

PART I

Late Antiquity to the Early Middle Ages (Fifth–Eleventh Centuries)

The transition from the ancient to the medieval world, between the fourth and sixth centuries, and the concurrent influx of Germanic settlers who in previous centuries had dwelled on the outskirts of the Empire engrafted Europe with a corpus of new institutions and customs which were far from Roman law but equally far from the traditional customs of the Germanic races. The law of the late Roman Empire nevertheless had a considerable influence on the public precepts and private law itself of the Germanic people, who had by then relinquished their original nomadic state and were permanently settled throughout the territory.

Thus began an era which was to last around 600 years, until the end of the eleventh century, during which time what had survived of Roman law within the Germanic kingdoms of Western Europe variously intermingled and coexisted with Germanic customs, part of which were set down in writing, mostly in Latin, from the sixth century onwards. The Church was to exercise its authority and with it a fundamental cultural, religious and pastoral role, but also a social and political one. It contributed by transmitting to civilised society many rules of law derived from Roman law which the Church had made its own, but also and more importantly the inestimable heritage of ancient Greek and Roman culture, of which all that has survived are the texts chosen and transcribed by medieval clerics and monks.

Although the written laws of the Franks, the Lombards, the Visigoths, the Anglo-Saxons and other Germanic peoples include many rules willed by the kings who issued them, their primary root is undoubtedly that of custom. Following the ninth-century resurgence of the Western Empire under Charlemagne, for the first time in history the premises were created for a political and juridical union of Western Europe.

These were the centuries during which custom dominated the sources of law, ultimately giving life to new and complex institutions which cannot be considered either Roman or Germanic. The feudal

2 PART I: LATE ANTIQUITY TO THE EARLY MIDDLE AGES

relationships which were to take root on the continent through custom were to develop by the same route. Custom is not static, but transformed in time and space, at different times in different areas. Neither was custom always nor solely spontaneous: feudal law and the servile condition, at once flexible and stable, resulted from the forces which had been present in the arena for centuries and in the course of which public power underwent profound changes, which were then reflected in the laws of the time. Personal status, family structure, contracts, the criminal system and trials were wrought by a harsh and often violent reality, in which the exercise of force coexisted with the very different values of the Christian message.

Despite the extraordinary variety of local customs, many fundamental common elements exist in early medieval European law, deriving both from common religious beliefs and the similar conditions in which the predominantly rural and military societies lived.

This historical condition of Europe was to undergo a profound change with the great 'renaissance' of the legal system in the eleventh and twelfth centuries.

Law in Late Antiquity

1.1 Political Structures

In the last centuries of the ancient world – the centuries between the age of Constantine (313–334) and the age of Justinian (527–565) – Roman law experienced a series of profound changes, which were to have an influence on the entire successive cycle of legal history in Europe. The vast territory of the late Empire included the area of the whole Mediterranean basin extending as far as the Rhine, the Danube and southern England. It was divided into 114 administrative provinces, equally split between the Eastern and Western Empires, the first with a capital to begin with in Rome then in Milan and Trier; the second with a capital in Constantinople. The bipartite political, juridical and administrative division between the empires of East and West was emphasised at the end of the fourth century [Demougeot 1951], becoming irreversible with the fall of the Western Empire in 476. This did not prevent the leadership being centred on a single man during some phases of late antiquity, under the governance of some great emperors, among them Constantine, Theodosius I and Justinian. The apogee of power was at once powerful and fragile. Succession to the throne entailed two emperors (the *Augusti*) and two designated successors (the *Caesars*), in a partnership which was in practice often disregarded and in any case characterised by mutual diffidence, so well expressed in the fourth-century sculpture in Venice representing four personages forming a single group: one hand leans on the shoulder of a colleague, but the other grasps the hilt of a sword.¹

Civil and military administration had been separated from the time of Constantine [E. Stein 1968], by a radical reform in antithesis with the classical Roman principle of the indivisibility of the *imperium*. Three distinct hierarchies stood side by side in the territory, in a legal order whose articulated complexity induced a great historian to state that in comparison ‘all hierarchical settings of successive eras seem the mediocre

¹ The ‘Four Tetrarchs’, relief in porphyry from St. Mark’s Basilica, Venice.

work of beginners' [Mommsen 1893]. The military hierarchy revolved around *duces* and *magistri militum* posted in various parts of the Empire, as well as mobile military units that followed the Emperor as needed. After the decline of the classical formular procedure and the advent of the *cognitio extra ordinem*, the functions of the civil hierarchy were both an administrative and public order, but also included the function of civil and criminal judiciary. This was separated into as many as five levels, which included, in ascending order, the city *defensores*, the governors of the provinces, the vicars at the head of the dioceses (there were six in the Western and six in the Eastern Empire) and the four prefects of the *praetorium* in Italy, Gaul, Constantinople and Illyricum. A third hierarchy of functionaries, itself divided into two branches, exercised the vast tax and financial competencies of the Empire. Above the three hierarchies operated the Imperial Court.

By this time, the Emperor had a legitimate hold on all powers. It was he who was in charge of nominating the provincial governors, he who also nominated all other posts for civil, judicial, military and financial administrators. Legal cases, on which he made a final decision, reached him from every part of the Empire. And finally, it was to him that the exclusive right of legislative power was reserved.

Imperial bureaucracy, centrally recruited from the vast Eastern and Western territories, was certainly not devoid of vice and abuses such as corruption, greed and arrogance [Jones 1964]. Nevertheless, the high professional level of the offices is undeniable, particularly that of the central offices whose task was to set in motion the course of the legislative and jurisprudential evolution of law. The hundreds of edicts and rescripts that have come down to us are a clear evidence of this. It has been said that with the post-classical age 'the spirit of Roman law did not die out but migrated to another body' [Schulz 1946].

1.2 Post-classical Legislation

As to the sources of law, the distance from the preceding age could not have been greater – the age in which a number of great jurists had elaborated the admirable set of principles, categories, rules and methods which constitute the backbone of classical Roman law having ended; every task in the production of norms during the late Empire rested solely in the hands of the Emperor. He officiated through the agency of his central offices which were under the direction of a handful of high commissioners whom he selected and could dispose of at any time.

The *Quaestor* of the Holy Palace (responsible for questions of law) and the Master of Offices (head of the Imperial Chancellery) – with the aid of designated officers equipped with advanced technical skills – drafted the constitutions (*edicta*)² which, upon the Emperor's approval, became binding law in either the Eastern or Western part, if not throughout the entire territory of the Empire.

To this was added the judicial function at the highest level, also exercised by the Emperor through his central judges. Cases were assigned to him in the phase of final appeal, after at least two inferior levels of judgement. There were direct appeals to imperial justice on the part of imperial subjects. Not infrequently there were requests from local officer-judges, mostly provincial governors, regarding questions which were not resolvable with existing laws. The imperial court, through its central office (*scrinium a libellis*), solved such cases by issuing a rescript or a consult in the name of the Emperor, a brief text in which the controversial question was set in legal terms based on the facts provided by whoever had submitted it for superior judgement.³ As the parties were not present, the rescript often contained a clause in which the solution of the case was conditional on the facts included corresponding to the truth, to be duly verified *in loco*.⁴

The rescript was then used not only for the specific case that had originated it, but also for similar cases occurring in other parts of the empire, by other judges who had come to have knowledge of the imperial judgement. Emperors intervened forbidding the rescripts issued by the central office to go against general rules (*contra ius elicita*)⁵ and to prevent the surreptitious spread of the contents.⁶ Rescripts were in fact to acquire a normative role, a role which became official and was formalised when a select number became part of Justinian's compilation.

As a result the classical system of sources was profoundly transformed. Customs and uses (*mores*), opinions (*responsa*) of accredited jurists, the *senatumconsulta* and other sources still referred to by Gaius in the second century were already relegated to the background, whereas the only

² All the constitutions in the Theodosian Code, as we shall see, belong to this category. For example: *Cod. Theod.* 11. 30. 17, incorporated with modifications in *Cod. Iust.* 1. 21. 3; the Justinian compilers replaced the penalty of deportation inflicted on those who had addressed a plea to the Emperor rather than appealing a decision, with the less severe penalty of infamy.

³ Only one example among the hundreds of rescripts included in Justinian's Code, *Cod.* 1.18.2 of the year 211–217, denies an adult who had appealed to the Emperor in a case involving inheritance the possibility of pleading ignorance of the law.

⁴ *Cod.* 1. 22. 5: '*Si preces veritate nitantur*'. ⁵ *Cod.* 1. 19. 7. ⁶ *Cod.* 1. 14. 2.

source regarded as central in the evolution of law consisted of imperial decisions in the dual form of rescripts on specific cases and edicts of a general nature. Post-classical theorisation in this way reduced the sources of law to two categories: on one hand, the *iura*, which included the traditional sources of civil and honorary law, still valid unless expressly or tacitly abrogated, and, on the other hand, the *leges*, that is, imperial statutes.

Post-classical and Justinian legislation intervened in almost every field of law, introducing profound changes with respect to the classical era. The influence of Christianity may be perceived in many of the dispositions concerning the law of persons and family law from Constantine onwards: for example in the sanctions introduced against the abuse of children on the part of fathers and the lessening of the characteristically rigid *patria potestas*⁷ (which some sources now qualify with the very different expression *paterna pietas*); in making redemption possible for parents forced by poverty to the all too frequent practice of selling their children;⁸ in the equality between male and female in legitimate succession;⁹ in the introduction of obstacles to divorce.¹⁰ The ban on splitting slave families in the division of inheritance,¹¹ the simplification of manumission¹² and the possibility of acquiring freedom through prescription¹³ may also indicate a Christian influence. Greek law was also in various ways to influence imperial law, for example imposing the restitution of the wife's dowry in case the marriage was dissolved,¹⁴ the introduction of the practice of registering mortgages in public registers (*apud acta*) and allowing the withdrawal from a purchase agreement by forfeiting the deposit in contrast to classical Roman law.¹⁵ In some cases, the Old Testament also influenced the law through the Christian religion,

⁷ Cod. 9. 15. 1 of 365; Cod. 8. 51 (52). 2 of 374: sanctions for the killing of a son and the exposure of infants.

⁸ Cod. Theod. 5. 10. 1 of 329; Justinian accepted the provision, but interpolated the text limiting the lawfulness of the selling to cases of extreme poverty (Cod. 4. 43. 2). In a Novel of 451, Valentinian testifies to the practice of selling one's children because of the terrible hunger ('*ob obscaenissimam famem*') caused by famine (Nov. Valentiniani 33, in Nov. Post-Theodosianae).

⁹ Nov. 118. ¹⁰ Nov. 22 of 536; Nov. 117 of 542.

¹¹ Cod. Theod. 2. 25. 1 of Constantine = Cod. 3. 38. 11.

¹² Cod. Theod. 4. 7. 1 of 321 = Cod. 1. 13. 2.

¹³ Constantine required a period of sixteen years and good faith (Cod. Theod. 4. 8. 7 of 331), Anastasius was to subsequently extend the period necessary for prescription to forty years (Cod. 7. 39. 4. 2 of 491).

¹⁴ Cod. 5. 13. 1 of 530: *actio de dote*, granted also to the heirs. ¹⁵ Cod. 4. 21. 17 of 528.

for example when the rule on evidence was imposed requiring the declaration of at least two witnesses.¹⁶

1.3 Theodosius II to Justinian

Legislative enactments in the fourth and sixth centuries were innumerable. It is therefore understandable how the necessity arose for collecting the *corpus* of the constitutions of the Emperors into homogeneously conceived texts. Rescripts up to the age of Diocletian had already been collected in the Gregorian and Hermogenian Code,¹⁷ but far greater importance was given to the Theodosian Code, issued by Theodosius II, in which all the general constitutions from the age of Constantine until 438 were collected in sixteen books. Every book was subdivided under titles, under which the successive constitutions were listed in chronological order. The Code, which included the constitutions generated in Constantinople as well as those written in the West, was extended to both parts of the Empire [Archi 1976]. In the West, it exercised a lasting influence in the course of the early Middle Ages, until after the eleventh century.

The sixth century saw the origin of Justinian's great compilation (527–567). This Emperor, who was to mark the end of a span of more than 1,000 years of the law of Roman antiquity, played an unsurpassed role as legislator as well as being among the great rulers in history. Hundreds of constitutions ratified by him and compiled by a small group of jurists and high-ranking functionaries introduced new norms – adding to or derogating from post-classical law – in every field of law, from private to criminal, from procedural to public. But most of all Justinian was the promoter of the great collection of texts to which his fame is tied: an enterprise, however (as has often happened historically with innovative events), which his contemporaries entirely neglected.

In the short space of five years, from 529 to 534, three works appeared which together with the later *Novellae* formed what would be called the *Corpus iuris civilis*.

The *Codex* was (in the second issue of 534 which has come down to us) systematically collated in twelve books, each of which was subdivided

¹⁶ Cod. 4. 20. 1 of 334. See Deuteronomy 19.15 and Daniel 13.

¹⁷ The two collections have not survived, but are worth remembering, as use was made for the first time of the term 'Code' later to become current, although with different meanings, in subsequent eras.

into titles by subject, containing thousands of rescripts and imperial constitutions from the first century to the age of Justinian himself.¹⁸

The *Digest*, which dates from 533, comprises a vast selection of classical legal science texts collected in fifty books, each of which was subdivided into titles. It was the result of work undertaken by a commission headed by the jurist Tribonian, *magister officiorum*, who also made use of many works from his own extensive library. Though in fragmentary form, the *Digest* saved for posterity the writings of the greatest Roman jurists of antiquity, from Salvius Iulianus to Labeon, from Paul to Ulpian, from Pomponius to Callistratus, from Modestinus to Papinianus and many others. What we know of classical jurisprudence and the form of reasoning and argumentation of Roman jurists is essentially owed to this work of incommensurable value to the legal historian. Without it the most perfected brainchild of Roman civilisation would have been lost. And it is truly surprising that the *Digest*, this imposing monument to Roman legal wisdom, was conceived and produced far from Rome; equally surprising is the fact that this work began having an effect in the West only six centuries later, as if it had been conceived for a Europe which did not yet exist.

Justinian's compilation includes a brief summary, the *Institutiones*, modelled on the Institutes of Gaius, and the *Novellae*, a collection of constitutions¹⁹ promulgated by the same Emperor in the thirty years of reign after the Code was issued.

Justinian intended to create a work which would substitute all other sources of law²⁰ and which would be applied in full by the judges of the Empire, to the future exclusion of all other sources: even commenting on it was strictly forbidden²¹ (one of the most disregarded commands in history). Justinian's undertaking was all the more ambitious if we consider that the collection included texts generated in ages very distant from each other both in time and in the nature of the legal institutions.

¹⁸ Confirming that the separation of the two parts of the Empire was already under way, it is significant that no constitution after the year 432 of the *pars occidentis* of the Empire is included, despite the abundance of legislation of Italic origin in the fifth century.

¹⁹ The number varies in the three versions that have come down to us: 124 Novels in the Latin *Epitome Iuliani* of Julian, a law professor in Constantinople, circulated in the West during the early Middle Ages; 134 Novels in the Latin *Authenticum* commentated on by the Bologna School; 168 Novels in the Greek collection, with 10 Novels promulgated by the Emperor Tiberius II (578–582).

²⁰ *Digesta, de confirmatione Digestorum*, const. *Tanta*, § 19: 'omne quod hic positum est hoc unicum et solum observari censemus'.

²¹ 'Nemo [...] audeat commentarios isdem legibus adnectere' (const. *Tanta*, § 21).

The collection, translated into Greek and including the constitutions of the subsequent Emperors, remained the basis for Byzantine law for almost ten centuries, until the fall of Constantinople to Turkey in 1453. Justinian wanted to introduce the compilation to the West in his re-conquest of Italy,²² but was unsuccessful in his attempt, as Spain and Gaul were already the territory of Germanic reigns, whereas almost immediately after his death southern and central Italy were occupied by the Lombards who had descended into the peninsula in 568. Only with the rediscovery in the twelfth century would Justinian's work begin its life-cycle as the principal source of the new *ius commune*. As such, it would dominate continental law in Italy and in Europe until the end of the eighteenth century.

The fact that the work of Justinian and his jurists would play a key role from the twelfth century onwards is due primarily to the contents and conceptual structures that the work was able to transmit. Their richness is indeed extraordinary, if only because it portrayed so momentous a historical evolution, from the law of the republican age, to the era of transformations of the Empire, to the events and upheavals of the post-classical age to Justinian. It is, however, undeniable that the principles of classical origin are its most defining trait. As selected and systematically arranged in the great Justinian compilation, they were to re-emerge in the work of the jurists and the imperial rescripts of the first centuries.

These traits, characteristic of the Roman concept of law, may be summarised in some basic principles²³ which constitute what Jhering called 'the spirit of Roman law'.²⁴ Among them are the separation of law from norms of a different nature, in particular deliberately focusing on private law, according to the principle of 'isolation'; the concentration on the resolution of concrete cases, thus avoiding definitions, generalisations, classifications and the systematic arrangement of the subject matter; the combinatory and almost mathematical approach, in which legal concepts are often handled as if possessing a life and an objective reality;²⁵ the weight attributed to tradition, to authority, to the certainty

²² *Pragmatica sanctio*, § 11 (of 554), in *Novellae*, ed. Schoell-Kroll, p. 800.

²³ On this, we follow the lucid account by Schulz in *Principles of Roman Law* (Oxford 1936).

²⁴ R. v. Jhering, *Geist der römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1852–1865).

²⁵ As F. v. Savigny had already noted in his *Vom Beruf unserer Zeit für die Gesetzgebung und Rechtswissenschaft* (1814), § 4. As Schulz wrote, 'private Roman law as portrayed by classical writers attains an extraordinary, almost logical, definiteness. The number of juristic conceptions which play a part in it is comparatively small, as all which pertain to special or non-Roman variations are set aside. The legal rules take on the character of

of acquired legal relations,²⁶ to good faith, to the freedom and autonomy of individuals, notwithstanding the entrenched strict social hierarchy.²⁷ It is surprising that these characteristics – which perceptive historians have brought to light and which our modern sensibilities interpret as embodying the quintessence of Roman law – were almost never expressed by the ancients themselves, evidently being so natural as not to necessitate expression.

In their sober account of cases and their solution – not least of the reasons for which they wield such fascination – the authoritative opinions of the jurists and the decisions of the imperial rescripts would inspire medieval and modern scholars to engage in the analysis of the texts and in the techniques of analogy. But most of all it was the art of argumentation, the wisdom of proposed solutions and the austere sense of justice unleashed with every proposition, that would bring these texts back to life in medieval and early modern Europe. Nor should the contribution of Greek culture to the more decisive phases of Roman legal science be overlooked.²⁸

These principles belong primarily to classical law and were only in part to be retained in the last centuries of antiquity. They were to be transmitted in the successive ages by the classical texts collected in the *Digest* and *Codex* by the Justinian compilers.

It was mostly in the field of institutions that the law of late antiquity was to make its most creative contribution to the history of civilisation. As Peter Brown fittingly put it, ‘Seldom has any period of European history littered the future with so many irremovable institutions. The codes of Roman Law, the hierarchy of the Catholic Church, the idea of the Christian Empire, the monastery-building – up to the eighteenth century, men as far apart as Scotland and Ethiopia, Madrid and Moscow, still turned to these

apodictic truths, as any limitations imposed by public law or extra-legal duties are ignored. Often the jurists’ statements almost give the impression of a mathematical treatise or rather of a treatise on a law of Nature’ (1936, pp. 34–35).

²⁶ This differs from the modern sense of legal certainty: Roman jurists deliberately intended to keep law in a fluid state, rather ensuring ‘*ius quaesitum*’; the disinclination towards legislation in the classical and republican age also reflects this idea.

²⁷ ‘The fact that it [Roman law] developed in the context of a historically localized aristocracy did not prevent it from acquiring universal value; in the intensive intellectual elaborations of the classical jurists . . . the aristocratic nature of the social structure is translated . . . into an equality of native and notable individuals. . . . The more substantial the equality in a historical society, the more valid the Roman law principles’ (Lombardi 1967, p. 58).

²⁸ On this, see the papers collected in the two volumes, *La filosofia greca e il diritto romano*, Rome, 1977.