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European history of law

Evolution and fundamental features

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Part I

THE MIDDLE AGES: LAW IN EUROPE

Chapter 1

GENERAL BACKGROUND: AT THE ORIGINS OF THE EUROPEAN LEGAL SYSTEMS

SUMMARY: 1.1. Introduction. – 1.2. The Roman origin. – 1.3. The Holy Roman Empire. – 1.4. Feudal law.

1.1. Introduction

Every stage of development of legal ideas and institutions shares some common elements that are essential to fully understand the changes and the features of the rules adopted by a community to organize and distribute power, to limit and control violence, and to manage property and family relationships. Therefore, the history of transformations of the legal system deserves and requires a specialized study, and «cannot be treated as mere incidents in the general history of the societies where they occur».

The goal of this volume is to provide the students with useful instruments with which to understand both the past and the present, as far as the most important elements of "law" are concerned. The aim is to give an insight, to carry out an investigation, into the origins and development of law, being conscious that legal history is part of general history but that it has its own autonomous features. It will be possible to show that law is made up of very old as well as very modern elements, and that during the centuries it went through periods of stagnation and periods of rapid change [1]. Legal history is a useful tool also for lawyers and legal scholars, who are essentially concerned with current problems, and it could help them, «to be meaningfully aware of the past as a healthy check on our often overly optimistic and unfounded hopes» [2]. In the daily life of a jurist the knowledge of legal history and the awareness of the importance of the

[1] F. POLLOCK, *Introduction*, in H. SUMNER MAINE, *Ancient law in connection with the early history of society and its relation to modern ideas*, New York 1906, p. XV.

[2] C. WOODARD, *History, Legal History and Legal Education*, in «Virginia Law Review», 1967, vol. 53, p. 105.

origins and the development of every element of each legal system are an important aid in drawing «the ever-difficult distinction between the "temporal" and the "eternal", the changing and the unchanging» [3].

The goal of legal history should not be limited to explain why an innovation occurred when it did but to explain also why a legal change did not occur when society changed, or when perceptions about the quality of the law changed. It is also important to understand why a certain legal change was not introduced before: studying the evolution of the features of the different legal system is fundamental to answer this question.

One preliminary remark should be emphasized: the term law is a multifaceted word. In Italian, we have *legge* and *diritto*, in French, *loi* and *droit*, while the term 'law', in the English peculiar history, shows rather blurred boundaries.

People often identify the idea of law with the idea of legislation: this is a mistake. If we were to believe that this way of thinking is correct, we wouldn't be able to understand the real essence of 'law', especially in the Middle Ages, but also up to the beginning of the nineteenth century. If we were to give it the meaning which is normally given in continental Europe legal context, that is: – law is the command of a Legislator – we could not understand the historical process of European law correctly; in other words, to identify the idea of 'law' with the idea of 'legislation' might be fully misleading. If we were to believe that that way of thinking be correct, we wouldn't be able to grasp the real essence of law.

In fact, it is fundamental to underline the fact that legal regimes reveal their identities in their sources of law. The most important elements are legislation, legal doctrine and legal practice. The first one, legislation, is the most recognizable feature of the legal system as it is composed by the rules of behaviour imposed on subjects living under its provisions. To identify law with legislation means to overestimate the role of political power, as an organized identity, capable to retain the monopoly of 'law'. The risk is considering law as a top-down command, an authoritarian voice that emanates from the holder of sovereignty. The task of the legislation is to introduce general principles to apply to some future set of disputes [4].

The legal doctrine entails the intellectual pursuit undertaken by legal professionals and scholars who possess the requisite training and skills to identify, interpret, and systematize legal principles, with the aim of facilitating their integration into the legal system and their application to real-life scenarios.

Legal doctrine is needed to provide to the legislative power the principles that law should follow and the goals that it should achieve. The role played by legal doctrine is fundamental when a change is necessary in the content or the

[3] C. WOODARD, cit., p. 100.

[4] A. PADOA SCHIOPPA, *A History of Law in Europe*, Cambridge 2017, p. IX.

application of legislation. In this case the legal scholars have the capabilities required to prompt a certain change or to induce the adoption of a certain approach as they can identify the values or interests deemed worthy of safeguarding. The approach and the methods used by the interpreters have changed over time, but the aim of this activity has maintained its distinctive features in the different periods.

The other fundamental element composing the legal sources is legal practice that represents the manifestation of legally significant behaviours originating from the customs of a community. It is established over time by community members or rulers, or through judicial rulings in the resolution of disputes within private or criminal law.

Legal sources are intertwined: on the one hand legislation is not only the product of a ruler's will, but it also reflects the intellectual framework and the customs current at the time it was enacted, on the other hand legal doctrine is rooted in the ideas and in the methods of the intellectual framework of the time, but it can also be a marker of parallel normative rules and customs.

Legal practice shows the tendencies and concrete choices made by individuals or communities and by the law courts in real-life cases, but it also directly or indirectly records – through transactions, contracts and court decisions – the normative framework and the culture of the legal profession.

The relevance of each of these sources changed over time: in the early Middle Ages in Europe customary laws played a very important role; the following period, from the twelfth century onwards, saw the emergence of a new legal science as an autonomous source of law starting from the School of Bologna. Beginning from the late eighteenth century, legislation achieved the role of the dominant source of law throughout the reforms, the subsequent codifications and the increase in statutory laws produced in the nineteenth and twentieth centuries [5].

The hierarchy of these sources has changed over time: the role played by legal history is also to underline the prevailing elements in the different periods and the changing balance between them. Considering these elements, it is crucial to bear in mind that the interplay of legal sources is contingent on the requirement to address the two fundamental necessities that a legal system must fulfil: the demands for justice and certainty [6]. Certainty in the legal field means that the law must be accessible, as intelligible as possible, clear and predictable. These are characteristics which are the essence of certainty. Because of the application of certainty standards to the legal system, questions of legal right and

[5] A. PADOA SCHIOPPA, cit., pp. IX-X.

[6] F.R. COUDERT, *Certainty and Justice*, in «The Yale Law Journal», May, 1905, vol. 14, n. 7, pp. 361-337.

liability should ordinarily be resolved by the application of the law and not the exercise of discretion.

Certainty is fundamental at the regional and international level: the EU's Court of Justice adopts certainty in its jurisprudence, stating that «the principles of legitimate expectation and assurance of legal certainty are part of the legal order of the Community» (Deutsche Milchkontor GmbH v Germany (Joined Cases 205-215/82)[7]. Legal certainty and legitimate expectation are, as the Court of Justice implied, related. If the law is certain, citizens know what to expect. There is in all modern states today a general conflict between certainty in the law and concrete justice in its application to single cases; in other words, between the effort to always have a general rule everywhere equally applicable to all cases and the effort to reach what may seem to be fair dealing between the parties upon the particular facts in each case. In fact, when rules become so fixed and rigid that they are difficult or impossible to change, the law is out of touch with prevailing moral ideas, which like all other ideas are constantly progressing; the law thus necessarily becomes a clog upon national development, an incentive to revolutionary reform.

In this field, the legal historian's most important task is to study change over time and try to explain the origin of the changing balance to ensure the need for justice and the need for certainty. In the past, historians emphasized the aspects of continuity. Nowadays, perhaps more attention is directed towards discontinuity, with the intention of highlighting the factors that instigated a shift in a particular direction or the preservation of certain customs and regulations.

A fundamental role in the development of legal history is played by the jurists: lawyers, judges, arbitrators, professors: their role and their position, as well as their competences, their careers, were greatly different during the centuries. Their activity is fundamental not only for the development of legal doctrine but also for the introduction of legislative sources and their application through legal practice.

The influence of political power on legislation cannot be underestimated: however, jurists were generally capable of maintaining some power and independence; consequently, examining the role played by jurists in the 'administration' of law will be one of the purposes of the volume. It is a central theme these days: the questions about the role of law and jurists in contemporary society are posed with mounting urgency: is the law an oppressing or a liberating force? What is law? It goes without saying that law may be the instrument by which a ruling, dominant class can safeguard its position, but law has also been the instrument by which justice could be achieved.

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[7] J.H. MANCE, *Should the law be certain?* The Oxford Shrieval lecture given in the University Church of St Mary the Virgin, Oxford on 11th October 2011 (https://www.supremecourt.uk/docs/speech_111011.pdf).

Attention must be paid to another fact: the conception of law as synonymous with legal systems created by the States, as sole creators, is now proving inadequate to provide order in a global society such as today's; the States are certainly not vanishing, but they are becoming less and less important as producers of law.

In this course the focus will be about western Europe: it is evident that the European regions share a common legal heritage, deriving from the fact that the Roman tradition mingled with Germanic customary laws. Of course, especially as far as Roman law is concerned, there are many elements in common between East and West. Our focus will be on Italy, France, Germany, and England.

Talking about law means to dedicate much attention to the jurists: lawyers, judges, arbitrators, professors. Their role and their position as a ruling class, as well as their competences, their careers, were greatly different during the centuries.

It is important to keep in mind that on the one hand one of Europe's major cultural achievements is its law, its unique legal culture but, on the other hand.

> European history had not only been a history of freedom, equality, and fraternity, as many like to present it. But it was also a history of violence, oppression, exploitation, and disfranchisement of entire continents by European colonial rulers of formal or informal imperialism [8].

As a consequence, it is important to try to adopt not only European but global perspectives on European history as they are necessary for a more wide-ranging understanding of the evolution of every legal system, and they represent a precondition for a global dialogue on justice.

1.2. The Roman origin

In ancient times, 'law' consisted not only in power and command, but also in the manner in which a society organized itself in accordance with certain historical values. Law was an expression of international (European) society rather than the State (the Nation-State). Furthermore, from the Early Middle Ages to the seventeenth century, law was a product of experience. Thus, the notion that law must always adhere to rational and logical frameworks, the idea that it should align itself with those structures, does not accurately depict the reality of the situation.

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[8] T. DUVE, *European Legal History. Concepts, Methods, Challenges*, in T. DUVE, ed., *Entanglements in Legal History*, Frankfurt am Main 2014, pp. 29-30.

For centuries past, it is really striking to see the overwhelming power of society: in ancient times law was no act of authority, not rational, not a product of logical schemes, but it was inscribed in the concrete facts of life; it was a state of mind more than a set of commandments. The influence of this medieval approach was long-lasting: Hegel's idea of the modern state is constructed around many of the institutions and structures characteristic of medieval politics, that were monarchic government, intermediary bodies, guild values, militaristic organization.

Hegel himself thus employs many elements crucial to the political model which he condemns the Middle Ages for upholding. It is important to understand the manner in which these features of medieval political life matter to the understanding of the Hegelian notion of the modem state. Provisionally, it is possible to answer this question in the following terms: Hegel's modern state is derived dialectically from the historical experience of feudal society in the European Middle Ages. Hence, while Hegel finds little to admire in feudalism on its own terms, the dialectical nature of historical progress, through which the past is retained in mediated form, renders the feudal system of significance to modern politics [9].

Bearing this in mind, it will be important to consider the entire legal and historical landscape adopting a broad view, far from rigidly interpreting models.

The Middle Ages are an age of legal pluralism. This derives from the idea of sovereignty, as developed by medieval thinkers.

The medieval sovereignty was very different from the modern concept. An important legal principle, introduced in Europe by the Germanic peoples, was the principle of the personality of Law: according to it, the law was tribal, it belonged to the person, it was a matter of kinship and blood-ties; it did not depend on the place where one lived, but it was one's ethnic inheritance.

This principle made the coexistence of different legal orders in the same territory possible. Since these orders emanated from different social groups, these groups were more important than the political power established in that territory. Under the rule of personality only the *forum rei* (competent tribunal) depended on territoriality, while the *lex fori*-the basic rule in modern conflicts of laws-was governed by race or nationality.

The consequence of the personality of law was the following: the coexistence of various legal orders in the same territory was, as a general rule, admitted; since these orders emanated from diverse social groups, these groups were more important than the political power established in that territory. To be more precise, the Germanic idea was that their own laws – their legal inheritance – could

[9] C.J. NEDERMAN, *Sovereignty, War and the Corporation: Hegel on the Medieval Foundations of the Modern State*, in «The Journal of Politics», 1987, vol. 49, n. 2, pp. 500-520.

not be imposed to the conquered Romans, who were allowed to continue to use their own Roman law.

As a consequence of this model of organization, it is possible to affirm that the medieval scheme of justice did not originate in state action. It is possible to underline that, in the first period, among the Germanic tribes, law was a tribal possession and therefore personal but in which the question of recognizing foreign law had not yet arisen. This phase is marked by the absence of written law, the dominance of custom and the popular administration of justice. It is fundamental to underline that, in the same period, also Roman law remained personal and acknowledged the existence and validity of provincial customs, native traditions and especially vulgar law side by side with official sources.

In the year 212 A.D. the emperor Caracalla issued the *Constitutio Antoniniana*, whereby all the free inhabitants of the empire became citizens. The roman jurist Ulpian emphasized the universality of the grant as the emperor's purpose was to increase the revenue by increasing the number of citizens subject to taxation. Consequently, according to the existing principle of personality of law everyone could use Roman Law, that was traditionally the law of the citizens of Rome.

Before, the early Roman law *(ius civile)* applied to Roman citizens only. This law was unable to provide a useful background for an expanding nation; so, the jurists 'invented' the *ius gentium,* which provided rules to organize the relations between foreigners and between foreigners and citizens; despite this, there was no acceptance of other nations on a footing of equality: Rome was the capital of the Empire. Institutions as the *ius gentium* (law of nations), *reciperatio* (reciprocal protection of citizens of two states), *autonomia* (autonomy) in Termessus, the Jewish *privilegia* (privileges), and the role of local usage in the provinces attest to some degree of recognition of the principle during the early and classical periods of legal development [10].

After the issue of the *Constitutio Antoniniana* a significant growth in the use of Roman law can be postulated, even though the importance of local customs cannot be underestimated. In view of the enormous expansion in the number of persons subject to Roman law, and of the political upheavals of the 3rd century, there was a widespread desire for simplification and certainty. It is possible to underline, once more, that the need for certainty was present in every phase of development of the legal system.

As a result, the notion that obtaining an immediately enforceable decision on legal matters and reducing uncertainty was more crucial than striving for an ide-

[10] As it is affirmed in the paper by S.L. GUTERMAN, *The Principle of the Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas*, in «University of Miami Law review», 1966, n. 21, p. 265.

al solution gained increasing acceptance. Therefore, elementary legal books were written with this aim in mind: *Epitomes* (summaries) of the *Institutes* of Gaius, the *Regulae* of Ulpian, the *Sententiae* of Paul (who were jurists of the classical period); a selection from some of the leading jurists of the past was made, known as the *Vatican Fragments*, because found in a manuscript in the Vatican library). The *Collatio legum Mosaicarum et Romanarum* (a comparison of Mosaic and Roman law) is an example of the changing approach of that time: it is one of the first attempt to harmonize the growing influence of Christianity and the codification of Roman law lies in the late antique Latin work known by scholars as the Lex Dei ("Law of God") *or Collatio Legum Mosaicarum et Romanarum* ("Collation of the Laws of Moses and of the Romans")[11]. The anonymous collator of this short legal compendium organized his work following a fairly regular plan, dividing it into sixteen topics (traditionally called titles). Each title begins with a quotation from the Hebrew Bible (in Latin), followed by quotations of passages from Roman jurists and, occasionally, from Roman law'. It is possible to affirm that the «apparent motive [of the author] was to demonstrate the similarity between Roman law and the law of God».

These works were accepted as working manuals of the courts of justice (which actually were disappearing, because of the Germanic invasions). The level of these works was rather modest, and reflects the devastation of the end of the Western Roman Empire and the difficulty to preserve the precise 'spirit' of Roman law.

The establishment of Germanic kingdoms in Italy, Gaul, Spain, and North Africa reduced the law of the Roman population to the status of a tolerated personal legislation. Among the Franks, Burgundians, Visigoths, and even Ostrogoths a dualistic system was established in which Romans retained the privilege of their own private law, according to the principle of personality of law, but in which the Germanic law undoubtedly enjoyed territorial validity in disputes between Germans and Romans. What should be the approach to the study of the legal system of this period? According to some scholars,

> the invasions must be studied, not in terms of an "ethnic dilemma", as Germanists and Romanists for a long time attempted to do, nor as a conflict of classes, as eighteenth-century authors conceived them, but rather as a meeting of peoples in differing stages of civilization[12].

The increasing diffusion of Germanic laws brought about a series of consequences. The historians, reflecting on the overall impoverished state of the

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[11] R. FRAKES, *The Lex Dei and the Latin Bible Author*, in «The Harvard Theological Review», 2007, vol. 100, n. 4, pp. 425-441.

[12] S.L. GUTERMAN, cit., p. 265.

West, speak of vulgarization of Roman law, since the ancient principles and the exact definitions of legal aspects and institutes, were too complicated for the populations of Western Europe. 'Vulgar law' means – essentially – a simplified Roman law, which had been exposed to the successful influences of the Germanic customary laws: the scientific work of the classical jurists was beyond the intellectual abilities of common people. Many legal institutes consequently were scarcely understood: a general misconception was widespread. The disappearance of the Western Roman Empire – 476 A.D. – and the mounting importance and influence of the Germanic peoples were decisive for the evolution of Roman law.

Vulgar law has been synonymous, for some legal historians, with 'provincial law' and is used to designate a body of relatively simple, perhaps customary, law which was not written down, and which governed everyday legal business in the provinces; only more major cases reached the courts which dealt in Civil Law. This kind of law will be described hereafter as 'custom' or as 'provincial law'. For other historians, however, 'vulgar' has a very different significance, and refers to late-Roman Civil Law. The reasoning behind this is that Civil Law gradually came to take account of, and to be influenced by, custom or provincial practice: it thereby lost its classical 'purity' and became 'vulgarized'. It is in this sense that the term is used hereafter [13].

With the passing of time, the establishment of Germanic kingdoms in Italy, Gaul, Spain, and North Africa reduced the law of the Roman population to the status of a tolerated personal legislation. Both in territory of contemporary France and Italy as well as in Spain, foundations were thus laid for a dual stream of legal activity and a merger of legal institutions and ideas on terms of equality. The Germanic people settled amid a larger Roman population and, faced with a superior system of jurisprudence, had little alternative but to recognize existing legal condition.

In fact, since the laws of the barbarians were personal laws, it would have been difficult to apply them to every individual of the conquered population without transforming them into Germans. Thus, the barbarians were obliged to recognize the personality of the Roman law, even though they did not extend this privilege to other barbarian nations [14].

In the 5th century Emperor Theodosius II (Emperor in the East) had a project to codify the whole Roman law: in 425 A.D. he ordered that private legal teaching had to be replaced by the systemized learning available at his newly opened university in Constantinople, located in the heart of the city and graced

[13] P.S. BARNWELL, *Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West*, in «Past & Present», 2000, n. 168, p. 14.

[14] S.L. GUTERMAN, cit., p. 271.

with many of the amenities available at its modern counterparts that were lecture halls, student cafeterias, and offices for teachers. Students studied grammar and rhetoric, both Greek and Latin, philosophy, and law. Besides insisting on the control and regulation of higher education, which had not been done previously in the history of antiquity, and, perhaps, anticipating a regularized and predictable quality of law student, Theodosius surrounded himself with highly skilled lawyers whose knowledge of classical law and jurisprudence was incomparable [15].

Theodosius, a few years following the establishment of his university, decided to commission the creation of a law code, designed, as he himself said, to collect the body of legislation which men of ability and ambition could master: «We have completed a true undertaking of our time; We have dispelled the darkness and given the light of brevity to the laws by means of a compendium» [16].

Except for two collections of the emperors' responses to individuals answering legal questions and dispensing legal favours (called rescripts because the emperor wrote back to his petitioner) that were published under the authority of the emperor Diocletian (A.D. 284-305), the Theodosian Code was the first collection of laws (*leges*) to have been issued since the promulgation of the Twelve Tables in the fifth century. The need for a code also depended on the fact that, with no definitive text to consult, people with quotidian legal questions (property rights and inheritance restrictions, for example) or in legal difficulties had to search assiduously for information on their own. Some regional government offices conserved archives, but in practice it is possible to suppose that this task was left to the discretion and inclination of the local administrators and thus neither regularized nor systematized [17].

The Code had to be adopted both in the East and in the West and was notable for its stress on status of persons and for its neglect of "contract": the Theodosian Code recognized Custom as a source of law, provided that it was not in conflict with reason or with Statutes given by the Emperor. This meant, of course, local custom and not the ancient custom of Rome, the so-called *mos maiorum*. One might conclude, as some have done, that codification was not undertaken with the citizen's legal convenience in mind. Instead, Theodosius II may have been motivated by political reasons, namely solidifying relations between his eastern half of the empire with that of the west.

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[15] E.T. HERMANOWICZ, *A Brief History of the Theodosian Code Author*, in «The Classical Outlook», 2002, vol. 79, n. 3, pp. 97-103.

[16] C. HUMFRESS, *Cracking the "codex": late roman legal practice in context*, in «Bulletin of the Institute of Classical Studies», 2006, vol. 49, pp. 241-254.

[17] E.T. HERMANOWICZ, cit., p. 98.

Compared to the West, the East was thriving as fabulous cities, famous libraries survived: this rich cultural environment made the compilation of legal works possible; however, the level of the Theodosian Code is quite superficial. It is possible to define the Roman law collected in the Code as the confirmation of a vulgarization. Due to the disappearance of key elements of the old legal culture, ancient Roman law gradually distanced itself from its classical origins. The decline in intellectual vigor in the West was notably evident in the alterations of Roman law.

Another important element of these centuries is the introduction of Christianity as the official religion of the State, and the transferring of the administrative capital of the Empire away from Rome by Emperor Constantine.

It was shortly after Constantine's victory over Maxentius, probably early in 313 A.D., that a document, known as 'Edict of Milan' was drawn up and issued. This most precious document spelled out, in detail, a complete religious freedom for the Church, granted the same religious privileges to the Catholic Church as those enjoyed by the official pagan religion, and ordered the immediate return of confiscated Church property throughout the Empire [18]. After several battles in 324 A.D., Constantine eliminated Licinius from the rule of the Roman Empire. A sole ruler of both the West and the East, Constantine issued edicts to protect the Church in the Eastern Provinces.

Constantine also removed some of the religious protections that the Jewish population had enjoyed under his predecessors. Under Constantine, the Jews lost some of their ancient and honoured privileges, such as immunity from membership of municipal councils, since Christians were obliged to fulfil such duties as well. But Constantine later allowed the immunity of two or three persons from municipal councils in each city, and, still later, he extended this privilege to all officials of the synagogue who thus achieved, in this respect, equal status with the Christian clerics [19].

The Church in the West came rapidly to prominence. The foundation of a legal order for the government of the Church can conveniently be dated to 325 A.D., to the general Council of Nicaea. The 4th and 5th centuries were crucial in the establishment of a more and more structured organization in the Church, which enabled it not only to play a vital role in legal history in the distant future, but also to do so in the 5th century, when the Western provinces were invaded by Germanic tribes. The Roman Church, at that moment, was already sufficiently strong: above all it was an ambitious institution, an entity which lived *secundum legem romanam* (in accordance with Roman law).

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[18] P. KERESZTE, *Patristic and Historical Evidence for Constantine's Christianity*, in «Latomus», 1983, n. 1, p. 89.

[19] P. KERESZTE, cit., p. 93.

At the Council of Nicaea all the bishops but two signed the creed and canons. This virtual unanimity must have been very gratifying to Constantine, and it represents an important achievement in reconciliation on the emperor's part – for it is not what anyone would have expected after the dramatic events leading up to the calling of the Council [20].

For what concerns civil law, although the Theodosius code was intended to provide an official collection of the interpretations of the jurists (including those of the praetorian prefects), that goal was not realized until the sixth century, when Justinian produced his great systematization of Roman law, and even then, imperial enactments and juristic interpretations remained in separate volumes [21].

The contribution that Justinian made to continental European law needs to be viewed in the context of how the Roman Empire had evolved in the years that preceded Justinian's arrival on the scene in the early 500s. Notably, just a half century before Justinian's rise to power, Rome had fallen to alien invaders – an event that itself was the culmination of increasing external political and military pressure that a swarm of Germanic tribes had brought to bear on the Western portion of the empire, especially in the third to fifth centuries.

Justinian's political plan included reclaiming the Italian peninsula from the Germanic tribes that had overrun it, thereby reuniting the empire that had been split several centuries earlier and then collapsed in the West and to restore classical Roman law to the power, elegance, and sophistication that it had enjoyed about three centuries earlier, when Roman law had matured into one of the empire's greatest achievements. Justinian completed both of those projects. The first of them – the reassertion of Roman political control over the Italian peninsula – was completed around 540 A.D. due to the military genius of Justinian's main general, Belisarius. That accomplishment was short-lived, however, and Justinian's dream of a reunification of the empire largely died with him.

The second of Justinian's accomplishments also gave the appearance of being short-lived. It was the legal compilation he requested. That compilation of laws fell out of use – and indeed some portions of it were for all practical purposes physically lost in the west – within a century of its issuance, and it would not re-emerge for about five hundred years. However, when it did appear again, as it will be explained in detail in the second chapter of this book, it became the centrepiece for the development of what became known as the civil law tradition, founded in Roman law [22]. Hence, this second of Justinian's accomplish-

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[20] H. CHADWICK, *Faith and Order at the Council of Nicaea: A Note on the Background of the Sixth Canon*, in «The Harvard Theological Review», 1960, vol. 53, n. 3, p. 171.

[21] P.S. BARNWELL, cit., p. 12.

[22] J.W. HEAD, *Justinian's Corpus Juris Civilis in Comparative Perspective: Illuminating Key Differences between the Civil, Common, and Chinese Legal Traditions*, in «Mediterranean Studies», 2013, vol. 21, pp. 94-95.

ments, in the area of law, ultimately did have a permanent influence. Indeed, the issuance of the Justinian legal compilation has been called the «most important single event for the subsequent history of Roman law in western Europe» [23].

The compilations, or "consolidations" of Emperor Justinian, who died in 565 A.D., were the most important legacy of Roman law. Justinian aimed to compile a substantial selection of the works of the classical jurists and imperial legislation. The texts chosen were revised, systematically arranged, and then published and promulgated. The *Corpus iuris* is made up of 4 collections: the most important is the Digest or Pandects (553 A.D.): it contains excerpts (*iura*) from the work of the jurists, the principal craftsmen of Roman law. The *Digest* is a condensed collection of the best of the writings of the Roman jurists of the classical age, most of whom had been active before 250 B.C. – that is, nearly three centuries before Tribonian and his commission were doing their work.

The second collection, the Codex, contains imperial constitutions and rescripts (the 2nd edition in 534 A.D.). The commission condensed three then-existing law codes (*Gregorianus*, *Hermogenianus*, and *Theodosianus*), together with various individual, previously uncodified laws from earlier emperors, into a single volume, the *Novus Codex Justinianus*. A major reason for this new code was the hope that it could make litigation more expedient. For many years, one of the major difficulties in operating within the empire's legal system had been the enormous body of different legal authorities, many of which conflicted with one another [24].

The Institutes (*institutiones*) were intended as an introduction for the use of students; this work derives largely from the Institutes of Gaius (a work compiled around 160 A.D.). The *Institutes* provided a systematic synopsis of the law designed primarily for use as an elementary text-book for law students, and it was actually completed and released approximately a month before the *Digest* was released.

Neither the *Digest* nor the *Institutes* constituted legislation as such. However, Justinian's great compilation effort did encompass legislation as well, in two distinct forms. First, the commission headed by Tribonian prepared the *Codex repetitae praelectionis* (referred to simply as the *Codex* or the *Codex Justinianus*) mentioned above. The Code is supplemented by the Justinian Novels (*Novellae*), a collection of laws promulgated by Justinian himself between 534 and 556 A.D. This set of new statutes is generally regarded as a final component of the *Corpus Juris Civilis*, even though it was compiled not at the same time as the other three components but rather over the ensuing years, after the commission had accomplished its other work. Operating in the nature of a gap

[23] A.T. VON MEHREN, J.R. GORDLEY, *The Civil Law System*, Boston 1977, p. 6.

[24] J.W. HEAD, cit., p. 95.

filler, the *Novellae* included those subsequent new enactments from Justinian's time that were necessary for responding to circumstances not covered in the old legislation [25].

Despite the relative force of the eastern empire, and Justinian's moumental effort in collecting the laws, his compilation, was not successful: in the East it was largely extraneous to local customs and even to the ideology of the Empire; in practice, it was not applied, and in 740 A.D. it was replaced by a sort of summary: *Ecloga ton nòmon*. In the West, it was equally ignored by the European population, which was then dominated by different Germanic political entities (in Italy, for example, the Lombards arrived in 568 A.D. Lombards, who destroyed the last vestige of the old Roman system). Having said this, it is remarkable to remember that, a few years before, 554 A.D., the Byzantines (from Byzantium, or Constantinople, the capital of the Eastern Roman Empire) had been able, after many years of cruel battles, to reconquer part of the Italian Peninsula; so, the Pope of Rome had supplicated Justinian to pass a law to put his *Corpus iuris* into force also in the West: this was made with the promulgations of the *Pragmatica Sanctio pro petitione Vegilii* (Vegilius was the bishop of Rome, the Pope).

The *Corpus iuris* moved into a long night that to some contemporaries must have seemed to herald its death. Classical Roman law was forgotten, not to be revived until the Middle Ages, and then on the basis of a single manuscript copy, known as the *Pisana* or *Fiorentina*. The *Corpus iuris,* as transmitted through this single document, contains all that has survived of Roman law except for a copy of the original version of the Institutes of Gaius that was rediscovered in the nineteenth century [26].

1.3. The Holy Roman Empire

After the complete economic, military, social and political break-up of the Roman imperial system in the West, the legal and social conditions of Western Europe were characterized by deep confusion and by the emergence of countless laws, based on the principle of the personality of law.

In Rome, the Pope maintained a form of overarching authority, although this was counterbalanced by a Roman Duke, who served as an envoy of the Emperor from Constantinople. However, the Pope swiftly consolidated his influence to become the sole dominant power in Central Italy.

In the broken-down Western Empire, no unaffiliated person was safe. People were forced to search for the protection of the powerful elites in their dis-

[25] J.W. HEAD, cit., p. 96.

[26] J. GORDLEY, *The Jurists: A Critical History*, Oxford 2013, p. 2.

tricts. People in power were typically representatives of the clergy, surviving heirs of Roman officers, or, more often, large landowners or members of powerful families. This was a typical way of living, and organizing, that the Franks used as a normal practice.

The Merovingian Dynasty founded by Clovis ruled over huge lands not only in Gaul, the ancient Roman Gallia, but in different districts. Charles-Martel was the founder of the Carolingian dynasty; he was the *Maior domus* (Prime Minister) of the Merovingian king, and gradually was able to become the king *de facto*.

He stopped the Muslims in a great battle near Poitiers (732 A.D.): in fact, by the dawn of the eighth century, the Islamic empire stretched from the frontiers of India through northern Africa. In 711, an army of Arabs and Berbers crossed the channel of Gibraltar and quickly subdued the Visigoths in the Iberian Peninsula [27]. These conquests brought the Muslims to the borders of the *Regnum Francorum*, where the once vigorous Merovingian dynasty had degenerated to a sorry state. Real initiative and power had passed from the Merovingian *rois-faneants* – 'do-nothing kings' – to officials known as 'Mayors of the Palace'.

The new Carolingian rulers, after Charles-Martel, king Pepin and Charlemagne, or Charles the Great, used their Catholic faith as a unifying force to cement their conquests. The beginning of Charlemagne's reign is in no way very remarkable. He governed half the Frankish kingdom, and his brother Carloman ruled over the other half. Charles put down a revolt in Aquitaine, but, under the influence of his mother, Bertha, he was reconciled with the duke of Bavaria, and reached an understanding with the king of the Lombards, Desiderius. This amounted to a recognition of the actual independence of Bavaria and a renunciation, in favour of the Lombard kingdom, of exercising any influence in Rome. In 771 the situation changed. The Lombard alliance was betrayed. Carloman passed away on the 4th of December and immediately Charles occupied the territories belonging to him; he excluded his nephews from the succession to the throne and re-established for his own benefit the unity of the monarchy [28].

The period of weakness had ended, and it seems as if Charles wished to adopt the policy formerly followed by his father. But in his hands this foreign policy became more marked, and the results achieved were far greater than those of his father. In Italy Charles continued to follow his father's policy. When, at the request of Pope Hadrian I, he decided in 773 to march against the Lombards, he did so with no more enthusiasm than Pepin III had shown. Nevertheless, Charles went much farther here. In 774, by proclaiming himself king of the Lombards, destroying whatever might be in opposition to his au-

[27] D. BALFOUR, *The Court of the Martyrs'*, in «Medieval Warfare», 2011, vol. 1, n. 3, p. 26.

[28] F.L. GANSHOF, *Charlemagne*, in «Speculum», October, 1949, vol. 24, n. 4, p. 520.

thority, he put an end to Lombard independence. In spite of his respect for the Holy See, he proved by his actions that the title of *patricius Romanorum* was to him the legal basis of a protectorate which he intended to exercise over the pontifical state[29]. The Carolingian dynasty was favoured by the Roman Church, which aided and legitimated the new dynasty. Charles remained the only heir to the enormous realm, which was still growing. At first Charles was simply the ruler of his father's kingdom of the Franks, but gradually the situation changed and other European regions were included in his realm: today's France, Switzerland, Germany, Belgium, and Holland. He conquered Lombardy and Northern Italy defeating the Lombards. The Lombards had always been feared by the Popes and perceived as a danger, and there had been an alliance between the Pope and the Frankish king against them in the time of Pepin. After two military campaigns against the Lombards Charles completely submitted Lombardy. Charles styled himself "King of the Franks and of the Lombards, and Patrician of the Romans".

The idea of the revived Empire emerged slowly: the Roman Church considered the Roman tradition as its inheritance and the Pope had become a paramount political entity. The new Pope, Leo III seemed to have decided to make Charles emperor. Hitherto the court of Byzantium had possessed a certain indefinite authority over the pope; strong Emperors, like Justinian, had obliged the Popes to be more or less submitted to their power. The idea of a breach, both secular and religious, with Byzantium was becoming a seductive one. So, at his accession Leo III sent the Keys of the tomb of St Peter to Charles as the symbol of his sovereignty in Rome; the Pope needed Charlemagne's protection. When the Pope had to face a revolt, Charles helped him to go back to Rome and reinstated him. In fact, a revolution in Rome overthrew Pope Leo III in 799 and created an extremely difficult situation which remained confused even after Charles had had the Pope reestablished on his throne. On Christmas Day, the Pope put a crown upon Charlemagne's head and hailed him Caesar and Augustus: a new Empire was founded, and it was called Holy Roman Empire. The old Empire of Rome, which had died in 476 A.D., rose again in 800. While its physical strength lay North of the Alps, the centre of its idea was Rome. Through Charlemagne the tradition of the Roman Caesar was revived in Europe. For eleven centuries, from Charlemagne onwards, Emperors and Caesars remained, more or less effectively powerful, in the history of Europe. Despite the adjective "Roman" it did not mean necessarily that this Roman Empire implied the revival of Roman law.

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[29] F.L. GANSHOF, cit., p. 521.

1.4. Feudal law

The contemporary usage and definition of the term 'State' have deviated significantly from its medieval understanding. In effect the modern State (starting from the XVIth and XVIIth centuries) is the incarnation of political power that has almost attained perfect completeness. On the contrary, the Middle Ages show a political reality composed of an extremely fragmented complex of communities, a society made up of societies (*une société de sociétés*) as the French jurist Portalis affirmed in the *Preliminary Address on the First Draft of the Civil Code* (Code Napoléon). When studying any aspect of medieval (and post-medieval) civilization we should not expect to find the sort of complete political power that we moderns call the 'State'. Having said this, it is possible to affirm, according to the prevailing interpretation of legal historians, that the Middle Ages are an age without 'State'.

In the incompleteness of Medieval political power lies the vital key to grasping "the secret" of the developments of law. Many consequences of the incompleteness are tightly interlinked and clearly visible: the first is the proliferation of social intermediaries, communitarian groups which take the form of replacements for a supreme power, that is absent or deficient. Another consequence is that these social groups function also as legal representatives of the groups. The medieval subject survives only being a member, a '*socius*' of a group not as a '*singulus*' (individual): he is a part of a community and not a solitary man, defenseless and fragile. The communities of which the medieval individual is a member vary widely: from family (clan) to noble houses, as well as commercial corporations, or religious brotherhoods, charitable societies, professional guilds. It was a long-living structure which was thriving on the eve of the French Revolution.

In this particular framework, the development of feudalism was but one of the consequences determined by the structure of the society. Among the various legal systems which flourished during the Middle Ages, contributed to the formation of the Modem Civil Law and left their impression upon all Western law, was that which grew out, and formed part, of what we call feudalism [30]. Montesquieu spoke of feudal laws as those «which suddenly appeared all over Europe, not being connected with any of the former institutions» [31]. He found feudalism in early accounts of the Germanic tribes, especially the Franks, and, apparently, deemed it unnecessary to go farther back but the explanation was not quite so simple. Feudalism was a product of many forces and elements, and it was not until the late 19th century that all were identified and assembled. As Marc Bloch affirmed, it is important to keep in mind that to Montes-

[30] C. SUMNER LOBINGIER, *Rise and Fall of Feudal Law*, in «Cornell Law review», 1933, p. 192.

[31] C. MONTESQUIEU, *The spirit of the laws*, 3rd book, Cincinnati 1873, p. 293.