obligations; while the *mos gallicus* survives in the more academic study of ancient law, and in the general culture of legal education.

#### *The influence of Roman law on canon law*

##### *General considerations*

33 The intensive study of Roman law at European universities was not just academic recreation, nor purely historical research. Quite the reverse: it strongly influenced and guided both the practical and the doctrinal development of law. The word 'guided' is used advisedly since, without the renaissance of Roman law, the development of law in Europe would have been fundamentally different. Even without the *Corpus iuris*, the society of the late Middle Ages would have had to free itself from the archaic law of the feudal period and develop a law adapted to its new needs. Such a law would have been the result of original innovation and intellectual effort, its solutions to comparable problems would no doubt some-

<sup>50</sup> E.g. P. Wielant's library (whose catalogue has recently been discovered) contained many humanist-literary works.

<sup>51</sup> Among the members of the Dutch Elegant School are Joachim Hoppers (Hopperus, d. 1576), Arnold Vinnius (d. 1657), Ulrik Huber (d. 1694), Johannes Voet (d. 1713) and Cornelis van Bijnkershoek (d. 1743), as well, of course, as Grotius, a very widely read lawyer who, although best known for his work on natural law and Roman-Dutch law, was also a learned humanist and author of a commentary on the *lex Romana Burgundionum*.

<sup>52</sup> Cf. F. Carpintero, 'Mos italicus, mos gallicus y el Humanismo racionalista. Una contribución a la historia de la metodología jurídica', *Jus commune* 6 (1977), 108-71. Carpintero sees this 'third' school as a transitional movement between the medieval lawyers and the authors of natural law, such as Grotius and Pufendorf.

times have been analogous to those of ancient Roman law, but the whole system of the Justinianic compilations would never have been adopted or reinvented. The Common Law shows exactly how a European post-feudal law might have developed in isolation from the Roman model.

The impact of the *Corpus iuris* and Bolognese teaching in Europe was not directly due to the legislative measures of sovereigns. There are of course measures which have about them something of a 'reception' imposed by the sovereign: in his kingdom of southern Italy Emperor Frederick II promulgated in 1231 the *Liber Augustalis*, which was profoundly influenced by Roman law; the *Siete Partidas* (1256-8) introduced in Castile by Alfonso X the Wise resembles a Roman law treatise; Charles the Bold, having defeated the people of Liège, abolished their customs and imposed Roman law on them. But in spite of these isolated and short-lived measures, the *Corpus iuris* was never imposed by authority. Even in the Holy Roman Empire, where the emperors considered themselves the successors of the Christian emperors of ancient Rome, the reception was not achieved by an imperial act: the decision in favour of reception was taken by the 'Estates' (*Reichsstände*) of the empire, and was based not on a specific statute but on the strongly Romanized case law of the *Reichskammergericht* founded in 1495.<sup>53</sup>

The triumph of the *Corpus iuris* is to be explained first and foremost by its prestige and its intrinsic doctrinal quality: Roman law was authoritative *non ratione imperii, sed imperio rationis*.<sup>54</sup> There are no modern parallels of such a phenomenon, but the role of American Common Law in relation to the diverse laws of the different states of the United States might be mentioned: it supplies guiding principles which are refined by scholarship, but it has no legislative force. Another instance is English Common Law, which in international commercial contracts is frequently declared to be applicable, even when the contracting parties have no connexion with England.

The task now is to study in detail how and by what means the *Corpus iuris* guided the development of medieval law, dealing first with canon law, and then with secular laws.

<sup>53</sup> Cf. section 53 below. The *Reichskammergericht* (imperial chamber of justice) was an institution of the *Reichsstände* (Estates of the empire) and not of the emperor; on the contrary, it even encroached on the emperor's own jurisdiction. Towards 1500 many German cities reformed their municipal law under the influence of Roman law (*Reformationen*).

<sup>54</sup> 'Not by reason of power, but by the power of reason.'



## Gratian

34 It is no accident that the study of canon law began in the twelfth century in Bologna, where the teaching of Roman law first flourished. The founder of the scholarly study of canon law was Gratian (who died probably before 1160), a Camaldolese<sup>55</sup> monk who taught theology at the convent of Saints Felix and Nabor in Bologna and who became particularly attracted to the study of the law of the church. His work, composed towards 1140, is entitled *Concordia discordantium canonum* ('reconciliation of conflicting canons') but is more generally known as the *Decretum Gratiani*.<sup>56</sup>

The *Decretum* is a systematic collection of ecclesiastical sources of different origins, and is made up principally of decisions of councils (*canones*: hence canon law to signify the law of the church) and decretals (pontifical letters interpreting or establishing rules of law).<sup>57</sup> Gratian also included various extracts especially from Scripture and the church fathers. His collection was certainly not the first of its kind,<sup>58</sup> but it was by far the most encyclopaedic, and took in practically all the sources of canon law known at the time.<sup>59</sup> Gratian was not content with compiling and ordering his sources. His original contribution was to summarize the texts and define the legal problem with which they were concerned. Furthermore, Gratian attempted, as the title of his work makes clear, to resolve disparities and occasional contradictions between different texts. To do so he established a hierarchy of sources (for instance, an ecumenical council took precedence over a provincial council, a pontifical letter over an episcopal letter). Above all, he employed the tried and tested technique of *distinctio*, which allowed the different meanings

<sup>55</sup> The order takes its name from Camaldoli, north of Arezzo, where it was founded as a reclusive order around 1000 by St Romuald. J. T. Noonan, 'Gratian slept here. The changing identity of the father of the systematic study of canon law', *Traditio* 35 (1979), 145-72.

<sup>56</sup> From the title of an earlier work, the *Decretum* of Ivo of Chartres (d. 1116). The name 'Decretum' also causes confusion, since it suggests a legislative work, although Gratian composed it as a scholar not an official.

<sup>57</sup> Decretals (or in full, *litterae decretales*) are so called because they are letters in the form of a 'decree', in the sense that they establish and impose a rule of law. Most are addressed to individuals (usually bishops) who had consulted the pope on a particular question.

<sup>58</sup> On many other collections, see A. van Hove, *Prolegomena*, 2nd edn (Malines and Rome, 1945; *Commentarium Lovaniense in Codicem Iuris Canonici* I, 1), 120-336.

<sup>59</sup> Gratian deals with very diverse subject-matter, and in particular with questions more relevant to theology than to law, such as sacraments and liturgy; in his day, canonistic jurisprudence was still taking shape from other disciplines (like the learning of the glossators).

and significations of a word to be distinguished.<sup>60</sup> For example, some canonical texts forbade the participation of the clergy in war, while others seemed to approve it. The solution was to distinguish between a defensive or just war and an offensive or unjust war.<sup>61</sup> The *Decretum* also contains texts which allow lay people to take part in the election of bishops, while others seem to exclude all participation by the people (*populus*) and reserve competence to the clergy (*clerus*) alone. Gratian tried to resolve this contradiction by accepting that lay people could not be ignored at such elections, but limiting their participation to expressing agreement with the choice of the clergy.<sup>62</sup> This example shows that contradictions were sometimes resolved only by means of subtleties and hair-splitting dictated by the need to reconcile the irreconcilable.

Gratian was not only a scholar but a teacher who appreciated the educational value of the concrete case in the study of rules. The second and greater part of his work is made up of fictitious cases (*causae*) which introduce a legal discussion, in which reference is made to the relevant texts and observations are also made by Gratian himself (*dicta Gratiani*). His method may be illustrated by an example from the law of marriage (it also has implications for the law of ordination). The case was the following: a married non-believer (which at this period no doubt means a Muslim) converted to Christianity, and was deserted by his wife, who was opposed to the new religion. He then married a Christian woman and on her death entered the clergy. Later he was elected bishop. Gratian formulates three legal problems (*quaestiones*) in relation to this case: (i) is a marriage between non-believers valid? (ii) May the convert remarry while his first wife is still alive? (iii) Should a man who marries another woman after having been baptized be considered a *bigamista*?<sup>63</sup> The answers proposed by Gratian are (i) between non-believers there can be an honest marriage, but it is not binding; (ii)

<sup>60</sup> An important part of his work is a series of *Distinctiones*.

<sup>61</sup> On the canonistic doctrine of different types of war, see C. Erdmann, *Entstehung des Kreuzzugsgedankens* (Stuttgart, 1933); F. Prinz, *Klerus und Krieg im früheren Mittelalter* (Stuttgart, 1971); F. H. Russell, *The just war in the middle ages* (Cambridge, 1975); E. D. Hehl, *Kirche und Krieg im 12. Jahrhundert. Studien zu kanonischem Recht und politischer Wirklichkeit* (Stuttgart, 1980).

<sup>62</sup> Dist. 62-4. Cf. F. Lot and R. Fawtier, *Histoire des institutions françaises au moyen âge, III: Institutions ecclésiastiques* (Paris, 1962), 165-6; H. Müller, *Der Anteil der Laien an der Bischofswahl* (Amsterdam, 1977); J. Gaudemet, *Les élections dans l'église latine des origines au XVI<sup>e</sup> siècle* (Paris, 1979).

<sup>63</sup> I.e. a person married twice in succession not (in the modern sense) to two people at once.

in a marriage between non-believers, if the wife leaves her husband, he may remarry even if he has converted in the meantime; (iii) by his second marriage, he none the less becomes *bigamista* and cannot as a result attain to higher orders. The man elected bishop cannot therefore be ordained or installed. (In this example too there are contradictory authorities: St Jerome saw no impediment in the state of 'bigamy', but St Augustine followed by Pope Innocent I asserted the opposite, and Gratian opted for their view.<sup>64</sup>)

Gratian therefore combined the qualities of compiler and teacher, and his work was not merely a collection of earlier sources but also a manual for study. For centuries the *Decretum* served as the basis for university teaching, even though it was never officially sanctioned. Gratian's work inaugurated the important studies of the School of Decretists, which was later followed by the decretalists.

#### The decretals

35 Gratian marks the end of the first millennium of the history of canon law and also the beginning of its new and unprecedented ascendance. Gratian's work and teaching had started and had facilitated the rise of canon law from the twelfth century, but that had been caused above all by a veritable explosion of ecclesiastical legislation beginning even in his time. This legislation included the canons of councils,<sup>65</sup> but was made up principally of pontifical decretals. While no decretal had been promulgated between AD 891 and the mid-eleventh century (the beginning of the Gregorian Reform), there are almost 2,000 for the period from the pontificate of Alexander III (1159-81) to that of Gregory IX (1227-41).

An illustration is the decretal *Veniens ad nos* of Alexander III (x.4, 1, 15) which was decisive for the canonistic theory on the formation of marriage. The decretal was the response to an inquiry from the bishop of Pavia about a specific case: in his diocese a certain G. had been surprised by his host while in bed with the host's daughter. Thereupon the daughter and G. exchanged consents for marriage *de presenti* which, according to contemporary theory, sufficed to form a valid marriage. It then transpired that the man was already living

<sup>64</sup> Cf. C. Brooke, *The twelfth century renaissance* (London, 1970), 79.

<sup>65</sup> For example the Fourth Lateran Council of 1215 was one of the most important in the history of the church.

together with another woman and actually had children, but he had not married her and had merely promised to marry her *de futuro*. Which of these 'marriages' was valid? The decision was referred to the pope, who held that a promise of marriage (*sponsalia de futuro*) followed by sexual relations (*copula carnalis*) formed a valid marriage, and that G. was therefore actually married when he made his declaration of marriage *de presenti* to the daughter of his host. The second marriage was therefore void.<sup>66</sup>

Systematic collections of new decretals were begun very early in order to meet the needs of teaching and practice.<sup>67</sup> A period of legislation and intensive compilation culminated in 1230 when the Spanish canonist Ramón de Peñaforte, chaplain to Gregory IX, was entrusted by him with the task of editing a definitive collection of the constitutions and decretals promulgated since the composition of the *Decretum* of Gratian. In carrying out this task, for ease of consultation Ramón de Peñaforte added to the texts summaries in his own words, and rubrics indicating the subject-matter. The various subjects were ordered and corrected, some were eliminated, and they were regrouped in five books according to an older model: *iudex* (the judge) on the organization of the courts; *iudicium* (process, judgment) on procedure; *clerus* (the clergy) on their rights and privileges; *connubium* (marriage) on the law of the family and persons; *crimen* (crime) on criminal law and procedure. In 1234 the collection was promulgated by Gregory IX: any texts later than the *Decretum* of Gratian which were not included in the new collection were abrogated, and the text of the collection alone was declared authoritative. It is entitled *Liber decretalium extra Decretum vagantium* ('book of decretals current outside the *Decretum*') and is now known as the *Liber extra*. The collection was also intended for teaching: copies were sent to the universities of Bologna and Paris. Just as the School of Decretists had devoted their study and teaching to the *Decretum*, so the decretals now became the object of study by the decretalists.

<sup>66</sup> C. Donahue, 'The policy of Alexander the Third's consent theory of marriage', *Proceedings of the fourth international congress of medieval canon law* (Vatican, 1976), 251; *idem.*, 'The dating of Alexander the Third's marriage decretals', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (K.A.), 65 (1982), 70-124.

<sup>67</sup> P. Landau, 'Die Entstehung der systematischen Dekretalensammlungen und die europäische Kanonistik des 12. Jhs.', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (K.A.) 65 (1979), 120-48.

The canonists also glossed the texts of the *Decretum* and the decretals (just as the Roman texts had been glossed) and composed an *apparatus* on the entire collection. The *apparatus* of Johannes Teutonicus (d. 1245 or 1246), revised by Bartholomew of Brescia (d. 1258) became the ordinary gloss on the *Decretum*; that of Bernard of Parma (d. 1263), based among others on the gloss of Vincentius Hispanus (d. 1248), became the ordinary gloss on the *Liber extra*. The *Decretum* and *Liber extra* were also the subject of important *summae* and *lecturae*,<sup>68</sup> as well as repertories, collections of *casus* and other works largely intended for practitioners. New decretals were promulgated after the *Liber extra*, and some popes published partial collections of them, notably the *Liber Sextus* of Boniface VIII (1298)<sup>69</sup> and the *Constitutiones Clementinae* of Clement V (1314, promulgated in 1317 by his successor John XXII).

The *Decretum* of Gratian and the official collections of decretals together make up the *Corpus iuris canonici*, a title used from the fifteenth century (by analogy with *Corpus iuris civilis*). In the sixteenth century the collections were submitted by pontifical order to a commission called the *Correctores Romani* for textual revision. The results of their work were published in Rome in 1582 under the title *Corpus Iuris Canonici* and this was not replaced until 1917 by the *Codex Iuris Canonici* of Benedict XV, which was conceived as a modern code. A revision of canon law was undertaken in connexion with the Second Vatican Council and led to the promulgation of a new code in 1983.

#### The canonists

36 There are several aspects to the influence of Roman law on canonistic legislation and doctrine. The example of Roman law enabled canon law to establish itself as an independent discipline, distinct although not separate from theology and ethics. This point deserves emphasis, since other religions make no distinction between rules of conduct and religious taboos on the one hand, and rules of

<sup>68</sup> Among the earliest works of the Decretists are the *Summae* of Paucapalea (1140-8), of Roland Bandinelli (the future Pope Alexander III) composed before 1148, and of Stephen of Tournai (not earlier than 1160); the *Summa* of Huguccio (not earlier than 1188) is very important. Among the best-known works of the Decretalists are the *Summa aurea* or *Hostiensis* of Henry of Susa (1250-3) and the commentary of Sinibaldus Fliscus (the future Pope Innocent IV) composed about 1251.

<sup>69</sup> '*Sextus*' because it was intended to complement and continue the five books of the *Liber Extra*.

law on the other; or, in other words, between the confessional and the court. Roman law scholarship at Bologna contributed to the rise of an independent canonistic scholarship which was soon distinguished by its own faculties, schools, classic works and authoritative commentaries. The study of Roman law was (as we have seen) necessary for the education of canonists, for it was in the schools of the civilians that canonists learned the 'grammar' of learned law, and there that they assimilated methods, fundamental concepts and legal terminology.

The *Corpus iuris civilis* gave strong support to the centralist policy of the popes. The Roman emperor, as universal legislator and supreme judge served as a model for pontifical aspirations to legislate and to administer justice for the whole of Christendom. The rise of canon law coincided with a marked resurgence of legalism within the church, and a focusing of attention more on questions of competence, justice and fiscality than on teaching, spirituality or asceticism. Although the popes had taken an interest in questions of law even before this time, it is significant that the tradition of pontifical jurists begins only in the twelfth century. Officials of the church came to be chosen more and more for their legal education and experience, rather than for their aptitude to govern or their personal sanctity or charisma.<sup>70</sup>

Canon law expressly recognized the authority of Roman law, inasmuch as it was the legislation of the Christian Emperor Justinian, at least so far as its dispositions were not contrary to the canons. This doctrine is found in Gratian: the statutes of emperors are to be applicable in ecclesiastical matters unless they are contrary to the holy canons of the church (D. x c. 7; *dicta post* D. x c. 6 and *post* c. 4, c. xv q. 3). The *Decretum* also contains some texts taken directly from Justinian's compilations.<sup>71</sup> The influence of Roman law is also to be found in the application by analogy of some Roman rules to subjects which were peculiarly ecclesiastical. Thus the doctrine of the canonists on *error in persona* as the key to the nullity of marriage is inspired by Roman principles of error in the contract of sale. The

<sup>70</sup> This excessive legalism was attacked by the reformers, who thought the church of the late Middle Ages paid too much importance to institutional and administrative questions and too little to its holiness.

<sup>71</sup> The source of the (much more numerous) additions of canonical texts known as *paleae* (a term whose exact significance is unclear) has not yet been established; they are attributed to pupils of Gratian.

appeal of this theory was such that, in the absence of canonistic scholarship or legislation, the canonists used it to develop rules on error as to person, which vitiated consent and so entailed the nullity of marriage.<sup>72</sup> Canon law criminal procedure is another striking example of the use of the Roman law analogy. For the rigorous repression of heretics, the canonists resorted to the very severe rules provided in Roman criminal law for the crime of treason. In the medieval period heresy as an offence 'against divine majesty' was assimilated to affront to the imperial majesty in ancient Rome. The civilians also contributed so much to creating a modern procedure for the church courts that it is known as Roman-canonical procedure; here Roman and canonical elements became fused.<sup>73</sup>

The influence of canon law on secular law was considerable; in fact the history of law in Europe is inconceivable without the contribution of canon law. The institutional structure of the post-Gregorian church, with its hierarchy, centralization, administration and its bureaucracy, served as a model for the institutions of kingdoms and principalities from the late Middle Ages onwards.

In some important areas of private law even lay people were subject to the jurisdiction of the church courts. The obvious example is the law of marriage and the family. This had inevitable repercussions for the law of succession, in which the question of legitimacy or illegitimacy was often decisive. People encountered the learned law, at least in its canonical form, in innumerable actions on questions of engagement, marriage, separation and paternity.<sup>74</sup> At the same time they encountered Roman-canonical procedure, with its own rules of evidence, judgment and appeal. This was the first experience which many people had of Roman law in practice, since the secular courts actually began to apply Roman law only after church courts

<sup>72</sup> J. Gaudemet, 'Droit canonique et droit romain. A propos de l'erreur sur la personne en matière de mariage', *Studia Gratiana* 9 (1966), 47-64. Obviously error as to person was very rare; but error as to the social status of the spouse was more frequent and, according to some authors, could be assimilated to *error in persona*; thus a free person who married a serf by mistake could invoke error to argue for nullity.

<sup>73</sup> Cf. below section 38.

<sup>74</sup> G. Vleeschouwers and M. van Melkebeek, *Liber sententiarum van de officialiteit van Brussel 1448-59* (2 vols., Brussels, 1982-3; Commission royale des anciennes lois et ordonnances, Recueil de l'ancienne jurisprudence de la Belgique, 7<sup>e</sup> série).

had become widespread, even in the Mediterranean regions (and *a fortiori* in more northerly regions).<sup>75</sup>

Some modern legal theory was developed by the medieval canonists. One example is the doctrine of *nuda pacta*, which was inspired by moral considerations (*solus consensus obligat*; *pacta sunt servanda*: every agreement, even if concluded without formalities, must be respected); another is the theory of *causa* in the law of obligations.<sup>76</sup> In criminal law, the canonical theory of culpability<sup>77</sup> prepared the way for modern criminal law, which attaches prime importance to determining culpability (voluntary or involuntary, premeditation, recidivism, mitigating circumstances, and so on), whereas primitive criminal law was interested above all in the harm done and in compensation.

#### *The influence of the 'ius commune' on legal practice in general*

37 The glossators (as we have seen) exercised an early and profound influence on canon law. But the spread of learning in Roman law was not limited to canon law, whose field of application was restricted both *ratione materiae* and *ratione personae*. Roman law increasingly affected legal life and practice in Europe in general. The degree of Romanization varied greatly from one country to another, but none completely escaped. The Roman law of the medieval universities therefore shaped and steered the development of law throughout Europe.

#### *Extent and speed of Romanization*

38 In some areas of the Mediterranean world, learned law was adopted as early as the thirteenth century as the basis of the legal system. In these areas, the customs and ordinances peculiar to each country or city were regarded as local variants, which were of course

<sup>75</sup> In the county of Flanders, for instance, learned law was already to be found around 1200 in the practice of the *officialité* of Tournai, but in secular practice the first traces of the influence of the legists are not to be found until the fourteenth century, particularly in the Audience of the counts of Flanders.

<sup>76</sup> Even today there are the two schools of 'causalists' and 'anti-causalists' among the civilians; cf. J. Limpens, *De wording van het contract* (Brussels, 1970; Med. Kon. ve Akad. Wetenschap. pen, xxii, 3) and H. Capitant, *De la cause des obligations* (Paris, 1927). On medieval theories, see E. M. Meijers, 'Les théories médiévales concernant la cause de la stipulation et la cause de la donation', *Revue d'histoire du droit* 14 (1932), 376; G. Chevrier, *Dictionnaire de droit canonique* iii (1942), col. 1-10.

<sup>77</sup> S. Kuttner, *Kanonistische Schuldlehre* (Vatican, 1935; Studi e testi, 64).

valid but were of limited application and were anyway subject to the general rules of the learned law. Italy and the south of France, the regions of written law,<sup>78</sup> are the classic instances of this type of Romanization. In Spain, there was a more tenacious tradition of local *fueros* (compilations of local law, sometimes archaic and of Visigothic origin), and the *ius commune* did not succeed in taking over entirely.

In Italy and the south of France the learned Roman law penetrated more easily owing to the tradition of Roman vulgar law. In Italy the university centres of learned law were clearly an important factor in Romanization. Twelfth-century Italy was also the European country in the most advanced state of development, not only politically but also socially and economically. There were strong cultural links between the Occitan region in southern France and Lombardy and Tuscany: the Italian glossators had already lectured in the south of France in the twelfth century, and universities and law teaching emerged there during the first half of the thirteenth century. The conversion of Roman vulgar or customary law into learned law could therefore take place in Italy and in the Midi spontaneously and without official intervention. Practitioners there recognized without difficulty the superiority of the *ius scriptum* taught at Bologna, and naturally preferred it to the local primitive and underdeveloped laws which had grown up over the centuries on the basis of Roman vulgar law.

In France, the voluntary adoption of the *ius scriptum* in the south and the preservation of ancient Germanic customary law in the north brought about and institutionalized a division between the region of written law and the region of customary law which was to last until the end of the *ancien régime*.<sup>79</sup> The Crown tolerated this division, but it always refused to recognize that Roman law was applied in the south because of imperial authority; instead, in its

<sup>78</sup> The boundary between the regions of written law to the south and customary law to the north became established in the thirteenth century. It ran from the Atlantic in the west above the island of Oléron to the north of Saintonge, Périgord and Limousin, then south of the Auvergne, north of the Mâconnais, Bresse and the Pays du Cex to Lake Geneva. It roughly corresponded to the linguistic boundary between French and Occitan, which was just to the south. See the map in H. Klimrath, 'Etudes sur les coutumes', *Revue de législation et de jurisprudence* 6 (1837), 107-35, 161-214, 321-93; the map has frequently been reprinted *inter alia* in J. Brissaud, *Cours d'histoire générale du droit français*, 1 (Paris, 1904); J. A. Brutails, *La géographie monumentale de la France* (Paris, 1923); J. Gilissen, *Introduction historique au droit* (Brussels, 1979), 241.

<sup>79</sup> Its distant origin was examined in the chapter on the early Middle Ages. The dichotomy remained to the end of the *ancien régime*, at least in theory; in practice differences exist even nowadays.

view it was founded solely on the ancient practices of the region, which had to be respected by the king.<sup>80</sup> The decretal *Super specula* promulgated by Pope Honorius III in 1219 at the instance of the king of France<sup>81</sup> made reference to 'Francia<sup>82</sup> and the other provinces' of the kingdom 'where lay people do not live under the rule of Roman law'. In this official document the legal dichotomy in France was openly acknowledged.

At a later period the learned law was introduced and adopted as national law in some northern regions, and replaced disparate and inconvenient customs. This was the case in Germany, where the Reception began towards 1500, and in Scotland, where continental learned law established itself during the sixteenth century. A German version of the *ius commune* was developed in early modern times and is known as the *Usus Modernus Pandectarum* ('new use of the *Pandects* or *Digest*'). The last flourish of the *Usus Modernus* was in the nineteenth century, particularly in the work of B. Windscheid (*d.* 1892), the most important of the pandectists. The legal authority of the *Digest* in particular, and Roman law in general, disappeared when the *Bürgerliches Gesetzbuch* (*BGB*) came into force in 1900. Still, the influence of the Pandectist School continued to be felt; and, besides, Windscheid played a large part in the compilation of the *BGB*. Scotland in the twelfth and thirteenth centuries had been strongly influenced by England, and Scots law had come close to Common Law. This development was interrupted when Scotland and England were at war, and to fill the gaps in its own underdeveloped customary law, Scotland decided to introduce continental *ius commune*, which had all the right credentials. It could give Scotland a sophisticated legal system, which was uniform throughout the regions, and it was also distinct from English law.<sup>83</sup> In these countries the learned law, Roman and canon law, was in principle the national common law; regional laws had a secondary role.

In other regions, northern France and the southern Netherlands,

<sup>80</sup> This conception is found in a royal ordinance of July 1254 about the seneschalsy of Beaucaire. An ordinance of July 1312 provided that the kingdom was not ruled by written law; and although the population of one part of it lived by written law with royal consent, that was not because written law was established, but because their traditional customary law was in conformity with written law. Such political speciousness did not affect the views of the regional counsellors, who sat in the *parlements* of Aix; Grenoble and Toulouse: for them it was enough to apply the *Corpus iuris civilis*, and that was that.

<sup>81</sup> Cf. section 43 below.

<sup>82</sup> I.e. the Ile-de-France, the old *domaine direct* of the Capetians.

<sup>83</sup> For this reason many Scottish students studied Roman law on the continent, initially at Orléans and Louvain, and after the Reformation mainly at Leiden.

official compilations of traditional customary law were made and promulgated. Although this preserved the customary character of these regions for the following centuries, the *ius commune* was not ignored and it played an official supplementary and interpretative role. Even in the customary regions, an education in written law was in any event indispensable for all those laying claim to be lawyers. In the northern Netherlands, Roman-Dutch law was a unique development: in Holland the customs had not been homologated, and the *ius scriptum* had not been formally introduced by way of authority. Jurisprudence therefore evolved a new synthesis of Dutch law and Roman law, adapted to the society of its time. Roman-Dutch law rapidly acquired an uncontested prestige and its influence was considerable right to the end of the *ancien régime*.

The development in England was without doubt the most unusual in Europe. In the twelfth century the royal courts had created an English common law inspired by feudal and customary law and devoid of Roman elements. This Common Law remained the basis of English law and was not affected by the diffusion of Roman law. Other courts, however, were created besides the Common Law jurisdiction. These developed their own case law and their own principles, which were in several respects remote from classical Common Law and closer to continental learned law, especially Roman-canonical procedure. This applies above all to Equity, the case law of the chancellor, who in the Middle Ages was almost always a bishop. He employed a procedure close to the Roman-canonical, which suited him (as a bishop) better than that of the Common Law courts. But the Court of Chancery and the Court of Requests (which was modelled on it) were less marked by Roman law than the Court of Admiralty, where the judges applied pure *ius commune*. There were also canonical elements in the procedure of the Star Chamber. The Church courts also, in England and throughout the medieval West, already applied canonical law and procedure, and that tradition was maintained even after the break with Rome.<sup>84</sup> The learned law in England was not confined to the legal practice of some jurisdictions, but was also taught at Oxford and Cambridge, and the principal Common Law author of the Middle

<sup>84</sup> As the Reformation had abolished the teaching of canon law, the learned jurists of the church courts were usually doctors in Roman law. 'Civilians' are also to be found in the English courts influenced by Roman law, the Court of Admiralty and Court of Chivalry. From the fifteenth century, these lawyers formed a body known as 'Doctors' Commons'.

Ages, Bracton (d. 1268) in his celebrated treatise *On the laws and customs of England* betrays a profound knowledge of learned law.<sup>85</sup> Since Vacarius,<sup>86</sup> the *Corpus iuris civilis* had never been completely absent from English legal theory and practice.

The *ius commune* was a true European law which transcended geographical boundaries. Yet it still met with social obstacles, for it was accessible only to a restricted elite of those educated at university, and to the people at large its Latin was a Sibylline tongue.

#### *The dynamic of the 'ius commune': ideas*

39 Any historian who is not content merely to recite facts must ask himself what caused the remarkable but incomplete success of Roman law in the Middle Ages and early modern times. In part it must be attributed to the intrinsic qualities of the *Corpus iuris*, which is the product of a highly developed civilization and the long experience of one of the greatest legal nations in history. Although Roman law was several centuries older, it still corresponded to a stage of social evolution incomparably more advanced than that of Europe around 1100. Rome had been a cosmopolitan and sophisticated empire, with a developed urbanized economy. Europe in the eleventh century, on the other hand, was a feudal and agrarian society of provincial scale and style; and in the twelfth century its degree of cultural and intellectual development was still primitive.

Romanization therefore meant modernization. Roman law appeared to be a modern system, progressive, orientated to the future, while customary law was traditional, antiquated and bound up with an increasingly obsolete stage of development. Roman law also had the advantage of being taught and studied in the universities, which in the late Middle Ages represented the centres *par excellence* of learned thought. To appreciate this, it is sufficient to compare the technique and mastery of style, the presentation, and the rigour of reasoning of the civilian treatises and commentaries with the clumsy attempts of their contemporaries who tried to formulate customary law relatively clearly. Jurisprudence was a skill

<sup>85</sup> *Bracton on the laws and customs of England*, ed. G. E. Woodbine, trans. with revisions and notes by S. E. Thorne, 4 vols. (Cambridge, Mass. and London, 1968-77; Latin text and English translation).

<sup>86</sup> Vacarius was an Italian glossator who taught Roman law at Oxford in the time of King Stephen (1135-54) and produced a cheap abridged version of the *Corpus iuris* for his students, which is known as the *Liber pauperum* ('book of the poor'). See the edition by F. de Zulueta (Oxford, 1927).

which had necessarily to be acquired in the school of Roman law. And when the professors in their teaching paid attention to the practical demands of the time, as did the Bartolists, the appeal of their message was irresistible. It is symptomatic that when Bracton set out to describe and comment on English law (which had escaped the influence of Roman law) he felt obliged to borrow the principles of a 'general theory' of law from Azo and other glossators.

Yet the intrinsic qualities of the *ius commune* do not alone explain the Romanization of the West. The teaching of the Bolognese masters, excellent though it was, would hardly have been sufficient in the absence of other powerful social factors. The rise and fall of legal systems and great legislative projects are in practice determined by the will of the dominant groups and institutions in a given society. The history of law cannot be understood out of the context of political history, and the effect of law on society is itself a political phenomenon in the broad sense. It is proper therefore now to consider what political and social circumstances allowed the learned law to spread through Europe.

The church was the first of the great powers of the medieval world to lend resolute support to Roman law. The education of Church lawyers was based on the *Corpus iuris civilis*, from which the methods and sometimes even the principles of canon law were derived, and the procedure of the church courts was impregnated to such a degree with Roman law that it is called 'Roman-canonical'. Centralization, hierarchy, bureaucracy, rationalization from above, the importance of law and administration: these were all elements contained in Roman law which the church authorities could use. From the Gregorian Reform, they were the broad lines of papal policy, and they were also precisely the characteristics displayed by Roman law, especially the law of the late Roman empire as enshrined in the *Corpus iuris*. The church adopted Roman law without hesitation despite the fact that the principal authors had lived in pagan times, for the law of the *Corpus* was associated with the prestige of the great Christian emperor Justinian.

Kings and emperors also realized the advantages they could derive from Roman law. In the Holy Roman Empire the authority of Roman law was self-evident, as the emperors considered themselves the successors of the Christian *principes* of ancient Rome. Kings too thought of themselves as the successors of the *caesar* or *princeps* of the *Corpus iuris*; the expression *rex imperator in regno suo* ('the king in his own kingdom is [as sovereign as] the emperor') was a commonplace

from the twelfth century. For the sovereigns of the late Middle Ages, the *Corpus* was above all an inexhaustible reserve of arguments to reinforce their positions. The *Corpus* says nothing about the rights of the people or limits on the power of the state; it knows nothing of democracy. Principles which support the omnipotence of the emperor and the majesty of the state therefore stand out all the more clearly. Maxims of the type *princeps legibus solutus* and *quod principi placuit legis habet vigorem*<sup>87</sup> suited to perfection sovereigns who were eager to break away from the feudal mould and establish modern political structures. This was why Emperor Frederick Barbarossa approached the four doctors of Bologna at the time of the diet of Roncaglia (1158) seeking a definition (which was to be used against the cities) of *regalia*, the sovereign and inalienable rights of the Crown. In France the legal advisers of Philip IV the Fair employed Roman law to justify the condemnation of the count of Flanders, as vassal of the king of France. Traditional feudal conceptions now came up against modern ideas on the indivisible sovereignty of the state.<sup>88</sup>

For sovereigns pursuing policies of rationalization and unification of the laws of their kingdoms it was tempting to take up the available model of Roman law.<sup>89</sup> No doubt it would be inaccurate to maintain that the rise of the modern sovereign state was a consequence of the teaching of the glossators; and it can in any case be shown that it had already taken shape in England and in Flanders before Roman law appeared there. None the less it is undeniable that the *Corpus iuris* provided authorities and solid compelling arguments for reinforcing state power against feudal fragmentation, and that many commentators on Roman law took the side of absolutism in the great debate of the age on the power of the state.<sup>90</sup> The legists<sup>91</sup> stood at the centre

<sup>87</sup> 'The emperor is not bound by the laws' and 'What pleases the emperor has the force of law.'

<sup>88</sup> The Dutch cleric and scholar Philip of Leiden (d. 1382), who was in the service of count William V of Holland, wrote a *Tractatus de cura rei publicae et sorte principantis* in which he argued for the extension of royal power and the civil state and against the nobility; for these purposes he made use of the Roman law he had studied at Orléans (he was also a doctor of canon law of the University of Paris). See P. Leupen, *Philip of Leyden. A fourteenth century jurist* (The Hague and Zwolle, 1981; *Rechtshistorische Studies*, 7).

<sup>89</sup> E.g. Louis IX of France in the ordinances of 1254 and 1258 which attempted to introduce a French version of Roman-canonical procedure. This met with resistance in feudal circles, which preferred such things as duels to inquests.

<sup>90</sup> Baldus, for example, wrote in his commentary on c. 1.14.4 that '*suprema et absoluta potestas principis non est sub lege*'; cf. R. W. and A. J. Carlyle, *History of medieval political theory*, vi (London, 1950), 20. On political exploitation of the *auctoritas* of Roman law, W. Ullmann, *Law and politics in the Middle Ages. An introduction to the sources of medieval political ideas* (London, 1975).

<sup>91</sup> So called as at university they had studied the *leges* of the Roman emperors (i.e. the *Corpus iuris civilis*).

of power, and there they developed doctrines to support the policies of centralization, rationalization and standardization pursued by sovereigns.

*The dynamic of the 'ius commune': the jurists*

40 The authorities of the emerging nation states not only made use of the principles of Roman law, but also secured the services of graduates of law faculties. In addition to ideas and rules, the universities could supply officials trained in the reasoning and argumentation of the learned law. From the thirteenth century, legists are to be found occupying influential positions in central institutions and courts of justice even beyond the Mediterranean world. In France they sat in the Parlement de Paris<sup>92</sup> from the mid-thirteenth century, and at court proved themselves loyal servants of the imperialist policy of Philip IV the Fair. In the county of Flanders, they appeared from 1279 at the court of Guy de Dampierre. The first councillors were still Italian and French, but in the fourteenth century most were Flemings who had studied at Bologna or Orléans.<sup>93</sup>

Large and powerful cities were also conscious of the advantages to be derived from having officials in their service whose legal education had equipped them to carry out the specialized tasks of municipal administration. The cities preferred to have university graduates to prepare and defend their legal actions. While city magistrates had been unimpressed by the theories in favour of sovereign power, they could see that the professional education offered in the law faculties could be turned to their advantage, and that in the huge arsenal of the *Corpus* it was not too difficult to discover quotations which could support their own interests.

Here it should be noted that medieval thought did not object to citation of ancient sources completely out of context or their application to situations for which the Romans had never intended them. The *Corpus iuris* could therefore satisfy the most diverse demands. The maxim *quod omnes tangit ab omnibus approbetur*<sup>94</sup> was

<sup>92</sup> Cf. section 53 below.

<sup>93</sup> See J. Gilissen, 'Les légistes en Flandre aux XIII<sup>e</sup> et XIV<sup>e</sup> siècles', *Bull. Comm. Roy. Anc. Lois* 15 (1939), 117-231.

<sup>94</sup> c. 5.59.5.3. The rule was wrenched from its context and applied, in favour of the conciliarist thesis, to the organization of both church and state. Cf. J. Maravall, 'La fórmula "quod omnes tangit" y la corriente democrática medieval en España', *Album E. Lousse*, IV (Louvain, 1964), 1-13; A. Marongiu, 'Le "quod omnes tangit" et une légende dure à mourir', *Revue historique de droit français et étranger* 48 (1970), 10-11; W. Ullmann, *Law and politics*, 281-2.

invoked as a fundamental principle in favour of representative institutions and participation by the people in decisions which concerned them. A literal reading could give the maxim a democratic meaning. To find such a rule in Justinian's *Code*, which is after all the work of an authoritarian regime, would be surprising - except that there it has no connexion with state power, and applies instead to a private-law institution, tutorship. Acts of administration which affected the property of a ward had to be approved by all the tutors. For such reasons it was inevitable that from the thirteenth century Italian cities should entice law professors, create universities and appoint lawyers to public office. In the twelfth century Roman law was still regarded as an instrument of imperial power; but its application in the thirteenth century in the cities of northern Italy (where Bologna had become a staunch focus of opposition to the emperor) was such that in 1224 Frederick II created a university in Naples favourable to his own interests, where the *Corpus* would be interpreted and elucidated more 'correctly'. In northern regions there was a comparable development: legists were appointed to the service of cities, and universities were founded on municipal initiatives, for example Louvain in 1425. But all this happened considerably later than in Italy.<sup>95</sup>

Finally, legal circles made their own contribution to the diffusion of the learned law. Advocates, always on the lookout for arguments to suit their own cases, did not hesitate to cite the *Corpus iuris* to impress their audiences.<sup>96</sup> In his defence a litigant had no option but to call another advocate who could either cite other texts of the *Corpus* refuting the arguments of his adversary or show that the texts cited by him were not relevant. From now on mastery of the learned law became an important trump card.<sup>97</sup> Besides, it was useful not just for the parties but for judges too, when confronted with new

<sup>95</sup> From 1304 to 1332 Ghent had in its service Hendrik Braem, *legum professor*, at a salary of 100 pounds. Liège obtained the services of John of Hocsem (d. 1348), also *legum professor*.

<sup>96</sup> For the oldest testimony on this point, see A. P. Schioppa, 'Il ruolo della cultura giuridica in alcuni atti giudiziari italiani dei secoli XI e XII', *Nuova rivista storica* 64 (1980), 265-89; L. Schmugge, '"Codex Justiniani et Institutionum baiulus". Eine neue Quelle zu Magister Pepo von Bologna', *Ius commune* 6 (1977), 1-9.

<sup>97</sup> From the time of the glossators, a letter is extant written by a monk of the Abbey of St Victor in Marseilles who was travelling Italy and sought permission from his abbot to study Roman law; he pointed out that in the future the abbey would thereby be better placed to defend itself against its detractors. The date of the letter is uncertain, but recent research places it between 1124 and 1127. Cf. J. Dufour, G. Giordanengo and A. Gouron, 'L'attrait des "leges". Note sur la lettre d'un moine victorin (vers 1124/1127)', *Studia et documenta historiae et iuris* 45 (1979), 504-29.



problems: the *ius commune* was so extensive and the *consilia* so abundant and detailed that, in the absence of a customary rule, judges could be sure of discovering a principle in the learned law.<sup>98</sup> In great political debates a need was also felt to make reference to Roman law or contradict opponents by quoting the *Corpus*: when Philip IV the Fair attacked the count of Flanders with the aid of the *Corpus iuris*, the count felt obliged in his turn to ask legists for help in defending his position, for the traditional rules of feudal law no longer made any impression.

#### *Learning and the university*

41 The university<sup>99</sup> was the common basis of the powerful supranational body of lawyers. Its origins go back to the twelfth century in Bologna, Salerno and Paris. In the centuries which followed, universities spread throughout the West. Although there were important local differences, the medieval universities had various features in common. In the teaching of law the following are notable. In the Middle Ages above all, the university world was cosmopolitan: national frontiers (which at the time counted for little) constituted no more of a barrier than vernacular languages. At all the universities from Poland to Portugal, from Scotland to Sicily, teaching was in Latin, the basic works were the same, and the qualifications were recognized in all countries. Students flocked from all areas of Europe especially to the large universities and organized themselves into 'nations'; at Orléans, for example, the students who came from the German empire formed the 'Natio Germanica' within which students from Brabant, Liège and Holland were strongly represented. The recruitment of professors was also wholly international, and so were the regulations and the syllabuses which the new foundations often borrowed from old and sometimes distant universities.

Like all teaching institutions, the medieval universities had an ecclesiastical character. Most had been created by a pontifical bull and placed under the authority of a cleric as chancellor. Originally

<sup>98</sup> For the circumstances in which the first arguments of learned law were made before the Flemish courts, see E. I. Strubbe, 'De receptie in de Vlaamse rechtbanken van midden veertiende tot einde vijftiende eeuw', *Revue d'histoire du droit* 29 (1961), 445-62 (also in *idem*, *De luister van ons oude recht. Verzamelde rechtshistorische studies* (Brussels, 1973), 601-15).

<sup>99</sup> Originally *universitas* meant 'group', 'society', or 'corporation'; it came to be used for the associations of professors or students of a town. Little by little, it became the standard term for the body of professors and students of the *studium generale* in a town.

all the students belonged to the clergy, although the great majority had merely entered minor orders, and only a few ended up being ordained priests. Towards the end of the Middle Ages, the clerical character abated, and from then on the majority of the student population was made up of lay people.

The universities of the Middle Ages were fiercely independent in their administrative and financial management. This was natural for the first groups of students which grew up around certain well-known professors; but even after the universities had become institutionalized with charters of foundation, regulations, and financial support from public authorities, they retained extensive independence. State interference in prescribing courses and appointing professors is a late phenomenon more characteristic of early modern times. At that time a certain 'nationalization' of the universities also occurred. From the end of the Middle Ages, some rulers had founded universities specially intended for their subjects and to provide for the needs of their administration and government. In exceptional cases, such as the 'political' university founded in Naples in 1224, study abroad was actually forbidden. In early modern times this type of monopoly tended to multiply: for instance, in the sixteenth century in the southern Netherlands in favour of Louvain and Douai, for motives which were as much political as religious.

The first universities were not deliberate foundations: they were spontaneous associations or corporations (so popular in the Middle Ages) either of *magistri* and *scholares* together or 'masters' and 'students' separately.<sup>100</sup> Some universities originated when professors and students seceded from an existing university, owing to internal differences, longstanding disputes, or conflicts with the municipal authorities, and set up a new university in another town. The University of Cambridge, for instance, was founded after a secession from Oxford. At a later stage the deliberate official foundation of a university went hand in hand with the setting up of an official organization and the granting of state or local endowments. In several Italian cities professors were paid out of the municipal budget; at Vercelli in 1228 the community undertook payment of the salaries of seven professors of law. This meant progressively

<sup>100</sup> Sometimes professors were appointed and paid by the student body: in the thirteenth century the University of Bologna was a student corporation with an independent administration, and many students were men with legal and administrative experience. In the fourteenth century, administration fell into the hands of the town itself.

greater interference by the authorities in the internal affairs of the universities.

The universities were elitist, first in the intellectual sense. The courses of study were long (seven years or more was normal) and demands were high. Familiarity with Latin was essential in order to take part in 'disputations', as well as to learn the *Corpus iuris* (often by heart) and the Gloss. Secondly, the small circle of students<sup>101</sup> was elitist by social origin. Studies were often pursued abroad and were expensive; bursaries were rare.<sup>102</sup> Some students did manage to pay for their studies by working in the service of wealthy students,<sup>103</sup> but most belonged to the nobility or the *haute bourgeoisie*, which in early modern times supplied the administrative classes and the *noblesse de robe*. The *petite bourgeoisie*, artisans and countrymen were hardly represented. Finally, the students made up an elite by virtue of their rights: members of the university enjoyed numerous privileges, notably that they were not subject to the jurisdiction of the ordinary courts. The constitution *Habita* of 1158 of Frederick Barbarossa had already given important privileges and exemptions to university scholars. In early modern times in particular the circle of university-educated lawyers tended to form an exclusive elite. Alliances within the homogeneous social class of senior officials and magistrates were frequent; an introduction or a promotion often depended on family connexions. Yet the lawyers, in spite of this influence, did not succeed in extending their grip beyond administration and legal practice. Political decisions remained in the hands of the sovereign, and the attempts of some courts of justice such as the Parlement de Paris to play a political role provoked several grave conflicts with the Crown.

In early modern times university syllabuses and the elitism of the lawyers hardly changed. Roman law and canon law still had almost

<sup>101</sup> Around 1200 the University of Bologna, the main institution for legal education, is thought to have had around 1,000 students. Orléans and Avignon towards the end of the fourteenth century had significantly fewer (256 bachelors and 368 students at the former, 339 bachelors and 467 scholars at the latter). At Cologne, probably the most important faculty in fifteenth-century Germany, the estimate of law students is 100 or 200. In general the larger universities had from 500 to 1,000 students, and the smaller about 100.

<sup>102</sup> The complete set of the five manuscript volumes of the glossed *Corpus* cost as much as a town-house. Bursaries were sometimes awarded by municipalities in the hope of attracting to themselves a devoted lawyer; most bursaries were awarded for the same reason by ecclesiastical bodies (chapters or abbeys) to their most promising members.

<sup>103</sup> They were inscribed as *pauperes* in the registers and exempt from matriculation fees.

a monopoly on the subjects taught.<sup>104</sup> On the one hand the state increasingly interfered in university affairs, while on the other the intellectual level and originality of legal teaching declined.

#### *The university and the theoretical approach*

42 The fact that for centuries leading lawyers were educated in law faculties had great importance for the development of law in Europe. It gave continental European law not only its Romano-Germanic basis but also its typically theoretical and conceptual character. In a general historical perspective, it is rather surprising that these lawyers received their professional education far away from daily legal practice; their education instead took place in universities and consisted in an initiation lasting several years into the 'sacred books' of their discipline. The education of common lawyers is much more typical: young people who wanted to devote themselves to a legal career were taken on as apprentices with an established practitioner and worked as clerks or assistants in practice in London, where the royal courts sat. They lived in institutions for students, the Inns of Court, where they received lodging and a training which was basic and not to be compared with a university syllabus. There was no requirement for university study of law until the twentieth century in England, and the most eminent lawyers (the judges of the higher courts) were not graduates in law but practitioners who had learned their skills on the job. Only recently did it become the norm for intending lawyers to study law at university and to obtain a degree in law.<sup>105</sup> On the continent, for centuries judges and advocates

<sup>104</sup> Reference to the customs and ordinances in force was very infrequent. A hesitant start on teaching non-learned law was made in France by the *Ordonnance* of St Germain-en-Laye of 1679, which prescribed that a chair of French law should be established in Paris and elsewhere. The first professor of French law in Paris wrote a commentary on the *Institutes* of Loisel (see section 26 above). Cf. A. de Curzon, 'L'enseignement du droit français dans les Universités de France aux XVII<sup>e</sup> et XVIII<sup>e</sup> siècles', *Revue historique de droit français et étranger* 43 (1919), 209-69, 305-64 (also published separately, 1920). The order of the Consejo of Castile in 1713 to replace Roman with local law was ineffective, owing to the opposition of the faculties.

<sup>105</sup> In 1976 70 per cent of new solicitors and from 90 to 95 per cent of new barristers were law graduates. Around the middle of the nineteenth century virtually nothing was prescribed for legal studies in England; it is not surprising that the report of the Select Committee of 1846 which had examined the issue ended with a long list of complaints that made numerous references to the position abroad. It is therefore only since the second half of the nineteenth century that universities have begun to award degrees in law. Many eminent judges, however, opposed this innovation, and in 1904 Vaughan Williams LJ observed that the law schools would lead to codification, and so it would be better to do without them; cf. A. H. Manchester, *Modern legal history of England and Wales* (London, 1980), 54-66.

trained in practice practised alongside university graduates. In the Netherlands the latter acquired real importance only from the fifteenth century,<sup>106</sup> and in general the notion that a university education was indispensable for judges and advocates in the higher courts became current only in early modern times.<sup>107</sup> A parallel evolution took place in medicine: originally it was in the hands of surgeons and doctors trained in practice, and graduates were a minority; but graduates established themselves little by little and finally acquired a legal monopoly in the art of healing.

Each educational system – theoretical on the continent, practical in England – has its advantages and disadvantages. The continental method offered the prospect of acquiring a detailed knowledge of the principles of a rational legal system, but it was remote from actual legal practice and did not prepare graduate lawyers to practise customary law. The English method on the other hand immediately confronted the intending lawyer with daily practice and living law, but it could not offer him the theoretical and analytical approach peculiar to universities, nor familiarize him with Roman law to broaden his intellectual horizons.

#### Opposition to 'ius commune'

43 In the Europe of customary law, the reception given to Roman law was not always favourable. It is worth noting the main points of opposition. Like every innovation, the spread of *ius commune* disturbed conservative circles, which saw it as a challenge to their traditional interests and their manner of thinking. Feudal law was not just an abstract system of rights and obligations, but the very foundation of the landed property of numerous noble families; unforeseen innovations threatened to alter the nature of landownership completely and the rights and burdens which attached to it.

<sup>106</sup> At the Audience, which later became the Council of Flanders, in the course of the sixteenth century legists became ever more numerous until they obtained a monopoly. From that time almost all councillors in the superior courts had to have a legal education. At the *parlement* (1473–77) and the Great Council (1504–1794) of Malines, all the councillors were doctors or graduates in law. In the important courts of aldermen, from the fifteenth century one or two learned lawyers sat in each court, and in the eighteenth century they formed the majority. In lower courts the aldermen asked a qualified lawyer to frame an appropriate judgment.

<sup>107</sup> There was occasional legislation to this effect: at the Council of Brabant an ordinance of 1501 required that advocates should be graduates in Roman or canon law. H. de Ridder-Synnotis, 'Milieu social, études universitaires et carrière des conseillers au Conseil de Brabant (1430–1600)', *Album amicorum J. Buntinx* (Louvain, 1981), 257–302.

Farmers were equally preoccupied. By applying the Roman law conception of absolute ownership, the learned law threatened to overturn time-honoured practices of exploiting farmland and using common lands to the profit of landowners.<sup>108</sup> In still other areas feudalism opposed the innovations of the learned lawyers. Thus in 1236 English barons blocked the introduction of the canon (and Roman) law principle of *legitimatio per subsequens matrimonium* because it would have had important repercussions for the traditional scheme of inheritance. Their refusal to adopt the learned law was categorical: *nolumus mutare leges Angliae*.<sup>109</sup> A similar reaction had already been seen in France, where in the second half of the thirteenth century the knights vigorously opposed the new 'inquest' procedure which was inspired by Roman-canonical principles and was intended to replace the traditional duel. Owing to their resistance to learned law in general, the regions of customary law retained their own character. At the *Parlement de Paris*, the councillors were obliged to judge appeals from these regions according to the customs of the region and not according to the learned law. In 1278 Philip III even prohibited advocates from citing Roman law in cases coming from the regions of customary law.<sup>110</sup> The councillors and advocates found themselves in a dilemma. Since they were educated in Roman law, they reasoned according to its categories and for their own purposes prepared their judgments or pleadings following the principles of the *Corpus iuris*, but they were prohibited from making open use of them or explicit reference to them.

The conservatism of certain circles did not provide the only support for traditional customary law: regional and local particu-

<sup>108</sup> See the discussion in A. Stern, 'Das römische Recht und der deutsche Bauernkrieg', *Zeitschrift für schweizerische Geschichte* 14 (1934), 20–9. The peasants' registers of grievances took particular exception to the code for Baden compiled by Zasius, probably because it altered the surviving spouse's right of succession into line with Roman law (i.e. in favour of cognates). The peasants also demanded that judges should be elected by the community, and that all the books containing 'Juristerei und Sophisterei' should be burned.

<sup>109</sup> Feudalism was based on primogeniture and, according to the traditional view, an illegitimate son born before the parents married was a bastard, who was excluded from all rights of succession, even if the parents subsequently married; but if he was legitimated by *legitimatio per subsequens matrimonium* he inherited the entire fief, and his younger brother born after the marriage of the parents did not.

<sup>110</sup> *Ordonnances des rois de France* XI (Paris, 1769), 354, art. 9, 'Li advocats ne soient si hardis d'eus mesler d'aleguer droict escrit, là où coustumes aient lieu, mais usent de coustumes' ('Advocates are not to be so bold as to cite written law where custom applies, but are to make use of customs.').

larism was another factor in its favour. In the Netherlands, among other places, local custom was valued as an element of political independence, and for the cities in particular custom constituted an obstacle to the policies of central authorities. It is typical that, when Charles the Bold conquered Lille, he abolished customary law there and replaced it with the *ius commune*, a measure revoked after his death when the Burgundian occupation ended.

Opposition to Roman law might also be inspired by considerations of national policy. This was especially so in France. Roman law, which was regarded as imperial law, awoke anxieties in the French monarchy, always eager to refute the potential claims of the Holy Roman emperors to legal supremacy. The French kings therefore always opposed the very idea of Roman law having the force of law by virtue of the authority of the German emperors. This opposition caused another dilemma: the kings appointed legists to the Parlement de Paris and included them in their governments, but refused to recognize any authority in 'imperial' law. This is the background to the bull *Super specula* pronounced by Honorius III in 1219 at the instance of the king of France: it prohibited any teaching of Roman law (but not canon law) at the University of Paris.<sup>111</sup>

In the sixteenth century the rise of sovereign nation states and nationalistic sentiments made its mark. In France, Fr Hotman maintained that a codified French law was needed. His was one of the first projects to aim at codification on a national level of the whole of private and public law. This was to take place in the context of a policy of nationalization and standardization of French law, and in connexion with a strong national monarchy. Hotman stressed the relative authority and the imperfections of Roman law.

It is a fact that, in spite of its intrinsic qualities, *ius commune* also presented certain disadvantages; in spite of everything lawyers found 'thorns in the garden of law'. Criticisms that learned law and procedure were beyond popular comprehension were not

<sup>111</sup> Although this prohibition was to some extent evaded by 'private' lessons, it remained in force until its revocation by Louis XIV. in 1679. One reason (among others) alleged by the papal bull was that the study of Roman law was turning too many clerics in Paris away from their proper discipline: theology. Cf. G. Périès, *La faculté de droit dans l'ancienne Université de Paris* (Paris, 1890), 99-108; W. Ullmann, 'The prohibition of Roman law at Paris', *Juridical Review* 60 (1948), 177; S. Kuttner, 'Papst Honorius III und das Studium des Zivilrechts', *Festschrift Martin Wolff* (Tübingen, 1952), 79.

unfounded; discontent was aggravated by the secrecy and the length and expense of legal actions and appeals. The golden days of legal actions in the open air completed in a day - as prescribed by a capitulary of Charlemagne - were longingly evoked. The tendency of learned lawyers to entangle themselves in quibbles and quarrels and to contradict themselves was also a defect of the *ius commune*. The accuracy of the medieval expression *doctores certant* was too often demonstrated: for every opinion of a *doctor legum*, after a little investigation a contrary opinion could be found. The certainty of the law was at risk. Several sovereigns resorted to a *lex citandi* declaring, for instance, the exclusive authority of Bartolus over every other author. But this could only mitigate the basic weakness very imperfectly.

#### Commercial law

44 What of the role of merchants in the diffusion of Roman law? It might be thought that the *Corpus iuris* and its advanced law of obligations would have supported the growing international commerce of the late Middle Ages, and that merchants would have been among the most active exporters of the *ius commune*. Yet this was not the case. Commercial and maritime law developed independently of Roman law and canon law (and in opposition to the latter, so far as interest on loans was concerned). Both the *ius commune* and commercial law were international and multi-dimensional: each flourished but each pursued its own path, the first in the world of universities and the higher courts of justice, the second in the daily practice and customs of merchants and their own market and maritime jurisdictions. Roman law was suited better to jurisprudence and to administration than to commercial practice, so from the twelfth to the fifteenth centuries, a customary and cosmopolitan commercial law was developed in practice. It was dictated essentially by the needs of practice and commercial efficacy in commodity and money markets, in trade fairs, corporations, banking operations and means of insurance and credit.

Although, from the sixteenth century, there were attempts to systematize this body of rules according to jurisprudential criteria, commercial and maritime law remained connected with practice to such a degree that in the following century the author of the first general treatise on commercial law was not a lawyer but a merchant, and in France the codification of commercial law under Louis XIV

was also in large part the work of a merchant.<sup>112</sup> Western *ius mercatorum* (commercial law) was largely shaped at the great international trade fairs, in particular those of Champagne in the twelfth and thirteenth centuries; ancient practices turned into generally recognized usages and rules, for example in the case of bills of exchange. Contributions to the formation of European commercial law were also made by the rules of merchant corporations, as well as by the two great families of maritime law, that of the Mediterranean lands, where the *lex Rhodia*<sup>113</sup> and the *Consulat de Mar* were observed; and that of the north of Europe, where the 'Rôles d'Oléron' and the maritime law of Damme and Wisby were followed.<sup>114</sup>

Merchants had their own jurisdictions, market and maritime courts (*Consulat de Mar*), in which rules of commercial law were applied, and merchants were judged by their peers. In general, commercial customs were unwritten, but compilations were made at Genoa from 1154 and in Venice under doge Ziani in 1205-29. There were also various Spanish compilations, culminating in the Barcelona version of the *Consulat de Mar* which goes back at least to 1370.<sup>115</sup>

The example of commercial law shows that the Middle Ages were capable by their own means of developing a new body of legal rules in response to economic demands. In the late Middle Ages practice

<sup>112</sup> I.e. the *Consuetudo vel lex mercatoria* of Gerard Malynes of 1622 and the *Ordonnance sur le commerce* of 1673 or Code Savary, named after the merchant Jacques Savary who had an important part in its compilation. The elements of commercial law were for a long time to be found in practical manuals, together with such miscellaneous topics as weights and measures, geodesy, mathematics, economics and so forth.

<sup>113</sup> Since Roman times the expression *lex Rhodia* (after Rhodes and the merchant community based there) has referred to the body of maritime customary law of the Mediterranean, of which little is known other than the citations in the *Digest*. From the eighth to the tenth centuries a written Byzantine collection was produced, which can be regarded as the point of departure for medieval maritime law. The principal concern of the ancient authors was general average, which is why the ancient law is known as the *lex Rhodia de jactu* (jactu meaning jettison).

<sup>114</sup> The 'Rôles d'Oléron' is a thirteenth-century collection of judgments of the commercial court of the island of Oléron, which lies on the Atlantic coast, on the busy sea route linking the Mediterranean with Flanders and England. Wisby was a Hanseatic town on the Swedish island of Gotland in the Baltic Sea.

<sup>115</sup> For a general sketch, see H. Pohlmann, 'Die Quellen des Handelsrechts' in H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 1 (1973), 801-34; L. Goldschmidt, *Universalgeschichte des Handelsrechts*, 3rd edn. 1 (Stuttgart, 1891); H. Mariage, *Evolution historique de la législation commerciale de l'ordonnance de Colbert à nos jours* (Paris, 1959); G. Colon and A. García I Sanz, *Llibre del Consolat de Mar*, 2 vols. (Barcelona, 1981-2); M. Bottin, 'Le Développement du droit de la mer en Méditerranée occidentale du XII<sup>e</sup> au XIV<sup>e</sup> siècles' *Recueil de mémoires et travaux des anciens pays de droit écrit* 12 (1983), 11-28.

and custom evolved an impressive legal system regulating business in general, and the organization of credit, insurance and banking in particular. This system was adequate for its time, and some of the basic principles worked out in the Middle Ages (especially fiduciary currency and bills of exchange) were preserved in the international commerce of modern times. Like the Common Law, commercial law took a fundamentally different approach from *ius commune*; the learned law, unlike Common Law and the *lex mercatoria*, had a general theory of law; it approached specific questions by setting out from general categories and concepts; and it swore by written sources (the text of the *Corpus*) and by logic, rather than by experience, precedent or practice.

#### LEGISLATION

##### *The renaissance towards 1100*

45 Nowadays legislation is the main source of law. The legislator abolishes existing rules and creates new ones in accordance with policy and social requirements. To legislate is to manipulate the law and society in a desired direction. In former times, it was by no means clear that law could result from deliberate and purposive intervention. Instead, law was regarded as a fixed and eternal reality, which could at most be adapted or clarified, but the main concern was to maintain the good old law. The insignificance of legislation<sup>116</sup> during the first centuries of the Middle Ages is explained partly by this view, and partly by the impotence of the central authorities.<sup>117</sup> Although the situation changed during the later Middle Ages and modern times, the importance of legislation was still very slight compared with its role in the great codifications

<sup>116</sup> Cf. above, section 15.

<sup>117</sup> This also applies to a large extent to the most important series of statutes of the early Middle Ages, the Anglo-Saxon *dooms*. Although there is an element of new law in them, whether in connexion with clerical privileges (necessarily new, after the conversion of the Anglo-Saxons to Christianity) or in connexion with the struggle against uncontrolled private feuds, these statutes also contain much traditional law, and the later *dooms*, especially the very lengthy ones of Cnut, repeat word for word a large number of provisions of the earlier ones. In the preamble to his statutes, Alfred the Great expressly states that he has repeated what was equitable in the statutes of his predecessors, and rejected or corrected other provisions, but that he would not have dared to promulgate numerous statutes which he had drafted himself. His statutes were promulgated towards the end of the ninth century, exactly at the time when the capitularies, indeed all continental legislative activity, were coming to an end.

of the eighteenth century, let alone under a legislative monopoly such as Napoleon attempted to secure.

One factor which explains the secondary role of legislation as a source of law under the *ancien régime* is competition from the *ius commune*, which made it possible to transform the old European law without legislative intervention. Yet the revival of legislation (in the sense of deliberate intervention in legal development) clearly goes back to the end of the eleventh century. From that time onwards the domain of the statute slowly but surely expanded. Even if the great national codes did not appear before the eighteenth century, or in some countries before the beginning of the nineteenth, legislation was already a fully-fledged source of old European law alongside jurisprudence and case law. During this period legislation by the church, by states and cities guided the development of law. Broadly speaking, two types of legislation may be distinguished. First, legislation by popes and secular rulers, promulgated by them and imposed on their subjects according to their policies. Second, legislation wanted by the community and implemented for the common good (hence the Dutch expressions *keur* or *willekeur*, which mean 'choice' or 'voluntary choice' and emphasize that the basis of this legislation was the free will of the community concerned). Such legislation was to be found in the cities of the later Middle Ages; this democratic form of legal development later came to an end with the rise of the absolutist state.

#### *Popes as legislators*

46 The revival of legislation within the church coincided with the Gregorian Reform. From the second half of the eleventh century, synods and reforming popes attempted to combat alleged 'abuses', that is, the traditional and customary subordination of the church to temporal power. The signal for reform was given by Gregory VII, who before his election had already played an influential part within the *Curia*. There was no chance in the revival of legislation during his pontificate; to initiate reform and suppress abuses the church authorities needed to legislate. Of this Gregory VII was perfectly aware, as is clear from his assertion 'only the pope has the right to promulgate new statutes according to the needs of the moment',<sup>118</sup> as

<sup>118</sup> Art. 7 of *Dictatus Papae*, a sort of manifesto for the Gregorian reform, dating from 1075.

well as his hostility towards custom as a source of law. The existing situation was hallowed by custom, but the pope was determined to impose new principles; he must be on his guard against custom, since the success of his policies depended on the effectiveness of his legislative initiatives. Several Roman councils promulgated new rules for the whole of the Latin church; regional councils, which were in closer touch with the people, differentiated and reinforced these principles in their respective regions and countries. But it was the popes, even more than the councils and canons, who maintained the legislative tradition from the second half of the eleventh century.<sup>119</sup> Constant papal legislative activity influenced western attitudes at large and illustrated that the law could be deliberately manipulated towards given social ends.

The pontificate of Boniface VIII marked the end of the great period of papal legislation and the classical age of canon law. Afterwards the principal legislative initiatives came from the councils, in two distinct periods and in very different circumstances. First came the period of conciliarist theories, from the end of the fourteenth century through the first half of the fifteenth, during which Church assemblies were dominated by attempts to organize a form of parliamentary control. This was a response to the centralist policy of the Roman *Curia*, but such interesting constitutional experiments were to have no lasting effect. The second period was that of the Council of Trent (1545-63), which was convened in order to organize the Counter-Reformation. The decisions of this council were strongly anti-protestant and firmly in favour of centralization. They shaped the church until Vatican II.

#### *Kings as legislators in the Middle Ages*

47 After a gap of several centuries, legislation by kings and territorial princes also underwent a hesitant revival and became increasingly important. Their first legislative initiatives dealt only with points or questions of detail or else did no more than abrogate a customary rule which was thought to be unjust (*mala consuetudo*). In England William the Conqueror (1066-87) regulated the organization of the judiciary, criminal law and the law of evidence; Henry II (1154-89) introduced measures to protect peaceable possession of

<sup>119</sup> Cf. above, section 35.

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land and to generalize the use of the jury, which was intended to replace the judicial duel as a means of proof in civil matters. In Flanders, Count Baldwin IX (1194-1205) laid down rules against usury. Royal documents are extant from the Norman kingdom of Sicily which regulate feudal law and the organization of the judiciary from the twelfth century onwards. For twelfth-century France only a few scattered ordinances of the kings in criminal matters are known; more abundant legislation began only from the reign of Philip Augustus (1180-1223).<sup>120</sup> At the same time in the Holy Roman empire there were various statutes dealing with feudal and especially criminal law. The Germanic kings, who thought of themselves as the successors of the Roman emperors, sought to underline continuity with the imperial legislation of Antiquity by ordaining that some of their own constitutions be inserted into the *Corpus iuris*.

The first legislation on any scale (although it bears no comparison to a true codification) dates from the thirteenth century. The *Liber Augustalis* promulgated in 1231 by Frederick II for his kingdom of Sicily, and the *Siete Partidas* of Alfonso X of Castille, written in Castilian, have already been mentioned.<sup>121</sup> In England the reign of Edward I (1272-1307) saw a proliferation of statutes on matters of public and private law; the extent of this legislative activity was surpassed only in the nineteenth century. It appeared not in a single collection but as a succession of statutes regulating a great range of subjects. The early legislation betrays the lack of a tradition and the inexperience of legislators. Neither legislative technique nor drafting of documents was clearly established yet. Originally the new statutes were promulgated orally, and are known to us only through the chronicles or because they were confirmed at a time when writing had become customary. When, in the twelfth century, it became normal practice to set statutes down in writing, the formal aspects of this new type of publication had yet to be settled. To start with, the style was often informal: the text begins with a note of the type 'there follow the decisions of the king or count x' without an initial or final protocol, and without any formula of authenticity or mention of the date. Many important laws were typically 'granted' in the form of charters to a region or a city and, from the formal point of view,

<sup>120</sup> G. Giordanengo, 'Le pouvoir législatif du roi de France (XI<sup>e</sup>-XIII<sup>e</sup> siècles), travaux récents et hypothèses de recherche', *Bibliothèque école des chartes* 147 (1989), 283-310.

<sup>121</sup> Cf. above, section 33.

cannot be distinguished from documents attesting the transfer of property. For example Magna Carta is a collection of constitutional principles, but was promulgated in the form of a grant by the king to his subjects. The uncertainties of the age also emerge from the various names given to these ancient statutes. The statutes were sometimes called *assisae*, particularly in England, since they were worked out and promulgated at sessions (*assisae*) of the royal court. The old identification of law and custom was entrenched to such a degree that these first statutes were sometimes called *leges et consuetudines* (statutes and customs) or even *leges consuetudinariae* (customary statutes), although to us this seems to be a contradiction in terms.

In the twelfth and thirteenth centuries in particular, the sovereign very often addressed legislation not to the whole of the country but to certain cities or villages or groups of them. This was regularly in the form of a local charter or privilege, and frequently at the request of interested parties. Sometimes it was against their will (so-called *mauvais privilège*).<sup>122</sup> In the Netherlands the grant of charters to cities was the method most often used for legislation. For example, count Philip of Alsace (1157-91) introduced a standard modern municipal law in the seven main cities of Flanders by granting seven individual charters, whose content is identical.<sup>123</sup>

Techniques and formal rules for national legislation were gradually established. In England the practice that statutes must be promulgated by the king and parliament was instituted and has not changed since the end of the Middle Ages. In France *ordonnances royales* were promulgated by the government, generally without the involvement of the Estates General. In the Netherlands it remained quite rare for the sovereign to promulgate ordinances for each or several of the provinces. Under Burgundian rule such legislation became more important,<sup>124</sup> but its influence ought not to be exaggerated (certainly not in the area of private law). Many of the ordinances have nothing to do with statutes proper, but are indi-

<sup>122</sup> E.g. the 'mauvais privilège' introduced by count Louis of Nevers in several places, especially Bruges in 1329, after the suppression of the uprising in coastal Flanders.

<sup>123</sup> See R. C. van Caenegem and L. Milis, 'Kritische uitgave van de "Grote Keure" van Filips van de Elzas, graaf van Vlaanderen, voor Gent en Brugge (1165-77)', *Bulletin de la commission royale d'histoire* 143 (1977), 207-57.

<sup>124</sup> The ordinances of the period from 1381 to 1405 have been edited by P. Bonenfant, J. Bartier and A. van Nieuwenhuysen, *Recueil des ordonnances des Pays-Bas*, 2 vols. (Brussels, 1965-74; Première série, Comm. roy. des anc. lois).

vidual concessions, appointments or other administrative measures, or else deal only with taxation, finance or criminal law.<sup>125</sup>

### *Kings as legislators in modern times*

48 Before the codification movement of the eighteenth century, national legislation in Europe in modern times was not very abundant, at least in private law. In England the Tudors passed numerous important statutes, but they regulated only political and religious questions; in the following centuries statutes were most often made up of miscellaneous provisions proposed for their own purposes by Members of Parliament. In Germany and the United Provinces legislation remained very limited; the legal system was based on the *ius commune* and *Rooms-Hollands Recht* respectively. In Spain the *recopilaciones* were no more than compilations of existing legislation. In the southern Netherlands and in France the development of law threatened to peter out after the homologation of customs. None the less in France there was a series of great royal ordinances. This was legislation of prime importance whose influence is still felt today. Although the principal ordinances were promulgated under Louis XIV and Louis XV, there is no break in continuity between the medieval and the modern. Examples are the *Ordonnance Cabochienne* (1413)<sup>126</sup> which was an attempt at democratic reform of political institutions. The *Ordonnance* of Montil-lez-Tours (1454) aimed at better and swifter legal procedure, and provided for the official reduction of customs to writing in order to achieve greater legal certainty. The *Ordonnance* of Villers-Cotterets (1539) extended the jurisdiction of the royal courts at the expense of that of the church courts, largely for matrimonial cases; it also regulated questions of procedure; and it contained dispositions relating to wills and the registration of donations (which are now to be found in articles 907, 931, and 939 of the *Code civil*). The *Ordonnance* of Moulins (1566) extended the jurisdiction of the royal courts still further, this time at the expense of the urban courts; it also contained

<sup>125</sup> On the disparate character of these ordinances see the criticism of P van Peteghem, *Revue d'histoire du droit* 48 (1980), 84-8. In criminal law, the ordinances of the Duke of Alba were most important: M. van de Vrugt, *De criminele ordonnantiën van 1570. Enkele beschouwingen over de eerste strafrechtcodificatie in de Nederlanden* (Zutphen, 1978).

<sup>126</sup> The name refers to the riots and demonstrations which preceded the promulgation of the ordinance; the processions were often led by Caboché, who worked at the great St Jacques slaughterhouse.

a disposition requiring written proof for contracts in excess of a certain sum (repeated in article 1341 of the *Code civil*). The very extensive *Ordonnance* of Blois (1579) contained dispositions on very diverse matters: clergy (arts. 1-64); hospital management (65-6); reform of the universities (67-8); the administration of justice (89-209); the abolition of certain offices and burdens (210-55); the nobility (256-75); the army (276-320); the court (321-8); Crown estates (329-54); the police and the maintenance of highways (355-6); the guilds (357-63).

In the Middle Ages, ordinances were worked out by the royal government after consultation with the powerful secular and clerical figures of the kingdom; drafting them was generally left to legists in the service of the king. The assemblies of the Estates (the 'parliaments' of the Middle Ages) did not usually take part in this legislation (by contrast they did in England). During the second half of the sixteenth century, when the French monarchy was in a grave crisis, the Estates General were able to extend their influence, but their role diminished once more in the following century, as they were no longer convened between 1614 and 1789.

### *The great ordinances of Louis XIV and Louis XV*

49 Some of the French ordinances were very succinct and regulated only a single question; an example is the ordinance of Louis XII in 1510 on short prescription;<sup>127</sup> others (as we shall see) were extensive and various, but dispositions on private and civil law were mostly infrequent. This state of affairs changed with the great ordinances of Louis XIV and Louis XV. Three ordinances were promulgated under Louis XIV thanks to the political support of Colbert, who recognized that the development of commerce and industry demanded proper administration of justice, and thanks too to the legal knowledge of Guillaume de Lamoignon (*d.* 1677) and Henri Pussort (*d.* 1697).

The *Ordonnance civile pour la réformation de la justice* (1667) was known as the *Code Louis* owing to its scale. It aimed to introduce a uniform system of civil procedure for the whole kingdom and to speed up legal process, which was to be conducted according to a written procedure. The *Code de procédure civile* of 1806 repeats this

<sup>127</sup> Most are repeated in the *Code civil*, arts. 2271-7.



ordinance almost in its entirety, and its influence can still be traced even in the Belgian *Code judiciaire* of 1967; other dispositions were repeated by the *Code civil* of 1804. The *Ordonnance sur le commerce* (1673) known as the *Code Marchand* or *Code Savary*, after its principal author, proved very durable and laid the basis for the *Code de commerce* promulgated under Napoleon. The *Ordonnance sur le commerce des mers* or *Ordonnance de la Marine* (1681) on maritime law was repeated in the second book of the same *Code de commerce*.<sup>128</sup>

These ordinances did not attempt to innovate, let alone to indulge in revolutionary codification. They built on existing dispositions, they harmonized the existing law, and they abrogated the rules which they did not include. This was a decisive step towards legal clarity and security. The importance attached by the young Louis XIV in 1665 to the reform of justice has to be seen in its political context; the essence of the reform was simplification and standardization.<sup>129</sup>

It is unfortunate that the works of the reform commission made no impression on the important fields of criminal and civil law.<sup>130</sup> In civil law, three partial codifications (simplifying and standardizing again, rather than innovating) were promulgated under Louis XV: the *Ordonnance sur les donations* (1731), *Ordonnance sur les testaments* (1735), and *Ordonnance sur les substitutions fidéicommissaires* (1747). The first and third ordinances applied throughout France; the second provided different rules for the regions of customary and of written law. The *Code civil* largely reiterated the principles of these ordinances. As they were in large part the efforts of the chancellor, Henri-François Daguesseau (d. 1751), they are also known as the *Ordonnances du chancelier Daguesseau*.<sup>131</sup> None the less, the monarchy did not achieve a unification and codification of civil law. It faced not merely the obstacles of ancient custom and regional tradition,

<sup>128</sup> The *Ordonnance criminelle*, which in fact dealt with criminal procedure, also appeared in 1670.

<sup>129</sup> The *Code de procédure pénale* of 1670, for example, was a logical extension of the development over the centuries of inquisitorial procedure, which had originated in Roman-canonical procedure.

<sup>130</sup> Guillaume de Lamoignon hoped to compile a comprehensive code of private law for promulgation by the king in a series of ordinances for the whole of France. In his compilation he made use of ordinances, case law, and above all customs, especially that of Paris. His radical unification came to nothing, although his preparatory texts, the *Arrêts* completed around 1672, are extant. They were published as a private work in 1702 (second edition, 1783) after his death in Paris. Daguesseau was influenced by them; and the compilers of the *Code civil* were also familiar with the work.

<sup>131</sup> H. Regnault, *Les ordonnances civiles du Chancelier Daguesseau*, 3 vols. (Paris, 1929-65).

but also the resistance of conservative *parlements*. The political unification of France was recent in comparison with England, and in the eighteenth century still incomplete.<sup>132</sup>

There are several aspects to the involvement of the *parlements* in the legislative process (de Lamoignon, for example, was the first president of the Parlement de Paris), but the main one is the right of remonstrance. The *parlements*, at their head the Parlement de Paris, had the right to refuse to register new royal ordinances (that is, to inscribe the authentic text in a special register, with the legal consequence that the statute was thereby promulgated and came into force). Legal reasons for refusal had to be submitted to the king (*remontrances au roi*). The reasons might derive from divine law (which was the basis of royalty itself) or from fundamental laws of the realm, a rather vague body of customary rules which had never yet been clearly formulated and whose content seemed to be known only to the counsellors. The king then had the choice whether to accept the remonstrance and withdraw the statute or to reject the arguments of the *parlement* and ordain registration by letter of order (*lettre de jussion*). If the *parlement* persisted in its refusal, the king had a final resort to the 'couch of justice' (*lit de justice*): surrounded by his chancellor, peers and his council, he was installed on the *lit de justice* in the *parlement* and in person ordered the clerk to proceed with the registration of the statute. The frequent use of the right of remonstrance by the *parlements* (although reduced under Louis XIV) and the serious conflicts which followed seriously affected the development of French law, although more in the area of public than private law.<sup>133</sup>

### Municipal legislators

50 Nowadays the expression 'municipal legislation' sounds contradictory: municipal authorities have the right to lay down administrative regulations about such things as traffic and highways, but legislative power in the strict sense, especially in the area of private law, is not within their competence. In an earlier period the position

<sup>132</sup> A distinction was drawn between the *pays d'élection*, *pays d'états* and *pays d'imposition*; there were still internal customs barriers within France.

<sup>133</sup> S. H. Madden, 'L'idéologie constitutionnelle en France: le lit de justice', *Annales. Economies, sociétés, civilisations* 37 (1982), 32-60; S. Hanley, *The lit de justice of the kings of France: constitutional ideology in legend, ritual and discourse* (Princeton, 1983); M. P. Holt, 'The king in Parlement: the problem of the lit de justice in sixteenth-century France', *Historical Journal* 31 (1988), 507-24.

was different. In the later Middle Ages cities which gained their political independence acquired with it a legislative capacity, whose extent depended on the balance of power in that country. Where the central authorities were strong (as in England) local legislation was little more than regulatory power; but where the central authorities could assert themselves only with difficulty, and the cities were in a position of strength (as in Italy), municipal legislation was important and extensive, and might even have consequences on a European scale. In France local legislation was important in the twelfth and thirteenth centuries, during the transition from a weak monarchy and fragmented kingdom before the time of Louis VI (1108-37) to a strong monarchy and unified kingdom in the time of Philip IV the Fair (1285-1314). In the Netherlands, where the balance of power between the cities and the princes was always uncertain, municipal rules laid down by aldermen were an important element in the development of law. In Flanders in 1127 the city of Bruges obtained from the new count, William Clito, the power to 'amend' its customs. In his Great Charter, Philip of Alsace gave the great cities the right to lay down regulations under the supervision of the count, but this last restriction had already disappeared at Ypres towards 1300. An important collection of fourteenth-century legislative documents enacted by the city of Ghent is preserved; its enforcement relied on a communal system of fines.<sup>134</sup>

In the sixteenth century the great age of municipal legislation came to an end; the power of national monarchies and the spread of the learned law had brought it to a standstill. The cities were reduced to local subordinate administrations or were incorporated into small principalities. Custom, the *ius commune* and scholarship were the principal sources of the *Code civil*; municipal legislation was not. Yet in its heyday this legislation had had its significance for the history of European law: it was the first attempt to reform and develop law from the base of society. The content and perspective of municipal law are also interesting and quite different from that of royal legislation or the *Corpus iuris*. Within the community the policy was friendly conciliation between fellow citizens rather than repression; there, voluntary solidarity was more effective than subjection to the sovereign; it was a much more dynamic model of law than blind acceptance of the authority of ancient customs.

<sup>134</sup> N. de Pauw (ed.), *De voorgeboden der stad Gent in de XIV<sup>e</sup> eeuw* (Ghent, 1885).

## CASE LAW

51 Case law was a source of law alongside custom, statute and scholarship, and was intimately connected with the other sources, for the origin and development of a custom is to be seen in its application by the courts; statutes (whatever some may say) cannot foresee everything, and have to be completed and interpreted by case law; while a jurisprudence which takes no interest in case law amounts to no more than an unworldly abstraction. It was often through the courts of justice, in which the legists sat and pled, that the learned law was introduced, sometimes unobserved, into practice. Owing to the case law of the Parlement de Paris, various principles of the *Coutume de Paris* came to form a French common law. And when scholarly opinion was divided, it was up to case law to determine which theory should prevail (a role which the Roman Rota often played). Not only was case law for centuries an important source of law, but for that reason it is also well documented, as the miles of archives of the European high courts of justice attest. The oldest sources of this vast judicial documentation date from around 1200 for the royal courts in England and 1250 in France. Although case law always had a role to play, its importance varied greatly from one country to another, according to the importance attached to the other sources of law. It is obvious that in the system of the Common Law, in which legislation and jurisprudence were merely secondary, case law had fundamental importance. By contrast, canon law was focused on legislation and jurisprudence and placed little weight on case law. The following is a sketch of case law from legal system to legal system and country to country.

In the classical canon law of the twelfth and thirteenth centuries, the case law of the pontifical *Curia* was eclipsed as a source of law by the decretals. When the creative energy of the decretals died out in the fourteenth century, the judgments of the supreme church court, the Roman Rota, increased in importance. The law had to develop and, when legislation was lacking, case law had the chance to take its place. During the fourteenth century court officials compiled several selections of the judgments of the Rota (*Decisiones*). Hundreds of manuscripts of these collections have been preserved, and some were printed at a very early date. Legal practice before the Rota made a major contribution to the development of the law of procedure,

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even in the secular courts (such as the Imperial Chamber in Germany).<sup>135</sup>

In England case law always occupied and still occupies an important place. From the twelfth century onwards there is an uninterrupted series of 'rolls' of the royal courts which record precedents. In legal practice, however, private anonymous collections for the use of advocates ('Year Books'<sup>136</sup>) were more significant. These collections, which appear from the thirteenth century, rather resemble legal journalism: they repeat the legal arguments advanced before the court, and give a vivid account of the interchanges between judges and advocates, often word for word. The Year Books report decisions in chronological order; from the fifteenth century they were reworked and were used as the basis for systematic collections ('Abridgments') which regrouped cases according to subject-matter, and which had considerable influence on the education of young lawyers.<sup>137</sup> The last Year Books were compiled towards the middle of the sixteenth century; their role was then taken over by the Law Reports, some of which grew into virtual commentaries.<sup>138</sup>

In France, too, case law was an important source of law. Authors who made use of the judgments of the Parlement de Paris and the Châtelet have been mentioned. They gathered their information by consulting the imposing series of registers covering the activities of the Parlement from the middle of the thirteenth century, and containing not only final judgments, but also interlocutors, internal discussions and even the pleadings of advocates.<sup>139</sup> Alongside these official sources, there were private collections compiled for the use of practitioners which contain, in addition to judgments, other sources of interest, such as notes and arguments, often borrowed from the

<sup>135</sup> Cf. G. Dolezalek and K. W. Nörr, 'Die Rechtsprechungssammlungen der mittelalterlichen Rota', in H. Coing (ed.), *Handbuch*, I, 849-565.

<sup>136</sup> From the fifteenth century, the reporters' names are sometimes known. From the reign of Henry VII (1485-1509) the Year Books were printed; a modern edition of the medieval Year Books began in the nineteenth century and is still in progress.

<sup>137</sup> The high point was the massive *General abridgment of law and equity*, ed. Charles Viner in 23 volumes between 1741 and 1753.

<sup>138</sup> E.g. the *Commentaries* of Edmund Plowden (d. 1585), based on the cases of the 1550s to the 1570s.

<sup>139</sup> M. Langlois gives a sketch of the collection in *Guide des recherches dans les fonds judiciaires de l'ancien régime* (Paris, 1958), 65-160. The judgments and appeal decisions of the county of Flanders for 1320-1521 have been edited by R. C. van Caenegem, *Les arrêts et jugés du parlement de Paris sur appels flamands conservés dans les registres du Parlement*, 2 vols. (Brussels, 1966-77; Comm. roy. anc. lois).

learned law. One such collection is the *Questiones* of Jean Lecocq, which brings together and annotates the decisions of the Parlement de Paris from 1383-98.<sup>140</sup> Collections of the judgments of the Parlement de Paris and the provincial *parlements* were published right through the *ancien régime*.

In principle, the task of the courts was to apply the law to actual disputes; it was for the legislator to lay down legal norms. The old courts generally kept to their judicial task. In France, however, the many *arrêts de règlement* (regulatory decisions) pronounced by the *parlements* are an exception to the rule. These decisions established general rules of law applicable to everyone, so that within the jurisdiction of the *parlement* they corresponded to a kind of legislation. They were pronounced in the course of litigation, when a new question of law arose.<sup>141</sup> Although they are found even in the fifteenth century, it is above all in modern times that they become important.

In the southern Netherlands case law is also to be found in the same three types of source: books of law (*rechtsboeken*) based on judgments; official series of decisions; and selections of judgments compiled and annotated by lawyers. These are some representative examples: among the medieval books of law made up essentially of judgments, the collection of the court of the Salle de Lille (from the end of the thirteenth century until the beginning of the fifteenth) is of particular interest.<sup>142</sup> Another important collection contains hundreds of judgments of the aldermen of Ypres for use as guidelines by their colleagues at Saint Dizier in Champagne. This city had in 1228 received the law of Ypres and for guidance turned to the aldermen of Ypres; when confronted with a new question of law,<sup>143</sup> they

<sup>140</sup> Modern edition by M. Boulet, *Questiones Johannis Galli* (Paris, 1944). From the same period there is also a collection of notes on the case law of the Parlement, gathered by an anonymous lawyer and published by Fr Olivier-Martin, 'Notes d'audience prises au parlement de Paris de 1384 à 1386 par un praticien anonyme', *Revue historique de droit français et étranger*, 4th edn, I (1922), 513-603. Cf. the edition of the *Arresta lata in parlamento* by C. Naud in *Bibliothèque de l'école des chartes* 121 (1963), 77-131.

<sup>141</sup> See G. Deteix, *Les arrêts de règlement du parlement de Paris* (Paris, 1930); B. Beignier, 'Les arrêts de règlement' *Droits. Revue française de théorie juridique* 9 (1989), 45-55.

<sup>142</sup> R. Monier (ed.), *Les lois, enquêtes et jugements des pairs du castel de Lille. Recueil des coutumes conseils et jugements du tribunal de la salle de Lille 1283-1406* (Lille, 1937).

<sup>143</sup> Comte Beugnot (ed.), *Les Olim ou registres des arrêts rendus par la cour du roi*, II (Paris, 1842), 718-853 (the so-called 'Tout-lieu de Saint-Dizier'); also published in L. Gilliodts-van Severen, *Coutumes des pays et comté de Flandre, quartier d'Ypres. Sources et développement de la coutume d'Ypres*, II (Brussels, 1908), 62-162 (Comm. roy. anc. lois). This series of questions and judgments extends from 1305 to 1470.

consulted them before passing sentence. The archives of the old courts of justice contain an imposing series of registers which are currently being studied. Notable among these are the archives of the Council of Flanders<sup>144</sup> and the Great Council of Malines.<sup>145</sup>

The *arrêlistes* ('case reporters') should also be mentioned. In early modern times they published collections of selected and annotated decisions. Their attention was focused principally on the decisions of the superior courts: the Great Council of Malines, the Council of Flanders, and the Council of Brabant. The titles of these collections often state that the work is made up of *decisiones*; for example, the work of Paul van Christynen (Christinaeus, *d.* 1631), advocate at the Great Council of Malines.<sup>146</sup> Another celebrated *arrêliste* was Pierre Stockmans (*d.* 1671), counsellor of the Council of Brabant and author of the *Decisiones curiae Brabantiae sesquicenturia* (Brussels, 1670). This work actually consists of 150 legal essays, usually but not invariably connected with a decision of the Council of Brabant; in each essay the arguments of the parties and sometimes the reasoning of the councillors are analysed.<sup>147</sup>

In Germany many collections of the decisions of aldermen (*Schöffen-spruchsammlungen*) were made in the Middle Ages; those of Leipzig and Magdeburg are among the best known. But in early modern times the main products of a jurisprudence which was now based on the *ius commune* were treatises and collections of opinions, and collections of case law occupied only a secondary place.<sup>148</sup> In Italy, from the later Middle Ages, case law paled into insignificance before

<sup>144</sup> The inventory of this large collection has recently been completed: J. Buntinx, *Inventaris van het archief van de raad van Vlaanderen*, 9 vols. (Brussels, 1964-79).

<sup>145</sup> J. T. de Smidt and E. I. Strubbe, *Chronologische lijsten van de geëstendeerde sententiën en procesbundels (dossiers) berustende in het archief van de grote raad van Mechelen*, I, 1465-1504 (Brussels and Utrecht, 1966); J. T. de Smidt, E. I. Strubbe and J. van Rompaey, II, 1504-31 (Brussels and Utrecht, 1971); J. T. de Smidt and J. van Rompaey, III, 1531-41 (Brussels and Utrecht, 1979); J. T. de Smidt and J. van Rompaey, IV, 1541-51 (Brussels and Utrecht, 1985); two additional volumes for the period to 1580 are in preparation.

<sup>146</sup> *Practicarum quaestionum rerumque in supremis Belgarum curiis actarum et observatarum decisiones* (Antwerp, 1626). The work contains 1,346 judgments and essays in several volumes, following the order of Justinian's *Codex*. Christinaeus often refers to foreign collections of judgments.

<sup>147</sup> Cf. P. Godding, 'L'origine et l'autorité des recueils de jurisprudence dans les Pays-Bas méridionaux (XIII<sup>e</sup>-XVIII<sup>e</sup> siècles)', *Rapports belges au VIII<sup>e</sup> congrès international de droit comparé* (Brussels, 1970), 1-37.

<sup>148</sup> H. Gehrke, *Die privatrechtliche Entscheidungsliteratur Deutschlands. Charakteristik und Bibliographie der Rechtsprechung- und Konsiliensammlungen vom 16. bis zum Beginn des 19. Jahrhunderts* (Frankfurt, 1974).

the *ius commune* and the *consilia*.<sup>149</sup> The absence of supreme courts of justice (a consequence of political fragmentation) was another reason why case law had little influence. In southern Italy, however, the situation was different: there a regional monarchy had established itself with its capital at Naples, and an important collection of decisions of the court of Naples was published.<sup>150</sup>

This short account shows that there are links between case law, legislation and jurisprudence, and that they are partly determined by political factors.<sup>151</sup> It is an interesting question, which will be developed in more detail later.

## THE COURTS AND PROCEDURE

### General considerations

52 The structure and procedure of the courts of the late Middle Ages were quite different from those of the early Middle Ages, and the modern system has retained its basic importance up to the present day. It is clear from the sources that modernization of the courts went hand in hand with that of procedure, and it is obvious that the two developments were related. But it is more difficult to say which of the developments preceded the other: were new courts created to apply new procedures, or did the new courts bring about new procedures? This (chicken-and-egg) problem can be illustrated by the example of the officialities, which were church courts created towards the end of the twelfth century. The judge was a new type of episcopal functionary, the official, who was a lawyer educated at university; the procedure of the court was Roman-canonical. It is difficult to work out what happened first: was it originally the bishops who wished to introduce specialization and delegate their own jurisdiction to a qualified clerk (who, having studied learned law, automatically applied the new canonical procedure)? Or was it the church authorities who wanted to introduce a new learned procedure (which then caused the creation of new courts and the

<sup>149</sup> Cf. above, section 31.

<sup>150</sup> The collection of the judgments of the *Sacro regio consiglio* of Naples is due to Matthaeus de Afflictis (1448-1528), and the *editio princeps* appeared as early as 1499 (the usual edition is Lyon, 1537).

<sup>151</sup> A general sketch of medieval sources of case law is given in P. Godding, *La jurisprudence* (Turnhout, 1973; *Typologie des sources du moyen âge occidental*, ed. L. Genicot, 6). For a sketch of the European collections of judgments and *consilia* in modern times, see H. Coing, *Handbuch*, II.2, 1, 113-445.

appointment of new judges)? The traditional *curia episcopalis* cannot have adapted to the new system without difficulties. Although this historical problem has not yet been solved, it is at least clear that Roman-canonical procedure (and with it the first learned treatises on procedure) was established (just) before the creation of officialities.

Inevitably, one country differed from another, but the basic common trends in reform and in development of the system of courts and civil procedure can easily be identified. There is remarkable continuity between the last centuries of the Middle Ages and modern times up to the Enlightenment; in this context the traditional divide between Middle Ages and modern times around 1500 is without explanatory value. We now turn to five fundamental aspects of the history of the courts in the *ancien régime*: centralization; specialization; the movement away from democratic institutions; state control; and rationalization of the law of evidence.

#### Centralization

53 Centralization, which replaced the local independence of the early Middle Ages, certainly did the most to shape the court system. The decisive element in this development for both church and state was the establishment of a central court with jurisdiction over the whole of a community or principality. Several paths led to this result. Centralization was most radical in England, within the Court of Common Pleas, a central royal court which sat at Westminster. It had jurisdiction throughout the kingdom for a great number of actions at first instance, which were initiated by royal letters or writs (comparable to the Roman *actiones*). Such disputes were between free men, who all had the right to turn directly to the royal jurisdiction, and did so mostly where land rights were concerned. The emergence of a central jurisdiction under Henry II (1154-89) naturally encroached on the territory of the old feudal and seigneurial courts. This is to be explained largely by the fact that litigants had much greater confidence in the powerful royal courts. The decline of municipal courts followed, and their competence was limited to cases of little importance. It was the great strength of the kings of England, and the rapid unification of the kingdom, which made this extreme concentration of judicial activity in one central court possible. Practical inconveniences such as long journeys to Westminster were reduced by a system of circuit judges who

travelled through the country, and by the local examination of juries in the counties. An almost complete centralization has persisted in England up to the present day. Decentralization began only recently, with the creation of a system of local courts of first instance which have a jurisdiction much more extensive than that of the county courts of the nineteenth century.

In the church and in most countries, centralization was achieved by the establishment of a central court of justice, whether pontifical, royal or comital, with a limited competence at first instance (for *maiores causae*, corporations and important persons), and usually a general competence in matters of appeal. The model for these courts was the *Curia Romana* (later the *Rota Romana*) whose judicial activity from the thirteenth century onwards was particularly intensive. It was the first European court of justice, for its jurisdiction extended to legal actions from the whole of the West, from Sweden to Portugal, from Scotland to Sicily. The large number of litigants from all the countries of Latin Christendom compelled the popes to entrust many of the cases to papal judges delegate, who were charged with investigating and judging disputes in the dioceses of origin and in the name of the pope. This centralization of the church took place at the expense of local instances - bishops, archbishops, deans, archdeacons and officials - who were placed under the very strict supervision of Rome. Centralization inevitably meant a hierarchical system of justice.

So far as secular courts are concerned, the following are the main points. In France the *Parlement de Paris* became the supreme royal court towards the middle of the thirteenth century. It was competent at first instance for some matters and for important persons; as an appellate court its jurisdiction was general.<sup>52</sup> In the Netherlands councils of justice developed in different provinces: in Flanders, for example, the Audience at the beginning, and the Council of Flanders towards the end, of the fourteenth century. Under Burgundian rule, the union of Dutch provinces led to the creation of central institutions for the whole of the Burgundian Netherlands: the (itinerant) Great Council of Philip the Good gradually developed within the ducal council between 1435 and 1445; the *Parlement of Malines*, established there by Charles the Bold from 1473-77; the Great Council of Malines (again fixed there) from 1504 to 1794. In

<sup>52</sup> In later centuries the provincial *parlements* relieved the burden of the *Parlement de Paris*.

the German empire, the *Reichshofgericht* was replaced during the fifteenth century by the *Kammergericht* in which academic lawyers sat. On the initiative of the assemblies of Estates, the *Reichskammergericht* was created in 1495, independently of the Crown. It was intended to sustain the general movement towards unification and political reform in Germany. Originally the court was composed in equal numbers of academic lawyers and noblemen. In addition to the *Reichskammergericht*, the emperor maintained a supreme imperial council, the *Reichshofrat*.

#### Specialization and professionalization

54 Centralization entailed specialization among, and professionalization of, the staff of the courts. In the old feudal *curia regis*, the king had discussed the most varied matters with his great vassals. From time to time these included legal questions, although they were much less important than the political and military discussions. The vassals of the royal court were bishops, abbots, counts and dukes, who had no legal education and had acquired their experience in feudal law with age. In the new central jurisdiction the position was quite different: strict division of labour applied; the councils had specifically to ensure the administration of justice; and they were occupied full time with legal questions arising from the cases which they had to judge. These councils were fixed in one place, unlike the old *curia* which constantly followed the king on his travels.

The councillors were professional judges who, at least on the continent, had been educated at university. Later, the lower courts would also employ professional and academic judges. This general development can be seen first in the church, where the system of officialities, which developed from the end of the twelfth century, became general during the thirteenth. The officiality replaced the *curia episcopalis*, in which very varied cases had been dealt with by various (some lay) people who had no specific training. Here Roman-canonical procedure was introduced. During the first half of the twelfth century, lawyers developed a jurisprudence of procedure, based on texts from canon law and the compilations of Justinian. They ordered and commented on the elements of the canonical and Roman sources, and so formulated a coherent procedural system, whose influence over the centuries extended throughout Europe,

first in the church itself (especially the officialities), and then in secular court practice. This might be either by ordinance of the sovereign or at the instigation of councillor lawyers, who modelled their own form of procedure on the learned law. The influence can be observed even in England, although not in the Common Law courts.

The *Speculum judicale* of Guillaume Durant (first edition 1271-6, second 1289-91) offers a very detailed insight into the principles of Roman-canonical procedure. The procedure is directed by a single professional judge (or by a panel of professional judges), who both investigates and pronounces final judgment. His task therefore involves evaluating questions of fact and questions of law. The core of the procedure is the examination of witnesses or, if necessary, documentary evidence. Writing plays an important part in the procedure: the statements of witnesses are written, and a written summary of them is made available to the other party. The plaintiff initiates the litigation with a document, the *libellus*, whose main purpose is to describe his *actio*; and he presents another document containing *articuli*, that is, the allegations on which the witnesses are to be examined, and which his opponent must contest or admit. The defendant can for his part invoke various *exceptiones*. The subject-matter of the legal action was defined at *litis contestatio*, and was also set down in writing.

The law paid particular attention to the procedure for appeal, which like all other stages of procedure was regulated in detail. Examination of witnesses was secret, in order to assure them freedom of expression; broadly speaking, secrecy was characteristic of learned procedure, and the public was kept at a distance. Bureaucracy dominated the procedure, as is shown (for example) by the inquests of councillor-commissioners, whose reports were the basis for the decisions of the council.<sup>153</sup> The detailed rules on evidence merit their own section.<sup>154</sup> The diffusion of this procedural model can be followed through the late Middle Ages; there is a link between Bologna and the church courts and the Parlement de Paris, whose

<sup>153</sup> This characteristic became so marked that in modern times it gave rise to the expression *quod non est in actis non est in mundo* (literally 'what is not in the documents is not in the world'); the magistrates took account above all of the papers rather than the people in the case.

<sup>154</sup> See below, section 57.

*Stylus Parliamenti* inspired the procedure of the courts of justice in the Netherlands, especially the Great Council of Malines.

#### *Movement away from democratic institutions*

55 These developments had the immediate result that popular participation in the administration of justice ceased to be important. During the first centuries of the Middle Ages as well as in Germanic Antiquity, the people had taken a direct and active part in decisions; sometimes the judges had sought assistance, and the people had been asked to express agreement with, or disapproval of, the decisions proposed by the judges who had 'found' the applicable law. The procedure was completely oral and public. After the late Middle Ages this practice disappeared. It would be an exaggeration to attribute the change solely to the spread of Roman-canonical procedure, since even outside its sphere of influence the role of the people was curtailed.<sup>55</sup> None the less, it is clear that the example and prestige of learned procedure played a part in the decline of popular participation in the law. The people also became less and less capable of grasping the contested issues or comprehending the learned language of the courts. This alienation was exacerbated when the recruitment of magistrates was restricted to graduates, and still more by the venality of offices (that is, allocation by the Crown of seats as councillors to the highest bidder). From that time on, the magistrates formed a class of wealthy noblemen practically as exclusive as the law which they applied.

English procedure too became more esoteric. There, too, the magistracy was scarcely accessible, and legal language was unintelligible to any non-initiate, not only because of its technicality but also because the language used was not even derived from English but was a petrified form of Norman French going back to the twelfth century ('Law French'). Yet the procedure (even the civil procedure) of the Common Law did preserve one traditional institution which maintained its link with the people: the jury. Since the professional judges were obliged to explain the significance of legal principles in comprehensible terms to a jury of non-lawyers, the people were not entirely excluded from the legal system.

<sup>55</sup> E.g. the prohibition in the Great Charter of Philip of Alsace on contesting the judgment of a court of aldermen.

#### *State control*

56 In the course of modern times the organization of the courts was taken over by the state. Of course, other courts existed alongside the royal jurisdictions, but their competence was firmly restricted. These were the feudal and seigneurial courts, whose origins go back to the early Middle Ages, and whose jurisdiction was over vassals and the inhabitants of the great domains respectively. The jurisdiction of the feudal courts was essentially limited to law on land ownership (relating to fiefs), while that of the seigneurial courts was often restricted to cases of low justice, higher justice being administered elsewhere. These jurisdictions were also subordinate to central control by way of appeal. Even in Roman Catholic countries, the church courts lost a large part of their jurisdiction over lay people to the royal jurisdictions, while the publication of new pontifical statutes was subjected to the *placet* (approval) of the sovereign.

The municipal jurisdictions, whose competence within the walls of a city and sometimes even beyond had for centuries been total, also declined in importance; their competence was restricted and the means of appeal against their decisions extended. Yet, in spite of the superiority of the royal jurisdictions – bailiffs, seneschals (*sénéchaux*), and *parlements* – the system of courts even in the eighteenth century was not a hierarchy in the shape of a pyramid. Historical exigencies had created different networks and systems of jurisdictions, with sometimes concurrent competences. At the end of the *ancien régime* these still coexisted. The establishment of a single system was a matter for the enlightened absolutism of the eighteenth century and the French Revolution.

#### *Rationalization of the law of evidence*

57 In the early Middle Ages the law of evidence was dominated by the irrational system of ordeals. This state of affairs changed completely in the period with which we are now concerned: from the twelfth century, ordeals were abolished and progressively replaced by rational means of proof, based on critical and rational examination. This change was already apparent in the twelfth century in England, Flanders and Italy, and reached central and eastern Europe about a century later. Some residues (such as the feudal fondness for the judicial duel, and the revival of trial by water during

Vanc 104-103

the witch-hunts of the sixteenth and seventeenth centuries) were still to be found at a later date, but, in general, from the thirteenth century the law of evidence in Europe employed essentially rational methods of inquiry.<sup>156</sup>

Roman-canonical procedure also influenced this development, but its importance must not be exaggerated. The renaissance of Roman law was not the proximate cause of the transformation. Rationalization of the law of evidence can be detected in England and Flanders from the twelfth century, and thus before Roman law penetrated into those regions, and before the church courts applied the new procedure. In England, therefore, a modern law of evidence could develop independently of Roman law based on national institutions, notably the jury. Elsewhere, where rationalization came later, it was simpler to follow the Roman-canonical method, for instance, in France in the thirteenth century. The learned law of evidence finally prevailed everywhere on the continent and became the system typical of Europe in modern times. The Common Law is the sole but important exception to this diffusion: the English system preserved the institution of the jury (and does still nowadays for criminal matters, and until recently for civil ones).

One of the most striking elements of the new procedure was the system of 'learned' or 'legal proofs'. To understand its significance, we must recall that the disappearance of the old modes of proof had created a serious gap. In the old system the irrefutable signs of Providence determined what was true or false, which party was innocent or guilty. How to replace this archaic system? By force of circumstance the judges had to rely on documents, witnesses, real evidence and so on, but it was obvious that a document could be falsified, that witnesses could contradict one another, and that evidence was sometimes unclear and misleading. Must the judges be allowed to assess the elements freely and judge on the basis of their inner conviction (as at present)? Or ought a system to be devised in which each mode of proof was assigned its own value, and in which the acceptance or refutation of various types of witnesses, and the authentication of documents, were subject to precise rules? In the

<sup>156</sup> Ordeals were criticized from all sides. The authorities mistrusted their ambiguousness and their potential for manipulation; the church began to see in them a challenge to God, from whom new miracles were constantly expected; the cities were against them because a merchant was inevitably at a disadvantage in a judicial duel against a knight; and the jurists were opposed to them as the *Corpus iuris* by its silence implicitly condemned them.

Common Law system the dilemma was resolved by entrusting the jury with the sovereign task of resolving questions of fact. The continent opted, on the other hand, for a system of 'learned proofs': the challenging of certain types of witness (for instance women, parents and serfs) was regulated in detail; and each element of proof (direct and circumstantial witnesses, character witnesses, real evidence, presumptions, bad reputation) was assigned a numerical probative value. In this system a full proof (*plena probatio*) corresponded to two direct corroborating witnesses. The original, and no doubt laudable, aim of this system was to safeguard the parties against any arbitrariness on the part of the judges. Jurisprudence discussing the admissibility of witnesses and the credibility of evidence certainly helped to convince magistrates of the relative value of different modes of proof. On the other hand, the system was also extremely theoretical and artificial.<sup>157</sup>

#### FACTORS

58 Without detracting from the importance of the learned lawyers, we should note some general political, intellectual and material developments which were decisive for the developments which have been described. In the first place, it must be recognized how important it was that power was concentrated in the church and in the states. The modernization of legal studies and the administration of justice fits perfectly in a policy of centralization and bureaucratization. The free cities were also in favour of a modernization of law. In the last centuries of the Middle Ages, it was these political institutions which abandoned the old feudal framework, and resolutely created new political structures.

Transformations in the law were clearly influenced by the intellectual climate in general, notably the revival of interest in ancient culture and the role of scholasticism, which attempted to combine rational criticism with faith in the absolute authority of sacred texts. Especially important was the increasingly rational character of western thought, under the influence of the works of Aristotle in

<sup>157</sup> Often in criminal matters it led to the use of torture: for instance when there was a single eyewitness (who counted for half proof) and a negative indication (such as running from the place of the crime, which counted for a quarter), the total was reached by declarations made under torture (worth a quarter) in order to arrive at a complete proof. G. Alessi Palazzolo, *Prova legale e pena. La crisi del sistema tra l'età medio e moderna* (Naples, 1979; Storia e Diritto: studi e testi raccolti da R. Ajello e V. Piano Mortari, 6).



particular.<sup>158</sup> Aristotelian social analysis was a fundamental factor in the shaping of modern society. The will to understand social organization rationally and to analyse it in depth had a stimulating effect which also had a significant impact on jurisprudence.

Finally, the development of law was influenced by material factors. The revival of cities and the development of a monetary economy assured the church and the states the financial means for reorganization (salaries for magistrates and officials educated in law) and allowed them to cover the expenses of the long (not directly productive) university studies of thousands of students. The socio-economic crisis of the agrarian and feudal world caused a crisis in the legal structures and conceptions of that society. The complexity of new economic structures, which from now on had an industrial and commercial dimension, also demanded a better-adapted and more complex system of justice. In particular, commerce and the monetary system could not develop without greater contractual freedom, a better system of credit, and the liberation of landed property from feudal and family charges. These demands exceeded what the western world in the early Middle Ages could possibly supply. It could offer the interminable discussions of village leaders, and a traditional wisdom which varied from one region to another. Growth of a new economy based on rational investment and an international market now depended on a single certain system, a system that was foreseeable and predictable.

#### EVALUATION

59 Respect for the law, and the tireless efforts of various social groups and individuals in developing it, stand out when the old law is considered as a whole. Yet all these efforts were neither coordinated nor directed by a central authority. The old European law was the typical result of an organic and natural development, with its advantages (richness, suppleness, renewal) and its disadvantages (extreme complexity, overlapping, and lack of certainty). In that respect this period contrasts with what preceded it and what was to

<sup>158</sup> Cf. H. Coing, 'Zum Einfluss der Philosophie des Aristoteles auf die Entwicklung des römischen Rechts', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (R. A.) 69 (1952), 24-59; G. Otte, 'Die Aristotelizitate in der Glosse', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (R. A.) 85 (1968), 368-93; G. Otte, *Dialektik und Jurisprudenz. Untersuchungen zur Methode der Glossatoren* (Frankfurt, 1971; Ius commune Sonderhefte, 1).

follow. In the early Middle Ages the law was simple, because traditional customs dominated all legal relations. In the Enlightenment, the desire to simplify the law manifested itself in a policy of national codifications, which aimed at a uniform law set out in a clear text, certain for all. In the period we have just examined there was no true European law, although a European jurisprudence reduced the disparity between local customs and ordinances. Nor were there national codes or even (except in England) national legal systems; the position of national law, between local custom and cosmopolitan common law, was obscure and somewhat uncertain. No single legal system had a monopoly; the law was characterized by pluralism and eclecticism. Lawyers willingly drew principles and concepts from different sources of law: Roman law, canon law, custom, royal or municipal legislation, the law of the country or foreign law. Upheavals in different areas and countries led to a proliferation of authoritative sources (or so it seems to modern eyes accustomed to national legislation and a central system of justice). From modern times this proliferation was criticized; and in the eighteenth century, the tendency was reversed. In place of the old law, which was the result of organic development, the reformers advocated the introduction of codes. They were conceived as instruments of modernization and social and economic policy, and were intended to ensure clarity and legal certainty.

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## CHAPTER 4

*Enlightenment, natural law and the modern codes:  
from the mid-eighteenth to the early  
nineteenth centuries*

## CHARACTERISTICS

61 This short period was exceptionally important. It saw the abolition of old legal traditions, the short-lived triumph of natural law, and the more lasting emergence of a belief in codes. The period began around the middle of the eighteenth century, when criticism of Roman law and the rise of natural law began to be reflected in important codifications. By the beginning of the nineteenth century it had already ended; natural law had lost its power to inspire, and was overshadowed by positivism and the Historical School of law. None the less the legacy of this relatively brief period was lasting: faith in codes persists (albeit less fervently) to this day, and their practical importance is still considerable. In the space of a few decades, concepts and institutions which had taken shape gradually over the centuries were abolished and replaced. This was the result of a policy guided by new principles and new structures, some of which are still employed.

## THE ENLIGHTENMENT

62 The renewal of the law has to be seen in the context of the Enlightenment, a European-wide movement which took a critical attitude towards the ideas and the society of the *ancien régime* in general. There was criticism especially of the following points. First, of inequality before the law, which was entrenched by the political system of Estates, with its fiscal privileges for the orders of nobility and clergy, and limited access to public office. Second, of the restraints on people and property: serfdom still existed, while various feudal and corporatist restrictions dampened down economic activity. 'Liberty' and 'equality' were therefore essential demands as

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