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Medieval Roots

I. A Legal Society Under Construction: The Workshop of Legal Practice

The Political Context: A Society Without a State. The Incompleteness of Medieval Political Power

The first defining feature of the medieval experience of the law, which we will now begin to examine in depth, is its profound discontinuity with the experience that precedes it. Medieval legal thought begins to define itself amongst the strategies and innovations with which the society of the fourth, and especially the fifth, centuries AD sought to reorient itself in the void generated by the collapse of the Roman political structure and of the culture that existed within that structure. Historically, the most salient point is the manner in which the society of the time dealt with that sudden absence of power. For now, we shall deal with the void as it affected the political sphere, which was the most consequential and the most problematic difficulty the new system of law had to face.

A machinery of power as robust, well-constructed and extensive as that of the Roman empire would not, indeed could not, be replaced by one of equal quality and vigour. The novel and defining feature of the era is therefore the *incompleteness* of political power in the medieval period. By incompleteness I mean the lack of any totalizing ambition in the political system of the time: its inability, and its unwillingness, to concern itself with controlling all forms of social behaviour. The political sphere in the Middle Ages

governed only certain aspects of interpersonal relationships, leaving others, many others, open to the influence of competing powers.

It is clear that political power – as the supreme power – was exercised in a variety of ways and was often wielded to full effect across certain defined geographical areas. It was also not uncommon to see unlimited power concentrated in the hands of a single prince who used it tyrannically. However, throughout the medieval period, the totalizing and all-encompassing mentality which, as we shall see, will be the distinguishing feature and the ultimate ambition of the princes of modernity is absent. The medieval prince concerns himself only with that which will help him maintain a firm grip on power: the army; public administration; taxes; and repression and coercion of the populace insofar as it helps him maintain order. He is not interested in being a puppeteer who pulls all the strings in the social and economic interactions of his subjects.

We may well ask, and indeed we ought to ask, why this was so: why was political power in the Middle Ages, despite many instances of tyranny, fundamentally weak and above all *incomplete*? The answer is that this situation was brought about by the conjunction of a very particular set of circumstances.

The centuries of transition between late antiquity and the medieval period, that is from around the end of the fourth century until the sixth, bore witness to a great population crisis brought about by war, disease and famine, a crisis which wrought dramatic changes upon the social and agricultural landscape. The population fell significantly and the area of land cultivated fell with it. Subsistence became more and more difficult and the natural world regained its status as an untamed and untameable environment, looming much larger in the collective imagination. The anthropocentric society of Rome, which was founded upon an optimistic faith in man's abilities to subdue nature, was gradually replaced by a more pessimistic attitude with much less belief in man's capacities and far greater emphasis on the primacy of reality. The anthropocentrism of classical civilization was therefore slowly overtaken by a resolute *reicentrism*: a belief in the centrality of the *res* ('thing'), and of the totality of things that make up the cosmos.

This attitude became a collective belief that invested the most insignificant of objects with an aura of power. Power was attributed first and foremost to the natural world, which was seen as a system of primordial rules to be respected. This system of rules conditioned the daily life of medieval communities.

There are also two other, more specific, historical factors which had a great influence on medieval social structures.

One of the defining events of the first centuries of the nascent Middle Ages was the intermingling of the Nordic races with Mediterranean civilization.

Ostrogoths, Visigoths, Vandals, Swabians, Longobards, Burgundians and Franks all established themselves in the Mediterranean region, and built stable socio-political structures there. As one would expect, they brought with them their own political mores, which were distinctive and very different from those they found where they arrived. In the Roman empire an idea of power as sacred, originating in the Orient, had held sway for some time; the holders of power in Rome were therefore seen as earthly manifestations of the divine. The northern races, meanwhile, took a more detached view, seeing power as a practical necessity and casting the wielder of power as his subjects' guide. There therefore arose in the collective imagination a narrative of descent from distant ancestors who were wanderers.

On the other hand, there was the Roman Church, whose influence grew steadily after the fourth century, with an organizational network which spread to the most far-flung territories. Given the absence, or impotence, of imperial power in many of these locations, the Church was by now the *de facto* political power there and could not but frown upon the arrival of a robust rival system, especially one which moved the attitude of the people in an anti-absolutist direction.

The result was, as I have said above, that the political system of the Middle Ages was characterized by a fundamental incompleteness, with important consequences for the rule of law. There certainly was a link from political power to law, that is to say there was law conceived of and promulgated under the influence of politics. This was the sort of law which emanates from on high in the form of commandments; indeed, it was the sort of law to which Europeans were accustomed until recently at the height of modernity. In medieval times, however, such politically generated law was restricted to the areas of legality that were useful to a prince in the exercise of power.

Yet great swathes of the legal relationships which governed the daily lives of the people could not be included amongst these 'political' laws. In these relationships, to which the political system of the times was largely indifferent, the law was able to regain its normal character of reflecting the reciprocal demands of society and the plural currents which circulate through that society. The law, when generated *de bas en haut*, is part of the complex and shifting reality of a society which is in the process of ordering itself and, by so doing, preserving itself. This type of law is not written in the commandments of a prince, in an authoritative text on the paper of the learned; it is an *order* inscribed in things, in physical and social objects, which can be read by the eyes of the humble and translated into rules for living.

An unexpressed but keenly felt suspicion arises that the law, the true law that is, rather than the artifice which helps the powerful maintain their supremacy, is a totality of values underlying social and economic relationships. The law is

thus an *order* which functions as a lifejacket for society, whilst the community, aware of this, responds to its values by observing the rules which emanate from them.

Two points must be emphasized.

This type of law is more *organizing* than *empowering* (or *potestative* in technical language). The difference between the two adjectives is not insignificant: the former signifies a bottom-up generation of law that takes objective reality into respectful account; the latter describes the law as the expression of a superior will, which descends top-down and can do violence to objective reality in its arbitrariness and artifice. In a normative vision, law is behaviour itself which, when understood as a value of life in general, is followed and becomes the norm; it is not the voice of power, but rather the expression of the plurality of interests coexisting in any given section of society.

The second fundamental point, and it is one which follows closely from the first, is that, when viewed in this light, the law acquires its own autonomy – despite being submerged in history, and despite being buried under the corporeality of the various interests and fluctuating demands of society. The law emerges as the ordering principle of society, which strives for legal solutions which allow society to continue independently of who wields power. And, contrary to what occurs under the leaden cape of statutory law (in late modernity, for example), where the law becomes the expression of a centralized and centralizing will (*legal monism*), we will observe that the Middle Ages are, throughout, an age of *legal pluralism*. The medieval period demonstrates the possibility of the coexistence of diverse legal orders emanating from diverse social groups, even whilst the sovereignty of one political authority over the territory those groups inhabit remains unquestioned.

It is in this incompleteness of medieval political power, I believe, that the vital key to grasping the 'secret' of the developments in the experience of the law in the early medieval period lies. The distinctive features of medieval law from the beginnings of the era onwards stem directly from this incompleteness.

Given these considerations, the distinctiveness of medieval law imposes upon us certain cultural scruples. We must proceed with extreme caution when deploying vocabulary and concepts closely associated with a modern vision of the law. Indeed, in my opinion we must avoid such terms and ideas for fear of provoking grave misunderstandings. The most problematic of these concepts, although by no means the only one, is the notion of the *state*, which many historians, legal and otherwise, transplant without hesitation to the Middle Ages.

Leaving aside the fact that 'state' could also be used by medieval writers to signify one's rank or social standing, what is most notable for our purposes

is that the term *state*, as it is defined and deployed in current usage, has diverged profoundly from the medieval understanding of the term. Indeed, far from signifying a structural continuity, the term has come to denote a concept of extreme historicity: a political entity that is inextricable from the all-encompassing, monopolizing, potestative legal mindset that produced it. In effect, the state is the historical incarnation of political power that has attained perfect *completeness*.

This is not to pose the crude question of whether there was such a thing as the state in medieval Europe, which is the dichotomy to which some have attempted to reduce the methodological problem I am discussing here. Rather, I would argue that, when studying any point in the course of medieval civilization, we should not expect to find the sort of complete political power that we moderns call the state. It is thus an elementary act of intellectual (and terminological) rigour to avoid both the word and the notion *state* when discussing the medieval historical context. That is how I have proceeded in the past and I shall continue in the same vein in this book.[1]

The Triumph of Intermediary Communities: The Completeness of the Community and the Incompleteness of the Individual

This early medieval world – populated by very few inhabitants, scored with perennial political and social disorder, gnawed at by the constant pangs of hunger, lorded over by untamed nature, and afflicted, as we have seen, by a deep-seated lack of faith in the collective – could not help but have a profound effect at an anthropological level, that is to say on the position and role of mankind in the physical and historical world.

One can therefore observe the medieval individual's lack of self-sufficiency and his natural imperfection, his need to bury himself in the bosom of a hospitable and protective community. In a confused and conflict-ridden social reality which lacks the reassurance of a complete political power, the individual has no means of existing peacefully. He will gain it, as we shall see, only with the advent of modernity, when state and individual live in an arrangement of perfect symbiosis and reciprocity.

In the historical context that we are examining here, the incompleteness of power brings with it two consequences that are tightly interlinked. 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. These social intermediaries are necessary organizations in a political reality which lacks solidarity and is therefore incapable of maintaining

social equilibrium. The second consequence is that the social intermediaries function as refuges which allow the individual human subject to thrive and to enjoy at least a measure of representation.

Assuming he survives at all, the individual survives as a *socius* ('member' of a society), not as a *singulus* ('individual'); he is a part of a community and not a lone being, defenceless and fragile like an ant outside its anthill or a bee far from its hive. The communities of which the medieval individual was a member vary widely: from nuclei of a few families, to noble houses, as well as guilds, which could be religious, charitable, professional or micro-political. The socio-political reality of the Middle Ages was composed of an extremely fragmented complex of communities, a society made up of societies. This structure would be long-lived and indeed would still be thriving on the eve of the French Revolution.

One further consideration should be added: the powerful influence of that perennial protagonist in medieval culture, the Church of Rome. The Church as a religious denomination was dominated by the idea of a community of the saved, and by a vision of eternal salvation that was problematic for an individual believer to reach in isolation but more permeable to a community possessed of effective sacramental materials, a situation which cannot but have contributed to the tenacious conception of the individual as incomplete and therefore structurally fragile. The sacraments themselves show us the distinction between the Middle Ages and modernity: the medieval communitarian worldview (*extra Ecclesiam nulla salus*, 'no salvation outside the Church') will be replaced by the sacralizing of the direct dialogue between believer and deity. This shift is the hallmark of the quintessentially modern Protestant Reformation.

The Cultural Void and the Factuality of Law. The Primacy of Natural and Economic Facts. The Primordial Facts – Earth, Blood, Time – as Foundational Forces

The void left by the collapse of the public structures of the Roman empire was filled, albeit only partially, by a form of political power which I have described here as 'incomplete'. The fall of Rome also had enormous historical significance for the generation and development of law in the new early medieval society. But another void left by the disappearance of the empire also had a great influence on the development of new experiences of the law, and that was the gap left in the cultural sphere.

The refined Graeco-Roman culture of the previous period left only traces in the closed citadels of early medieval monasteries; it did not circulate at all

in wider society. Meanwhile, the West at least appears to have forgotten totally the legal thinking of the ancients. This was a proud cultural edifice of the highest sophistication: built up throughout the republic and the dictatorship to fullness in the age of empire, it forged a perfect symbiosis between the philosophical reflections of the Greeks and the demands of the Roman state. Yet Roman legal thinking was lost by the medievals because it was unusable to them and so remained unused.

To whom might the theoretical niceties contained in the fifty books of Justinian's *Pandecta*, the jewel in the crown of Roman legal scholarship, prove useful? In a socio-economic context like that which took hold from the fourth century on, elegance was not of service; what was needed were tools, albeit rough and uncultured ones, which might help one cope with the gloomy realities of daily life. The greatness of Roman law lay in its academic precision, but the Middle Ages had no space for the deliberations of academics: they sought practical innovations grounded in common sense and pragmatism.

Was this an age of darkness? Do the Middle Ages constitute a time of regression unworthy of historical attention? We should beware of measuring the development of society against a single model. The legal historian, casting an unprejudiced eye over the nascent medieval reality, ought instead to recognize the innovations provoked by the loss of the Roman cultural heritage. Deprived of the inheritance of Rome, and of the undoubted cultural riches that might have been derived from that inheritance, a poorer legal culture had to be built out of procedures which could support and govern that poverty unaided.

It was this absence which led to the construction of an original and novel legal system. If I did not know that total annihilation is foreign to history, I would be tempted to underline the originality of medieval legal choices and solutions to the reader by saying that medieval jurists began again from zero. And where should we look to find the measure of this novelty? There is only one response: in the rediscovery of the *factuality* of law.

Factuality is an unfamiliar and somewhat obscure term; all that is clear about it is its derivation from *fact*. It denotes what happens when the law rediscovers facts in all their force, settles into them and allows itself to be shaped by them, rather than seeking to constrain or alter them. I should make clear that, when I refer to facts, I mean material objects and events, natural features (physical, geological and climatic) and socio-economic phenomena (structures of economic exchange, customs and collective behaviours). When a legal culture is based on scholarship (like Roman law) or on political authority (like modern legal systems), the risk, or the privilege, depending on one's point of view, is that the law is envisaged and devised

from on high and projected upon the facts of reality, fitting them, or even forcing them, into its vision. In the medieval context exactly the opposite is true; nature and society are left unmuzzled, whilst the law contents itself with a humble normative role.

It is physical nature especially which masters the law. Nature in the medieval period is a looming primordial force – mysterious, yet alive and fertile, and therefore feared and respected. Medieval man expresses fealty to this force by restricting his behaviour in accordance with the rules he believes he can read in the natural world. The era which we are investigating here seeks its underlying inspiration in a deeply-held *naturalism*: the human dimension is shaped by physical nature, to which it submits docilely. Indeed, so strong is this naturalism as to become a form of *primitivism*. The characteristic feature of the primitivist consciousness consists in an alignment to the natural world so close that person and nature begin to interpenetrate and the boundaries between the two become blurred, until any possibility of contemplating nature critically and objectively becomes lost. Similarly, the nascent medieval socio-legal culture bears witness to a cosmos in which men and things are seen as mere tiles in a mosaic. At the centre of the cosmos are things, not people, especially that great mother-thing, the Earth: an irresistible reality which entrances the human ants whom it nurtures and sustains, but also binds and governs.

The factuality of law in the Middle Ages is important. We shall see that, during the modern period, there is a largely successful attempt to sterilize facts to make them legally irrelevant until an authoritative figure appropriates them and renders them somehow 'legal'. In the Middle Ages, facts are already freighted with potential legal implications that await revelation. Three facts in particular play a determining role in the devising of the new legal order: the Earth, blood and time. The Earth, despite its mysterious vastness, is a maternal figure because it is productive and provides subsistence. Blood links human subjects together indivisibly and spreads amongst them their inheritance of virtue and wealth via means that cannot be communicated outwardly. Time is duration but is also the hammering of months and of years that creates, extinguishes and alters.

These three primordial facts have a single anthropological significance: they reduce the contribution of the individual, elevating nature and the group to protagonist status. The Earth is the resource upon which medieval man may draw to avoid hunger using cultivation and production, yet neither of these processes is carried out by individuals but rather by groups – either families or larger units. These groups reproduce themselves vertically in a chain of successor groups, because only collectively could humanity hope to have any success in the attempt to tame such a mysterious

and chaotic reality. Blood is understood as a precious signifier of identity in an ever-broadening circle of allegiances that begins with family and ends with *natio* ('race'), a greater group of individuals who descend from a single stock to make up a single people. Time is understood as a continuing duration and, as such, can only be manifest in the succession of the generations; the individual is therefore effaced as he becomes a mere point in a line. Like memory, time in the Middle Ages is best conceived of by the collective. We can see therefore how Earth, blood and time all emphasize the incompleteness of the individual with respect to the completeness of the community.

To make the historical meaning of this factuality even clearer to the reader, we should emphasize one final consideration: these facts have an immediate impact on the production of laws, because of the legal implications they carry. We shall deal with the Earth in the next section; for now let us say a few words on blood and time.

Blood unites those who belong to the same race but separates these people inexorably from those whom it excludes. Legally speaking, it therefore unites and divides as well. Shared blood means shared rights; different blood means an absolute division under the law. The law is thus reduced to an accessory to one's birth. The principle that is at stake here is what legal historians refer to as *legal personality* – personhood under the law. A venerable legal historiography emphasized the importance of this concept in the medieval period, whilst more recent historiographical studies have tended to reduce its importance in France and in Spain of the period (the Spanish scholars have debated the point particularly ferociously). What is certain is that blood, a primordial fact which distinguishes different races, is of the first importance in early medieval lawmaking. This importance can be seen in the Italian peninsula, a veritable patchwork of legal systems from the fifth century on, in the many so-called *undertakings at law*: the solemn affirmations of the applicability of various legal customs in their specific cases made in front of a judge by a parties or defendants. Undertakings at law were common up to the twelfth century in northern Italy, Lombardy and in the Norman realm (central and southern Italy).

Time is a brute fact in the Middle Ages, a continual accumulation of instants, which can impinge upon the legal sphere simply by the fact of its passing, without any contribution from a human will. This is a very different situation from that which obtained under Roman law, where juridical instruments such as statutes of limitations and positive prescriptions allowed the passage of time to play a role in the loss or acquisition of a legal position, but only when allied with human intervention – an attitude of negligence or diligence on the part of the party concerned.

The Primacy of Custom in Medieval Lawmaking

Let us recapitulate the lines of argument hitherto followed. There have been two guiding principles: *reicentrism* and *communitarianism*. Added to these principles is the widespread medieval tendency to consider the law as a factual entity. This factuality leads to a view of the legal world in the early Middle Ages as one of *custom*, where what is traditional, or customary, begins to generate and solidify new law.

What is custom? A simple but helpful explanatory image is that of a path beaten through a forest. The path does not come into existence until an enterprising subject takes the first steps in a certain direction; he is then followed by a crowd of imitators, all convinced that his is the most rapid way to cross the forest. The path is therefore nothing more than a series of steps, repeated consistently over time.

The same occurs in the formation of custom, which is an action repeated over time in the context of a community, whether small or large. The action is repeated because the members of that community perceive some positive value in it. And the philosophers are therefore correct to define it as a *normative action*: one which, by some peculiar quality, begins to be repeated over a long period of time and becomes the norm.

Since it is an action at root, custom conserves two necessary underlying characteristics. Firstly custom originates from below, from things and from the Earth, from which it cannot be separated; it sticks to the Earth like a serpent and faithfully reproduces the geological, agricultural, economic and ethical structures of the surrounding reality. Secondly, custom originates from the concrete, even if thereafter its significance may be extended by analogy; it therefore carries with it the unavoidable traces of the concrete reality which it seeks to govern with its laws.

But custom is never a solitary behaviour; quite the contrary, it cannot exist without the collective repetition of the action whence it springs. This shows us a further characteristic of custom: it expresses the identity of a group, of a collective – usually a small one at the time the custom is formed, but which can grow far broader with the passage of time. In summary, custom synthesizes the convictions and values that the new legal culture of the Middle Ages placed at its foundations, with the goal of winning its battle with history and guaranteeing its continued survival. It is no surprise therefore that custom shows absolute allegiance to the three fundamental facts of Earth, blood and the passage of time.

To add one further very relevant consideration: because custom originates in a community and expresses its identity, it tends to be projected upon a

region until it comes to stand for it and represent the character of its laws. Because of its natural localizing tendencies, custom is one of the factors in the territorialization of the law, albeit a limited form of territorialization restricted to certain areas.

Every region has its own customs; every region forms its own customary laws and moulds them to its purposes. Since custom does not lend its weight to artificial and arbitrary actions but rather to deeper values and convictions, it represents the superficial flourishing of the most profound cultural roots of a given region. Custom is the structure that a place sets up and in it can be seen reflected the deep structure of that place's culture; custom is the structure that allows society to preserve itself when daily socio-political life is often confusing and conflict-ridden. The very rich flowering of customs in early medieval Europe can therefore be seen as a sort of hidden but very solid legal platform. It is in customary law that we may see the *constitution* of the early Middle Ages, deploying the term (which may well sound anachronistic) not in the formal sense that modern jurists use it (a written charter of legal principles, like the Italian Constitution of 1948), but rather as a framework of rules that were not written down but which were nonetheless binding because they draw directly on the values to which medieval society adhered. So the term *constitution* is applicable because custom *constitutes* the various socio-political communities of the Middle Ages, giving each one stability and its own individual shape.

The best place to seek out medieval law is here, in this hidden level of society, rather than in the commandments of the various princes, despite their tyrannical range of powers. Indeed, the princes, as we shall soon see, are required to respect and adhere attentively to custom as much as their subjects are. Princes are not the producers of law: they do not create legal structures, nor does the medieval collective mind identify the dominant trait of their power as being the creation of authoritative norms. The virtue that makes one a prince – that is to say the feature that defines a prince, the ideal to which he has both the power and the duty to adhere – is *aequitas* ('justice'). A prince is a prince because of his ability to dispense justice, a quality which can be derived, in turn, from the lessons written in the tangible world of things and nature. The prince's apparently extensive power thus reveals itself to be an onerous duty.

The Primacy of Legal Practice to a Consideration of Medieval Legal Structures: Under the Banner of Particularism

The prevailing legal landscape of the Middle Ages is made up of a broad framework of the customs discussed above, covering the whole of the European West. This framework has some unifying features, since the aggregate of

customs reflects certain structuring principles and underlying choices which are common across the nascent legal context. However, this framework is also extremely fragmented, since each custom is also a reflection of the needs and interests of particular groups or specific local contexts.

The new legal order of the Middle Ages rides under the banner of particularism: that is to say it is an order which cannot and does not wish to smother the demands of the many minorities whom the incompleteness of medieval political power permits to survive and to thrive in all their vitality. Thanks to a fervidly reicentric attitude, the individual realms of the Middle Ages, each with its own legal style and vigour, foster and incorporate thousands of customary laws until these become as defining an attribute of each land as their differing flora.

One might think of a traveller who, when passing from one valley to another, finds that not only the farmland around him has changed but so have the legal customs of his location. Historical sources document this lively diversity, with widespread use of terms such as *consuetudo regionis*, *consuetudo loci*, *consuetudo terrae*, *consuetudo fundi*, *consuetudo casae* (roughly 'local custom/tradition' in each case, with a definition of 'local' ranging from the level of a 'region' to that of a 'household'). These terms appear to show that customs became identified absolutely with their location of origin, to the extent that they begin to stand for and in some way demarcate not only the boundaries between large regions but even those between one homestead and another.

In this context, one can well understand that the vital role of originator of laws is attributed not to a distant and far-off figure such as a prince, but rather to an individual who has the local knowledge necessary to interpret the legal system generated by custom. The law can thus be seen as the means by which medieval man gains his identity and standing within his community.

The protagonist of the medieval experience of the law is therefore not the legislator nor the scholar but the notary: a practical man. The notary is a character who has no truck with legal scholarship; he knows the law only insofar as he learnt it in his professional training and insofar as he needs to know it to satisfy the modest demands of any given case. Drawing heavily on common sense, the notary strives to reconcile the demands of the parties in a matter with the hidden but binding customs of his land.

Silently, unobtrusively, the legal practice of notaries does not create but instead gives concrete form and sufficient technical and juridical heft to procedures which the medieval experience needs in its daily struggle for survival. As we shall see below, it is mainly in the novel field of agricultural law (almost unknown to Roman jurisprudence) that the early medieval notary demonstrates his versatility and makes his positive contribution. Specifically, it is

the area of agricultural contracts, which were documents of the highest importance to the medievals, that gives the full measure of the prominence of notaries in medieval lawmaking.

The Marginality of Medieval Legislators

And what of the prince? What of, especially, the many princes who often governed their subjects harshly? Surely from their lofty position these figures ought to be able to promulgate general laws which cut through the heaving mass of customs – all the more so given that they can wield the fearful weapon of coercion? These questions are purely rhetorical, of course: we have already answered them in substance above. But it is worth posing such questions anew since they give us a point of departure to develop further the topic/problem of the incompleteness of power, as I have termed it – a deep-seated cast of mind which shapes legal historical reality.

What seems to us to be the primary and typifying characteristic of the modern potentate – namely the conception of his societal role as that of a legislator first and foremost – is not a perception shared by the early medieval or late medieval collective imaginary. Instead the prince is celebrated by the medieval mindset for his capacities as a judge – as the great bringer of justice to his people. In this he is given great latitude of powers, up to and including the spilling of blood and the say-so over the life and death of his subjects.

Religious, political and philosophical writings of the Middle Ages all emphasize that the greatest virtue required of a prince, and the virtue that most typifies the role, is that of *aequitas* ('justice'). The prince must distribute justice, and specifically he must distribute a form of justice modelled on the world of nature and of things. In his reading and interpretation of the natural world, the prince can be assured of two things: he will find there the instructions for administering truly equitable justice; and he will be able to discover the law, which customs have filtered out of the natural world with the passing of time.

The power of the prince is, and will be for all the duration of medieval jurisprudence, made up of a complex system of powers amongst which judicial authority is central. This system also includes, secondarily, the authority of *ius dicere* ('declaring the law') – the role of making the law manifest to the prince's subjects. Yet, in reality, the prince must come to terms with a constitution fashioned from legal customs which he was not responsible for creating and which, moreover, includes the prince himself under its jurisdiction as much as it does the lowliest of his subjects.

One might object that amongst the primary legal sources of the early Middle Ages, there are a number of legislative texts produced by monarchs or by their chancelleries. This is certainly true: the Visigoth kings in Spain, the Lombards in Italy and the Frankish kings and emperors all produced an appreciable quantity of legislation. But when examined closely, these laws and edicts follow the shape of the wider universe of mores, of customs from time immemorial, which the kings did not dare contravene and to which they submitted.

The medieval monarch shows no creative pride; he limits himself to making manifest in his *lex scripta* ('written law') that which is already contained in the *lex non scripta* ('unwritten law') observed spontaneously by the community. The early medieval attitude towards the term *lex* ('law') is very particular: the conceptual gap that separates *lex* and *consuetudo* ('custom') in modern formalist legal thinking is entirely absent. A *consuetudo* is merely a law that has yet to be made, and a law is merely a custom that has been properly written down, certified and codified.

One final consideration should be noted with regard to the content of legal sources. Often these sources are compendia: haphazard selections of specific or occasional legislation; collections of laws enacted by previous monarchs; edited versions of legal texts from the late Roman empire. They often take as their subject topics of general public importance connected with the exercise of supreme political power over the territory in question. One Italian example would be the penal code and family law contained in the extensive *Edictum Langobardorum* promulgated by the Rotharian kings in 643. The Frankish kings and emperors, meanwhile, produced the *Capitularia*: a series of legislative acts put forward during the long reign of Charlemagne in the late eighth and early ninth centuries. The *Capitularia* are mainly concerned with the rules governing public administration and the relationship between temporal and ecclesiastical power.

Legal Solutions for Daily Life in an Agrarian Society

The very general discussions entered into thus far might run the risk of seeming generic to the uninitiated reader. I am also conscious of the need to keep the promise I made at the beginning of this study to write about the law as a mentality, which would seem to demand a focus on the dealings of individuals. I shall now turn, therefore, to everyday life in the Middle Ages, to the solutions and choices which govern it, so as to fill out our picture of medieval law and give it concreteness. I shall examine here the contractual relationships between individual subjects in the languid dynamic of the relatively

stagnant medieval economy. Furthermore, I shall look at the legal procedures used to regulate the relationship between people and goods, especially between people and the land – an essential aspect of an agrarian civilization. To lend weight to my conclusions, I shall make use of the comparative method, with its superlative ability to highlight discontinuities. In this case the discontinuities we will find exist between the medieval context and the choices made by Roman lawyers, whose first aim is always to maintain control of the legal sphere, which Roman jurists saw as vital to the stability of the political order. The ancient Roman approach is, of course, antithetical to the one we found in our examination of medieval legal thinking. I shall therefore give what I hope will be a helpful comparative evaluation of the two systems.

The Romans ensured their contractual agreements were governed by a rigorous principle of standardization: private citizens were allowed standard types of contracts, which followed pre-made models. These offered legal protection only to certain established types of transaction: sales, rentals, loans, etc.

The early medieval practice of contractual negotiation, on the other hand, is characterized by a total lack of standardization. Indeed things could hardly be otherwise in such a profoundly custom-governed legal environment. Custom abhors a rigid template – its moulds are malleable and mutable. Instead it places total faith in the instincts of the notary and in the good faith of the parties. Often the will of parties to a medieval agreement was only free in theory, since they were bound by the demands of the pervasive network of customs. They therefore submitted to the types of undertaking which custom defined for them and towards which the notary would not hesitate to point them. The contractual models shaped by notarial practice functioned as very flexible formal receptacles; they differed dramatically from place to place, but all were able to accommodate a wide variety of customary content.

Roman law is similarly rigorous when it comes to the jealous territory of the relationships between people and property, especially those between people and the land. Roman civilization across all the centuries of its development was always a fiercely proprietary society: that is to say it was founded on the ideal of individual private property. The importance of private property exceeded the purely economic realm and became of political importance as well. The Roman legal term for so-called *real property* rights, that is the rights of people to own *res* ('things'), is *dominium*. *Dominium* describes a right of property which binds a thing tightly to its owner; the owner's independence and freedom to enjoy his property is respected and safeguarded by the law, which guarantees his *potestative* ('discretionary') rights over the object in question.

The Roman state was careful to institute a system known as *fundamentum rei publicae* ('foundations of the commonwealth'), which carefully circumscribes the conditions on the ownership of property enforced by coexistence with other citizens. This system renders any impingements in fact by other parties on a citizen's property (such as physical contact, use, enjoyment) of no legal standing. There may be physical contact, use or enjoyment of the object in question by parties who do not own it, but these have no legal relevance and do not compromise the integrity of the proprietor's ownership. Hence the distinction between *dominium* and *detentatio*, that is to say between full ownership and discretion over the object as guaranteed and safeguarded by the law, and the simple having of a thing in one's possession. With a piece of land, for example, the anthropocentric culture of Rome would emphasize rights of the holder of the proprietary title, even if he had never set foot upon his land. The owner's rights would be upheld over the rights of those without titular claims to the land but who were nonetheless intimately acquainted with it. A tenant farmer who rented his land from the owner is thus considered a mere *detentator* ('occupier').

Obviously, this entire legal framework was abandoned by the new reicentric culture of the Middle Ages, which did not believe in a puppeteer pulling the strings of the legal order, and depended instead on custom and factuality. Economic facts such as use, enjoyment, trade, or even the simple material fact of physical familiarity with an object, leave the hinterland of legal irrelevance and take up their own place and significance in the eyes of the law. This occurs especially once the passage of time has rendered these situations of fact *effective*. As we have seen, the medieval constitution is not concerned with *validity* – that is the compliance with an authoritative general principle – so much as with *effectiveness*.

To this should be added the change in outlook towards one's physical and social context characteristic of the Middle Ages. The medieval world is no longer seen from the point of view of the subject but rather from that of the object, with the result that the world is understood from the ground up. Things are no longer constituent parts of a landscape bestridden by the autonomous subject, but a living reality whose objective demands the subject must interpret and respect. This impression is entrenched all the more by the necessary facts of cultivation and production required for the subsistence of the community.

Roman law is primarily a civil law, and is therefore predicated upon a legal party who is abstract and economically undefined: the *civis* ('citizen'). Early medieval law, meanwhile, is predominantly an *agrarian law*: it is predicated on the fundamental economic facts of cultivation and production and on legal parties who are assumed to be growers, breeders, woodsmen or

suchlike. Medieval law is not governed by the cult of proprietary titles (although this certainly does survive), but seeks rather a more abundant and higher-quality agricultural harvest, in whose name all sorts of sacrifices may be demanded, even from registered titleholders of property.

From a technical legal point of view, there are several conclusions that readily suggest themselves. The medieval legal system favours procedures that provide effective resolutions with regard to land, particularly where agricultural activity is involved. The Roman opposition between owner and occupier appears not to obtain in the medieval period. Many occupiers of land under licence – particularly those who seek to improve the land's productivity in the long term – gain a status of para-ownership thanks to an unobtrusive but continuous erosion of formal property rights. The practice of lawyers in the early Middle Ages, although rough at the edges and lacking in technical sophistication, is already making advances which, in the late Middle Ages, will be formalized into a fully rounded body of legal thought.

The Church of Rome during the First Millennium: The Making and Formalizing of Canon Law

The Church of Rome is the pre-eminent figure at every level of medieval culture: religious, cultural, socio-economic, political and legal. Indeed, one could say that medieval culture is, for the most part, a creation of the Church.

The history of the Roman Catholic Church is of particular interest to the legal historian because it is the only religious denomination which takes it upon itself to create its own original body of law, drawing its authority directly from that of Christ as divine legislator, rather than from any temporal political system. This body of law develops into a unique legal system: canon law. Canon law is by no means the discipline of an isolated priestly caste: in a historical context such as that of the Middle Ages, where Heaven and Earth meet, sacred and secular intermingle, and the citizen and the believer join in one complete unity, canon law cannot but be integrated into the medieval legal order and, indeed, it makes a significant contribution to the shape of that order as we find it.

The reasons behind the Church's decision to enter the field of law are complicated, but I should attempt to give a conclusive answer. It is clear on the one hand that canon law represents a reaction to the Church's need to forge for itself effective instruments of power and influence. Nonetheless, the main reason for the existence of canon law, in my view, is anthropological: in order to obtain salvation, there was a need for a society of the

faithful – i.e. a structured hierarchy comprising the Church and its community of believers. Because the individual believer needed a social structure in which to find his place, there was therefore a requirement for a system of laws to govern the Christian community.

And so the Church of Rome, as a legal entity, is concerned from its beginnings to formulate a system of laws suitable for its governance. The first millennium of the Church's existence is scarred by many heretical movements, and its efforts are above all directed towards solidifying religious orthodoxy into stable theological truths. Nevertheless, over the course of the first thousand years of Catholicism, canon law makes slow but steady progress until it assumes a definable shape. Because canon law develops over so many centuries, and is produced in the most distant reaches of contemporary Christendom by a very diverse series of authors (popes, councils, bishops, religious orders, customs, theologians, jurists, etc.), it is unsurprising that the laws of the Church at first grew into a confused morass of rules, many of them inter-contradictory. The situation became an embarrassment for an organization dedicated to a mission of general salvation.

At the end of the first millennium the negative aspects of the canon law of that time had become glaringly apparent. Fortunately, there emerged some far-sighted jurists who began a robust campaign of putting the enormous quantity of material in order: consolidating some parts and harmonizing these with others. We should remember in particular the work of one French prelate: Ivo, Bishop of Chartres. At the end of the eleventh century – during the period known as the Gregorian era after the dominant personality of the time, the centralizing pope Gregory VII – Ivo succeeded in systematizing completely the canon law, producing a careful, unstrained interpretation of all its idiosyncrasies.

Ivo catalogued the many discrepancies and contradictions (*discordantiae*) that had accumulated over the centuries. In an important move for canon law's pastoral ambitions, Ivo resolved the problem by identifying two separate and dichotomous levels of meaning in Christian legal texts. First is that of divine law (*ius divinum*): perpetual and universal law which stems directly from God and is composed of a few essential rules (do not kill, for example). Divine law is immutable because it is vital to every human soul on the path towards salvation. Below divine law comes human law (*ius humanum*), which originates from the Church, from jurists and from custom. This level of law makes up the great mass of canon law and is merely useful for salvation, rather than essential. Since it is only useful, human law must accommodate itself to human frailties, taking into account such variables as differences of place and time, and the circumstances and motivations of actions.

Ivo's reordering of the law gave birth to a legal system which, while it certainly was not compact, now possessed a restricted core of extremely solid primary rules, surrounded by a much broader, more fluid periphery of secondary rules. The secondary rules, of course, needed fluidity in order to be able to find equitable ways to accommodate all of the differing circumstances into which the earthly pilgrim might wander. Moreover, canon law was naturally available to any medieval executor of rules, particularly judges, who, in their concrete evaluations of given situations, could apply either stringency or leniency in order to arrive at the outcome that best furthered individuals' salvation. Such leniency could even extend to a total non-application of the law if required – something that the canon lawyers called *relaxatio legis* ('relaxing the law').

Ivo did not invent any laws; he merely applied a general and longstanding principle of the Church's legal tradition, that of *aequitas canonica* ('canonical justice'), which called for the adjudicator to consider the specific actions of the individual believer and the circumstances in which these had occurred. In so doing, Ivo succeeded in putting forward an accurate interpretation of the canon law which took account of its ultimately pastoral nature. For this reason, the division made by this eleventh-century bishop from Chartres between *ius divinum* and *ius humanum* has stood the test of time and is still considered valid to this day by the Roman Catholic Church when interpreting its laws. From a legal historical point of view, we should highlight one further conclusion: the dominant influence of the Church of Rome and of its legal system in the Middle Ages means that the flexibility of human canon law becomes representative of the entire medieval legal process.

II. Medieval Maturity: The Laboratory of Learning

The Turn of the Eleventh and Twelfth Centuries: A Watershed in History. Socio-economic and Cultural Contexts

At the end of the eleventh century the substantial changes which time had unobtrusively but continuously wrought became more obvious. It is therefore justifiable to see the decades which straddle the division between the eleventh and twelfth centuries as a boundary between one historical moment and another, very different, one.

The agricultural landscape has now changed: where before it was a mixture of woodland and pastureland, now the countryside of Europe has been

deforested, its clods broken up and reclaimed for agriculture. The number of inhabitants living on that land has also recovered.

The collective consciousness also appears transformed: the former wariness which forced people to seek the security of a castle or a walled town is being gradually but definitively replaced by a more widespread attitude of trust and confidence. The signs of this change can be seen in the greater circulation of individuals around the continent and the progressive repopulation of the cities. The landscape of Europe is also growing more complex: although the rural sector remains dominant, the cities are growing in importance. And the city itself is far more than a collection of stones: it is above all a spiritual achievement. Whilst a castle may be set apart at the top of a hill, a city will be located at the intersection of the great trading routes which have now been established. The late medieval city does not exist in a state of autarchy, but is rather founded on a desire to be open to outsiders: it thrives on the contributions of people and goods from beyond its walls. This gradual but growing importance of cities demonstrates the renewed confidence late medieval man had in broader social relationships with those from further afield.

The range of socially significant roles also broadens with the rise of the professional merchant. The old markets of early medieval Europe, where local producers traded local goods, will no longer suffice. Given the greater abundance of goods for supply in the late Middle Ages, there is greater demand for long-distance trade. The importance of currency as an intermediary also grows, therefore: a further testament to the greater economic vitality of the period and the stronger bonds of confidence between individuals. A new historical personage arises: the professional merchant who resides in a city and relies on the whole of Europe as his trading space. The merchant himself is, of course, an indication of increased trust between people and peoples; he signals an openness to ever wider socio-economic horizons.

So much for the socio-economic aspects of the new historical context. What of culture? The early Middle Ages possessed plenty of schools and centres of great learning which carried out profound investigations of a theological or philosophical nature. But this knowledge tended to be confined to the monastery; it did not permeate the institutional walls to enrich early medieval civil society. In the late Middle Ages, however, schools began to appear more often in the centre of cities, attached to the cathedral. Cultural learning could now start to circulate more widely.

The cultural void I talked about earlier, which led me to speak of naturalism, and even of primitivism, began to be filled. This is demonstrated by the twelfth-century renaissance: a renaissance created not by the musings of isolated figures but by large personalities, who existed within a cultural

matrix that covered all of Europe, and who engaged in lively debate with their peers. The schools which took it upon themselves to foster these debates were by their nature opposed to the stifling influence of particularism, and strove instead for universal ideas. Thus began the great and, before long, widespread trend of founding universities.

We shall deal here only with the very profound realignments which occurred in the fields of theology and of philosophy, since it is from these disciplines that the study of law derived the intellectual nourishment which allowed it to start flourishing in such fertile soil.

Political Power and the Law: The Marginality of Late Medieval Legislators

One can identify a number of innovations, occurring around the end of the eleventh century and the beginning of the twelfth, that affected the underlying structures of Western culture and the collective consciousness. Men of culture began to circulate with the merchants along the reopened arteries of communication. They brought with them the basics of scholarly reflection, and so filled at least one of the two voids which we found to be determining for the shape of early medieval civilization: that of the sudden disappearance of ancient Roman culture.

At this point the reader might legitimately ask what effect these apparently significant changes had upon experiences of the law in the medieval period. Is it correct to categorize together experiences of the law across all of the period between the fall of Rome and the fifteenth century, or does the watershed I have just described suggest a more deep-rooted separation between the early and late medieval periods?

This is not only a legitimate question but a very apposite one, since the answer is, as my introductory comments suggested, that experiences of the law took on a unified shape throughout the Middle Ages: they appeared similar throughout; their foundations remained the same; and the approaches to living out and understanding the law remained coherent. One proviso must be attached to this conclusion, however: the historical period which the modern era so disparages with its epithet *medieval* (literally 'middle period', i.e. 'time of transition'), lasts for the best part of a millennium. The large amount of time to which the term *Middle Ages* therefore refers cannot but imply some variations in the historical experiences of the law during that period, since time never passes without leaving its mark. Nonetheless, we should not be deceived by this: the fundamental choices of medieval legal thought remain substantially constant.

Our task, and it is no easy one, is to justify these apparently generic and unsatisfactory assertions. We shall start right away by pointing out that despite the fact that the cultural innovations of the late Middle Ages were far from insignificant, they did not fracture the pre-existing medieval socio-cultural identity. Instead they were integrated harmoniously into the law's fact-based approach, which had been established through centuries of practice. In so doing, the cultural changes of the late Middle Ages lent medieval legal practice the further vigour necessary to satisfy the demands of a more dynamic, complex society, which was simultaneously rural and urban, agrarian and mercantile.

There is one point that must be emphasized: although the cultural void has been filled, the political void remains just as gaping. The kind of intrusive government which believes itself able and entitled to intervene at a social level and to control the legal dimension of its subjects' lives by producing all the laws which govern them finds no place in the Middle Ages and will not come about until a later period.

The prince continues to be thought of in the collective consciousness as the supreme judge of the community, with one fundamental, non-negotiable quality and virtue, that of justice: the ability to make equitable decisions based on the true nature of things. John of Salisbury, an English prelate who, in the mid twelfth century, wrote the first great tractate on political thought of the Middle Ages' era of learning, depicts the prince as an *imago aequitatis* ('image of justice').[2] The law, meanwhile, John calls the *aequitatis interpres* (the 'interpreter of justice'), foreshadowing the description of it a century or so later by Thomas Aquinas, the consolidator of most medieval theological and philosophical certainties, as *custos iusti* (the 'guardian of that which is just').[3] In other words, the prince is not seen as a supreme will, with arbitrary power over his subjects, but rather as playing a role of attentiveness to nature, the great text in which the lessons of justice are written. This is why St Thomas himself, in his definition of *lex* ('law'), identifies it as a product of reason and thought: the law is not used to project a despotic will upon a community of subjects, but rather to keep that community in order (it is a 'reasoned structure directed towards the common good').

The collective consciousness still does not think of the prince as a *legislator* – that is as a maker of laws. His duty of reading the text of nature will not produce universal and authoritative principles but will rather set the specific parameters of true justice. Indeed the prince himself does not see the *legislative* function as the defining characteristic of his power. The relative indifference to the law which we observed in the early medieval period continues in the later Middle Ages, as does the relative lack of a coherent programme of legislation. The prince is limited to producing such rules as

govern the limited field of the exercise of public power. And it is obvious that this should be so, since the dominance of custom continues, meaning that the law retains the imprint of custom, and political power is therefore marginalized and rendered subaltern as a source of lawmaking. This picture certainly holds true in central and northern Italy, where there is an upsurge in civic sentiment that is made concrete in the rise of city-states. The statutes of these city-states function as an expression of their autonomy and are usually fairly loosely drafted with no pretence to comprehensiveness: much more attention is paid to small-scale problems of town planning than to any great institutions intended to regulate citizens' lives. The situation is no different in southern Italy, where one of the great medieval monarchs, Fredrick II, had drawn up for the Kingdom of Sicily a magnificent, sprawling legal monument: the *Liber constitutionum regni Siciliae*, known as the *Liber Augustalis* – an ambivalent text which mixes numerous dated political ideas with a few revolutionary insights.

North of the Alps, in the final full century of the medieval period – the thirteenth – we find some eloquent confirmations of trends discussed here. The German-speaking lands continue with government by customary law for the whole of the century in question, but the monarchies of France, Spain and Portugal are beginning to move down a path that will lead in the end to their development into recognizable nation-states.

Not long after the thirteenth century, France will become the true testing ground for the politico-legal framework of modernity. The French monarchy, still heavily conditioned in its actions by the legacy of feudalism, began to create for itself in the 1200s a more defined and broader political space in which to operate. The greatest innovator in this effort was a king of undoubted managerial abilities: Philip II Augustus (1180–1223). During the course of the century the legislative activity is, however, sporadic and limited to topical interventions. The daily life of citizens in peacetime continues to be regulated by the age-old framework of custom, whilst the king is above all the 'guardian of custom', as Beaumanoir, one of the greatest French jurists of that century, puts it.[4] The first great reformist *ordonnance* (*ordonnance*, or 'ordinance', was becoming the normal term for general laws made by the king), was issued by St Louis (King Louis IX) in 1254 on his return from the Seventh Crusade. However, this edict is directed at royal administrators, and the king does nothing more than reiterate the validity of local customs.

In Portugal royal legislation does not become significant until the reign of Alfonso III (1248–79).

In Spain, Catalonia, Aragon, Valencia and Navarre are all dominated by local customary legal systems until the middle of the thirteenth century.

In the second half of that century, in Castile, Alfonso the Wise (1265–84) introduces an important piece of legislation called *Las siete partidas* ('The Seven Headings') – a very distinctive work which sits somewhat unhappily with Spanish law's localism and dependence on custom but which speaks volumes for the king's abilities as a legislator. *Las siete partidas*, named for the number of its internal divisions, contains mainly universal laws rather than Castilian ones. It therefore draws heavily on Roman and canon law, whose importance in the late Middle Ages we have yet to discuss but which were, it will suffice to say, still principally academic disciplines. And, indeed, the practising lawyers of Castile decisively rejected Alfonso's legal masterwork as alien, despite the fact that it was written in their own familiar tongue.

Western Society's Rediscovery of Complexity Requires New Legal Methods

The continuing dominance of customary lawmaking into the mid thirteenth century, and with it the persistence of an emphasis on factuality in the law, serve as ample evidence of continuity between the legal systems of early and late Middle Ages. This continuity is not only substantial but, I would argue, defining.

Custom is a friendly, nurturing source from which to generate law: it respects local differences and local needs. Nonetheless, custom has one intrinsic defect which I have been at pains to emphasize: fragmentation – it cannot but express a particular set of circumstances. In a less complex social order like that of the early Middle Ages, when society was relatively static and social change occurred at a leisurely pace, custom was perfectly capable of fulfilling the role of the sole legal framework which governed that society. However, custom's innate tendency towards fragmentation meant that it became unsuitable as the sole generator of law when the social, economic and legal landscape became more developed – especially when economic relationships begin to carry a similar weight to legal ones. The Crusades ensured that these relationships were knit together into a social fabric that extended from the Hanseatic ports of the Baltic to the Mediterranean Sea.

In such a complex and diffuse political environment, custom reveals itself to be an unsatisfactory ordering principle. It was clear that facts and customs must remain the primary determinants of the law, but when those facts and customs were spread out across a very large geographical area, and when the needs of agriculture had to be balanced against those of a vibrant mercantile economy, a need arose for broader schemata, more general

organizing categories and more rigorous and refined legal approaches than custom's universe of facts was able to provide. What was needed was an ordering framework into which to fit the facts of custom: one which would not stifle them but which would rather organize and systematize them. There was a need to bring some unity to the diversities of custom, since otherwise unmitigated chaos would reign.

There were two sources of law suitable to achieve this aim: legislation and scholarship. These were two sources of law that might lay themselves over the mass of facts and particulars and organize them according to principles, ideas and general patterns. A prince, whether a monarch or the head of a city-state, might very well perform such an operation, but this would involve renouncing his duty to adhere to nature and facts and turning instead to the setting of rules. Princes are still not allowed the role of legislator in the late Middle Ages. Instead only one option remains to a medieval culture that has by now rediscovered the importance of learning: that of scholarship, legal scholarship, to be precise.

The Role of Legal Scholarship. Particularism and Universalism. Customs and Scholarship in the Late Medieval Legal System

The late Middle Ages could well be called an age of learning since scholarship, legal scholarship in our case, takes up a primary cultural role. In a very significant development, medieval legal systems begin to allow scholarship to design the laws which their historical moment so greatly needs.

There are many reasons behind this rise of scholarship, the first of which was highlighted in the previous section: scholarship was the only source which, in the absence of a comprehensive political system, could gather together and organize a huge and disparate body of factual material. Only scholarship could make facts into the sort of ordering principle which any system of law requires by definition. This was a sizeable advantage, since the theoretical categories and principles to which scholarly reflection gives rise are by their nature elastic and therefore well suited to a legal system in a continuous state of development, whilst the authoritative pronouncements of a prince are necessarily more rigid when translated into general commands. As I argued above, scholarship organizes ideas not by suppressing points of difference, but by incorporating those differences as points of nuance to the broader sweep of lines of argument.

The profound importance of legal scholarship in the late Middle Ages is also predicated on other solid reasons. The general editor of this Making

of Europe series, Jacques Le Goff, wrote a seminal volume entitled *The Birth of Europe*.[5] The title of the Italian edition this book was *Il cielo sceso in terra* ('Heaven Descends to Earth'), a choice which reflects one of the great medievalist's most valuable insights: the extent to which medieval civilization was a historical moment totally focused on a reality beyond nature and history; the people of the Middle Ages certainly lived in space and time, but they saw their ultimate resting place as existing beyond those spatial and temporal boundaries. In such a context the jurist or master of laws, in his role as a learned man, is more intimately connected to God as the ultimate wisdom and ultimate truth than any other earthly worker. He is seen as an enlightened and enlightening being, a sort of mediator between heaven and earth, placed on a higher plane than any other searcher after truth. This elevated position explains the medievals' great faith in their jurists.

However, so as not to jump to misleading conclusions, we must add that this scholarship is of a concrete, pragmatic nature. As we shall see, medieval jurists are no cloistered academics, foolishly absorbed in theoretical projects entirely abstract from their context. Instead, this is an age of great thinkers – mostly teachers at the many universities now dotted across Europe[6] – real flesh-and-blood characters, well integrated into civil society and often occupying positions of power and prestige. Medieval jurists are moreover very attentive to the goings-on outside their studies and lecture halls, and acutely conscious that they bear the weighty yet honourable burden of bringing order to the potential chaos of the medieval socio-economic sphere.

It is this open attitude to wider society that allows the flowering of medieval legal scholarship to exist in a fertile relationship of symbiosis with the system of customs and facts which continues to underlie medieval law; indeed, scholarship even contrives at times to extend the reach of customary law. The pages of scholarly works provide a stable theoretical and technical home for the novel facts of social and economic life: the new situations encountered in legal practice, and the new legal formulations and the new institutions which lawyers require to cope with those situations. These facts of daily life are constantly forged and reforged in the ever-busy workshop of change that is late medieval society; the work of scholars removes facts from the furnace of change and discovers in them a higher, more rigorous, more universal message. Scholarship makes the legal formulations and institutions of legal practice into models that can be deployed in other similar contexts and at other points in time. In so doing the work of jurists takes upon itself the function of ordering the law, a goal it fulfils completely.

The Character of Late Medieval Legal Scholarship: *Ius Commune*, Roman Law, Canon Law

We must now descend to the level of concrete details. We have seen that legal scholarship plays a central role in the late medieval legal system, and we have seen why this is so. Now we must give a more detailed account of medieval legal scholarship's defining features.

First of all we should note the *isolation* of medieval jurists. By this rather unexpected term, I mean that our community of scholars does not operate within an all-encompassing political sphere like those that we will examine in the modern period: a political system which governs its subjects and imposes conditions upon them, protecting its lawmakers and conferring authority upon them using a police force and its powers of coercion. The authority of jurists was generated entirely by their spiritual and intellectual prestige, and yet how did they maintain the necessary level of observance of the law in the wider community? No one jurist, whether an exalted courtier to a prince or an influential member of the public bodies of a city-state, could satisfy this desperate need for authority. Authority could only be achieved by the plurality of voices contributing to a scholarly consensus.

The jurists still harboured in their unconscious the naturalistic and factualistic convictions of the pragmatic early Middle Ages, which had settled in the collective imaginary. Late medieval jurists thus studied the facts of their contemporary reality closely and with pleasure, because it was in facts that they might detect the primary quality of their work: *effectiveness*. However, they lacked their own structures of *validity* – that is a higher, general and authoritative model into which to incorporate the multitude of pragmatic conceptual and technical solutions for which they had had to reach for the sake of their work's effectiveness. This model was provided by Roman law.

During the early Middle Ages, Roman law had scraped by, donning the ragged clothes which befitted its forgotten status. Roman law became 'vulgarized', as Romanists call it, absorbing the simple, factual, effective traits of its social context and letting the high pinnacles of refined legal erudition fall into disrepair. To give an example: the most precious resource of Roman law, the fifty volumes of Justinian's *Pandecta*, which held the treasures of classical legal scholarship, were unknown throughout the early Middle Ages. They were incomprehensible because they were of no use: farmers and shepherds have no need of feathered hats and sequins. Legal historians rightly emphasize the year 1076, when a Tuscan legal document refers to the *Pandecta* for the first time since antiquity. The return to the *Pandecta* indicates that it was once again comprehensible: it could be put to use with understanding.

The cultural wealth of the eleventh century has a specific consequence for the history of law: the cultural inheritance of Rome that seemed to have been lost forever resurfaces with the plenitude of its scholarly detail intact.

The schoolmen wasted no time in grasping this opportunity. What we have up till now been calling, somewhat vaguely, 'Roman law' is in fact a system of laws codified by Justinian in the first half of the sixth century after Christ in the form of the majestic work called the *Corpus iuris civilis* ('Body of Civil Law'), made up of the *Institutiones* ('Elements'), the *Pandecta* or *Digesta* ('Pandects' or 'Digest'), the *Codex Justinianus* ('Code of Justinian') and the *Novellae constitutiones* ('Novels'). The jurists of the eleventh and twelfth centuries did not regard these texts as a mere treasury of useful terms, rigorous concepts and technical solutions, grounded in a robust and consistent legal language; rather, the *Corpus iuris* was their longed-for authoritative model, to which they deferred.

The *Corpus iuris*'s authority was great for two reasons. Firstly because of its age: it belonged to and contained within its pages the fabled world of the ancients. Antiquity was held worthy of especial veneration: as the above-mentioned John of Salisbury says, *venerabilior est vetustas* ('age should be respected more'). Secondly, the legislator in question was Justinian, who was not only a Roman emperor but moreover an unimpeachably Catholic one. Justinian cherished orthodoxy and protected, or even over-protected, the Church – as can be seen in the learned and respectful manner adopted by those parts of the *Corpus iuris* which deal with Church dogma.

Roman law served as an excellent means by which to justify the validity of medieval legal scholarship: it was the authoritative model which would, in turn, guarantee its emulators' authority and therefore widespread compliance with their work. The scholar had to present himself as a student of classical culture and drape his assertions with the protective mantle of some fragment of the *Corpus iuris*. These fragments were even known in the Middle Ages as *leges* ('laws'), as if to underline the necessity of conforming to them.

So far so good, but what happened to the facts of contemporary existence under these learned scholars? Was the veneration of Roman law not a betrayal of the primacy of effectiveness which these well-integrated jurists still supported enthusiastically? Let us not forget that the Justinian legal code dates back to the sixth century AD and, despite its great scholarly worth, was rooted in a very different society and historical environment from that of the late Middle Ages.

And so the jurists of late medieval Europe were able in good faith to swear fealty to two lieges: the venerable Justinian Code and the demands of contemporary society. This opened up the possibility, of course, that the demands of daily life in the Middle Ages found no answer in these sacred

texts or that the answer they did find was unsuitable. The solution in this case highlights the problematic nature of their approach and may be somewhat difficult for the educated twenty-first-century reader to accept: medieval jurists were careful never to depart from the *form* of the Roman *lex* in question, but they often departed from its *substance* where they found it necessary to do so in their role as constructors of a new legal order.

The jurists read the *Corpus iuris* with the eyes of late medieval man; they interpreted it in the light of the novel demands which pressed upon them. In effect, their interest in classical culture leant more towards style than substance. As we shall see, it is this anachronism that will later lead the humanists to scorn the scholastics as ignorant and asinine, since their interpretations of the classical material were not faithful to its original significance and indeed were often a travesty of it. Certainly medieval jurists read Roman law in a deeply contradictory way; only by accepting contradictions could the two sources of law, contemporary facts and the ancient *leges*, coexist. But the jurists still could not and did not discard Roman law and leave it to moulder. This was partly because of the veneration with which they viewed it, but mainly because it granted validity and coherence to their doctrinal musings.

And so medieval jurists found themselves in a curious position: whilst paying enforced and constant homage to the form of Roman law, where necessary they would propose audacious solutions demanded by the present circumstances. Effectively, they would invoke these ancient texts in the service of legal arguments that were at best foreign to their substance and at worst entirely contradictory. Our jurists were certainly *interpreters* of Roman law, but not in the modern European sense of that word, denoting readers of a text who allow the text itself to condition their responses. Their *interpretatio*, and I use the Latin term here for clarity, is more of a mediation between ancient law and novel facts than an explanation or exegesis of the source texts.

By tradition the first great medieval school, established at Bologna in the late eleventh and early twelfth centuries, produced *glossators*, whilst the more mature, culturally rounded institutions set up in thirteenth- and fourteenth-century Italy and Europe produced *commentators*. In either case it should be clear that, whether we are dealing with glosses or comments, the schoolmen of these institutions consistently styled themselves as *interpreters* of the Justinian Code. However, their mediation of Justinian's work was creative: it forged a new law, which typified a historical moment rich in scholarship. We call this law *ius commune* (literally the 'common law', although this is not the same as the English tradition of common law, to be dealt with in the next chapter).

Ius commune was a law created by jurists, by those steeped in legal learning – judges, notaries, advocates and above all scholars. These were schoolmen who taught at universities across Europe but who were fully

immersed in the tangible nature of the legal experience. They did not hesitate to make themselves available, whether as advisers to those who wielded power; as legal counsel to the parties in a case or to the judge; or as practising advocates or notaries. The *ius commune* was born out of the complex dialogue that these jurists set up between the facts of contemporary life and the rules laid down in the texts of ancient Rome. It would be fascinating to enter into the precise innovations of the various structures of the *ius commune*, but this book aims only to sketch a general picture of the historical developments. We shall limit ourselves to describing the degree of creativity and imagination shown by the jurists in one very important social and economic field: the law of property. Despite the clarity of Roman sources on the indivisibility of *dominium* ('ownership'), the late medieval readers of Roman law were also the heirs of the early medieval practices which had shifted the emphasis away from the principle of ownership and towards its effects. Late medieval jurists were conscious of the need to come up with a formal legal justification of the present situation, and so they confidently seized upon certain Roman texts and managed to twist their message so much that they were able to build two different forms of property rights out of the same concept of *dominium*. Situations of effective use of goods were now elevated to the rank of *dominium utile* ('ownership through use'). This gave rise to the long-lived theory of *divisible property*, which survived up to the eve of the French Revolution.

The *ius commune* was a pluralistic endeavour which spoke with the voice of an entire community of jurists and knew no borders. This late medieval law without a state can be likened to the handiwork of a class of skilled tradesmen engaged in the construction of a large building. The great Italian legal historian Francesco Calasso has rightly talked of 'the *ius commune* as a spiritual fact'.[7]

The *ius commune* was, as we have said, a law without borders, as is proper for a scholarly discipline. It always searched for universal solutions and rejected artificial political barriers, as the extraordinary circulation of teachers and students in late medieval Europe demonstrates. These cultural pilgrims travelled from one university centre to another, and claimed citizenship of a republic of letters to which all mankind might belong. The *ius commune* set up a universal framework of laws that claimed sole legitimacy through scholarship and effectively unified the legal system of Europe. To give one illustrative example amongst many, let us turn to the *Commentarii* ('Commentaries') of Bartolo da Sassoferrato – an Italian jurist of the early fourteenth century and head of the school of commentators. The *Commentarii* are predominantly made up of lecture notes which bear witness to a lively dialogue between Bartolo and his students. At one point, Bartolo substantiates one of his explanations by reference to a German

scholar who, he claims, had mentioned the opinion of a professor at the University of Orléans in his own lecture that morning.[8] To the jurist, the little classroom at the University of Perugia, where Bartolo teaches, is not encircled by the walls of a central Italian city but is, rather, at the centre of a web of intellectual relationships located in space across modern-day Italy, Germany and France – in effect the centre of the entire civilized world.

There are two things we should make clear.

Firstly, that the *ius commune* was not, as one Italian Romanist once put it, 'an updated Roman law', or, as some would reductively argue, the *ius romanum medii aevi* (the 'medieval continuation of Roman law'). Roman law was certainly a source of authority for the *ius commune*, as well as an indispensable guarantor of validity, a necessary point of comparison and a linguistic, technical and conceptual model, but it would be a mischaracterization of medieval law to identify it completely with its Roman predecessor. With regard to the new legal tapestry of the late Middle Ages, Roman law is only one thread in a larger whole, albeit an important one. And as anyone knows, the individual threads that make up a tapestry are transformed into a new and different artefact when they are woven together.

Secondly, and no less importantly, the *ius commune* is so called because it belongs to all the people, and is founded in the rationality that is scholarship's greatest weapon and resource. But it is the *ius commune* also because the medieval concept of personhood combines the citizen and the believer to make a political subject who is equally legitimately governed by the laws of the hegemonic religion – the canon law. A modern jurist would regard this as a set of laws belonging to an organization distinct from the state, with its own independent existence from any state or group of states. But in the Middle Ages such a distinction is unthinkable, since the law of the Roman Church complements that of the former empire, providing a second authoritative model and second pillar of validity. The jurist is thus the interpreter not only of the *Corpus iuris civilis* but equally of the canon law, in which any competent legal scholar must also be well versed. The resultant law is thus 'common' in a second sense, in that it stems from two traditions.

The Reform of Canon Law and the Creation of Classical Canon Law

We have already seen how, during the first millennium, the Church of Rome slowly but steadily constructed a body of laws that suited its purposes, and how the resulting legal system reflected the Church's pastoral mission. We have also seen how, at the outset of the second millennium, a few canon

lawyers of the Gregorian period made a preliminary attempt to harmonize the discordances in the canon law system and to revise it in accordance with the fundamental distinction between divine and human law.

The two centuries that follow constituted a coherent and visible implementation of the Gregorian policy. The popes of these centuries were predominantly trained canon lawyers, and they oversaw a complete review and reform of canon law, giving rise to what is often rightly called *classical canon law*. In the mid twelfth century it was a lone monk, Gratian, writing in a private capacity, who attempted to bring consonance to the dissonances of the canon law tradition in his famous work, the *Concordia discordantium canonum* (the 'Harmony of the Clashing Canons'). In the thirteenth century, meanwhile, it was the popes who took it upon themselves in their official capacity to promote significant collections of laws: Gregory IX in 1234, Boniface VIII in 1298 and John XXII in 1317. The Church thus began to gather together what would become known, in an echo of Justinian's great work, as the *Corpus iuris canonici* (the 'Body of Canon Law').

The technical features of this very particular form of law, shaped by the specific demands of the Church's pastoral mission, were those collected very adeptly by Ivo of Chartres, as recounted in the section above. I should now like to add a few considerations on the predominant, although not the sole, type of primary source in which the canon law of this period appears: the *decretal*. *Decretal* is an adjective, meaning decisive, which presupposes the noun *letter* (*epistola decretalis*, 'decisive letter'), and signifies the response given by the Pope to a request for definitive clarification of a doubtful point of canon law that had surfaced in day-to-day life. These strange sources appear difficult to classify to modern eyes, since they are neither laws, nor judgements, nor administrative acts. Instead they typify the combination of powers wielded by the pontiff: they concern a single case upon which they issue a ruling, but they also bind the rulings in similar episodes in the future.

Although the decisions of ecclesiastical councils, the scholarship of canon lawyers and judicial pronouncements all remain important, it is clear that the pontiff now plays a central role. He is the *vicarius Christi* ('vicar of Christ'), the supreme guide and successor to Peter, who can deploy any of the Church's powers – as the massive proliferation of decretals attests. This proliferation also demonstrates that canon law disdains abstract and general rules, preferring instead to focus on the concrete case, with all the garnishings of circumstance that accompany it. The 'pastorality' of canon law, in effect, leads to a law based on casuistry and precedent. From the thirteenth century until the first *Codex iuris canonici* of 1917, the law of the Church of Rome is and will be described here as primarily a *ius decretalium*, a law made up of decretals.

Ius Commune: Special Local and National Laws and Statutes

Its basis in scholarship meant that the *ius commune* was equipped with a startling capacity for expansion. It provided an almost inexhaustible reservoir of technical legal analyses and solutions, of concepts and principles that were suitably abstract and malleable to meet the urgent needs of the late Middle Ages' complex socio-economic reality. The basis of the *ius commune* in reason gave it a universal scope; it was not weakened by local legal customs. Although it was certainly absorbed by very diverse local traditions, every jurist, whether a theorist or a practitioner, was able to draw from it tools and solutions suited to his legal innovations.

The *ius commune* was born in the culturally fertile terrain of north-central Italy, specifically in the University of Bologna: the alma mater of legal scholarship. It then spread out across the whole of Europe, uniting it under one legal vocabulary and set of concepts and so allowing any jurist to feel at home wherever his travels across the politically fractured continent took him. The *ius commune* was taught not only at Bologna and in north-central Italy, but in all the universities of Europe: Salamanca, Lisbon, Montpellier, Orléans and Paris. Fredrick II, the same legislator of dubious quality who bequeathed to the Kingdom of Sicily its own body of law in 1231, stipulated the *ius commune* as the primary object of study in his reform of the law schools of Naples and staffed those schools with teachers trained at Bologna.

But the *ius commune*'s reach was even more pervasive than this: even when drawing up acts of royal legislation, the princely chancelleries, which were full of legal scholars, often based their work on the instructive technical practices of the *ius commune*. The same process occurred during the written drafting of customary laws or city statutes carried out by professional jurist-draftsmen. An even more extreme example is provided by the king of Castile, Alfonso the Wise, whose legislative legacy, *Las siete partidas*, was a text of almost pure *ius commune* translated into the national language. In France also, in the middle of the thirteenth century, the division of the territory into two regions – a south, ruled by *droit écrit* (or *ius commune*), and a *coutumier* north, ruled by predominantly oral customs – was consolidated and remained in place for the duration of the Ancien Régime.

Certain Italian legal historians have recently argued that the *ius commune* was more of a chimera than a true historical presence. I have no hesitation in deeming such scholars to be deluded by an unsustainable fascination with originality, a concept that finds no analogues (and indeed many opposites) in an objective consideration of late medieval society.

Instead I must address the historically salient problem of the relationship between the common law and local legislation, or *ius commune* and *iura propria*. This conflict arises because of the simultaneous presence in the same territory and under the same political system of one type of law that is universal and one that is local. The problem becomes more pressing over the course of the thirteenth century, when the first, admittedly timid, efforts at legislation by kings appear, coupled with a lively flourishing of *statuti* passed by cities, predominantly those of north-central Italy. It is above all in these Italian city-states, rather than in the monarchies, where the friction between common and local law is most keenly felt. For now, monarchs tended to concern themselves with matters of public import ignored by the *ius commune*, or dealt with only scantly. The city-states, meanwhile, had only recently emerged from the sway of empire after a bitter struggle; they drafted statutes with a much wider compass, although still somewhat haphazard and lacking in any aspiration to completeness. These statutes squarely address the common law/local law issue, deciding for the precedence of local law.

Does this mean there was a hierarchy for sources of law? That is what we would have to conclude if we saw the medieval Italian city-state as a sovereign entity when it declares the precedence of its own laws over the *ius commune*. A sovereign state is a rigid monist; it attributes the status of law only to those acts made by itself and tolerates no competing production of law within its borders. Yet I have already shown here how such an interpretative model of the state is unsuitable and misleading in the medieval context, and have instead sought to evoke the medieval legal experience by dwelling on one of its most characteristic features: legal pluralism. Within the same political entity there can be various producers of law, because the politico-legal medieval outlook of the Middle Ages does not provide for political power to be concentrated in the hands of a single officeholder.

In any large *comune* of the thirteenth century, the civic laws, or statutes, were not the only source of legislation: there was also the canon law laid down by the Church; mercantile law set by the community of merchants; and feudal law produced by those of the feudal class. Each of these had its own specific rules governing specific subjects and people and adjudicated by specific tribunals. Finally, there was the *ius commune* – constructed from the interpretation of the 'universal laws' (Roman and canon) by the universal community of jurists. The civic political order was unitary, but within the city walls also dwelt plural, diverse legal orders which coexisted with one another and shared in the government of the city's inhabitants.

The law was not held in the smothering embrace of the apparatus of public power; instead it led society, expressing its desires and conditioning its actions. The reference in the statutes to the *ius commune* does not set up

a hierarchy because there can only be such a thing when political and legal orders coincide in an indivisible sovereign power. The *statuto* is a complex of rules inscribed under the banner of the concrete, which services the needs arising in civic life; these documents limit themselves to clarifying that, in any matter, if there is a civic law dealing with the issue, the judge should apply that law, but, if there is a gap in the civic law, the judge should draw on the omnipresent and theoretically complete *ius commune* that needs no authorization to fill it.

In this integrated plurality of legal systems, *ius commune* and *iura propria* are examples of unitary legal orders that are not undermined by their proximity to power. The wielders of power, meanwhile, followed the collective consciousness in recognizing that the unity of the law went beyond their sphere. One great Italian legal historian whom I have already mentioned, Francesco Calasso, talked of a 'system of common law', made up of the *ius commune* and the local legal orders, which were not isolated one from another but rather part of a permanent integrating dialectic.[9] Calasso's interpretation is convincing if we interpret that demanding word *system* to mean something similar to what we have found to be rigorously true in the course of this chapter: a sense that both universal and particular are incorporated in a greater unity that respects plurality and diversity.

Ius Commune and Feudal Law: On the *Usus Feudorum*

The term *medieval civilization* tends to be accompanied by a further adjective, *feudal*, and with some justification. However, I should like to take the opportunity to clarify to the reader the significance of this very particular word. Firstly, it should be noted that the existence of a feudal class is not only a European phenomenon: it has arisen every time a historical civilization has found itself in similar socio-political circumstances, for example in the Chinese and Japanese empires – places that felt no European influence until the modern era.

The origins of what we now call the feudal order can be traced back to the origins of medieval civilization itself. The primary cause of feudalism can be sought in the way in which the political order adapted itself to the nascent medieval historical context. I shall reiterate here what I have already argued so far, with added nuance. The political and legal class of the Middle Ages is characterized by the following features: the impotence of the central authorities and their incapacity to impose their will, and the growing influence of other powers both by their *de facto* occupation of positions of strength and by formal entitlements granted from above. Amongst these

other powers, economics stands out: the possessor of wealth has access to the only decisive force in Middle Ages and, in a very slow process, he gradually gains the offices of judge, military commander and tax collector in his own lands. The Middle Ages are truly the historical moment in which the divisions between private and public are most fully erased. Many of those who wielded power from afar were in fact obliged to delegate that power to those more immediately present on the ground. This exacerbated the fracturing of political power in the Middle Ages, with the result that the political order was made up of a complex network of relationships that were only at first glance hierarchical.

In the legal sphere, this hierarchical structure, although belied in effect by the reality on the ground, was communicated formally via relationships of superiority and inferiority. The superiors promised protection and the inferiors swore loyalty via a series of links between individuals that often bore little relation to the effective situation of powers in an area of territory. The status of feudatory, or vassal, meant formally that the individual belonged to another man, but often the so-called inferior was, in effect, able to exercise considerable autonomy of discretion.

Feudalism signifies these complex interrelationships of people bound together by mutual bonds of protection and loyalty. The interrelationships soon became personified by a class of people, all of whom found roles in the intricate and fragmented mechanism of powers which linked the highest prince to the lowest serf. This process separated feudal powers off from the general multitudes of common mortals. It should be stressed that this commodification of the network of relationships was a slow process, but it did finally lead to the absorption of the feudal principles of mutual protection and loyalty into the land. There came about feudal territories which incorporated that mixture of public and private which is the primary feature of a feudal structure, with the result that certain public powers (known as *honores*, 'honours') came with the soil and those who acquired ownership of the land acquired with it the powers.

With regard to the legal sphere, I should briefly highlight the fact that, because of its separation, this complicated but isolated web of people and goods soon brought about an even more complex network of customs. Because these customs were restricted to certain subjects and certain areas, they took on the features of an autonomous body of law which we might call *feudal law*. This autonomy was entrenched by the creation of special tribunals to rule in the disputes regarding people from those lands or the lands themselves.

In the middle of the twelfth century, the sum of customs and judicial rulings, by now rendered extremely complex by the centuries-long process of accumulation, was put in order for the first time by an insightful practitioner

of law: a Milanese judge. The collection was called the *Usus feudorum* ('Feudal Customs') or the *Libri feudorum* ('Feudal Books'), and its inclusion as an appendix to one copy of the *Corpus iuris civilis* suggests that its material was now considered worthy of scholarly attention. And so scholars did study feudal law, giving rise to writings that are often of great cultural import; the great doctors of the *ius commune* were often not only Roman lawyers or canon lawyers but also feudal lawyers. There are many examples of such scholars: one could cite Baldo degli Ubaldi, a great Italian commentator of the fourteenth century, often acknowledged as the greatest philosopher amongst the jurists and author of a detailed commentary on the whole of Justinian's *Corpus*, on part of the *Corpus iuris canonici* and on the *Libri feudorum*. Feudal law as a special type of universal law came into close dialogue with the *ius commune* thanks to the legal pluralism of the late Middle Ages, with its legal universe that was, as we have seen, both unified and, at the same time, plural.

The Origins of Commercial Law

In legal parlance, *commercial law* signifies the complex of rules and institutions which governs that speciality. It is a field not of use to the general citizen but rather to those engaged in the mercantile profession. Merchants were a growing economic, social and political force in late medieval Europe, and with this new influence they gained the confidence to construct legal strategies to defend their interests. At its beginnings, commercial law consisted in nothing more than the customs of the mercantile class, whose members governed commercial dealings to their own satisfaction. These customs were born out of everyday practices – the dealings of the local market square made general by the now universal esteem in which the mercantile class was held. The customs were written down for the convenience of the users and became, by the middle of the thirteenth century, proper statutes of commercial law, reflective of the now fully realized power of the mercantile class.

Little by little, during the late Middle Ages, we find many developments: the invention of new commercial instruments – such as negotiable instruments, business associations, insolvency and insurance; the streamlining of old arrangements to fit them for commercial purposes – such as agency and assignment of credit; and the overcoming of old stumbling blocks deriving from a now unjustifiable technical analysis of Roman law – such as contracts for the benefit of third parties.

An organic collection of institutions began to take shape and, alongside it, a complex professional mercantile organization. One very significant

advance was the creation of special tribunals; at first these had only a limited field of professional and disciplinary activity, but they soon grew to encompass a proper jurisdiction equipped with its own set of rules. Commercial courts were able to rule on any aspect of commercial activity; they were presided over by unrobed judges, and followed procedures that were specifically designed for speed and efficiency. They would be long-lived and difficult to kill off: Italy's *tribunali di commercio* were only abolished in 1888.

Mercantile law was, without doubt, one of the protagonists of the piecemeal system of late medieval law.