

to be known as the *Corpus iuris canonici*, a compilation on a scale worthy of standing next to the *Corpus iuris civilis* of Justinian.

The compendious expression *utrumque ius*, 'both laws,' was used as a qualification for those who had studied both systems. It also indicated a relationship between them that became increasingly close as time went on. By the thirteenth century the two systems were on an equal footing and the civil lawyers sought to keep them in distinct spheres. The civil law was concerned with the common good of man on earth and the canon law with keeping him from sin and ensuring the salvation of his immortal soul. Accursius (*gl. conferens generi ad Auth. Coll. 1.6, quomodo oportet episcopus*) states that the Pope should not meddle with temporal matters nor the emperor with spiritual matters.

As later civil lawyers pointed out with exasperation, however, by reason of its concern with sin the Church usurped to itself jurisdiction over everything. From the time of the *Liber extra*, canon law covered many matters which were treated in Justinian's law. It included a large part of criminal law, from adultery and perjury to forgery and homicide; it touched private law at many points where a party might be tempted to sin, such as loan, the taking of interest, sale and real and personal security for debt. Because marriage was a sacrament, it was regulated by canon law and, as a result, all questions of family status fell within its purview.

Already in the twelfth century, problems arose in connection with the computation of degrees of blood relationship. This was crucial in ascertaining whether the parties to an apparent marriage were within the prohibited degrees of kinship. Civil law counted the degrees merely upwards from the parties to the common ancestor, whereas canon law counted them from one party up to the common ancestor and then down to the other party. As a result, many more cousins found that, under canon law, they were within the prohibited degrees, and so needed papal dispensations to marry, than would have been the case under civil law. The Fourth Lateran Council limited the prohibited degrees to four.

The glossators had tended to ignore such differences, but by the fourteenth century the two laws came to be dealt with together, even by civilian commentators. Many canonists were laymen and a qualification in both laws (*in utroque iure*) became quite common. The phrase 'both laws' began to refer to two aspects of what in many respects was regarded as a single system, a *ius commune* for the whole of Europe.

#### THE ATTRACTION OF THE BOLOGNA STUDIUM

By the end of the twelfth century the position of Bologna as the legal centre (or 'mother of laws') of Europe was unchallenged and the *studium* had thousands of law students from all over Europe. They were grouped in 'nations' according to their country of origin. For the first time since the fall of Rome, law in the West was an autonomous discipline, whose special techniques had to be learned over several years of rigorous study, at the conclusion of which a professional qualification was received.

The law students not only attended lectures. They cut their teeth as lawyers by participating in disputations on set topics, in which each side presented an argument with supporting texts, after which the master presiding gave his solution to the problem. They were expected to equip themselves with a personal set of the more important texts. Authorised booksellers, known as *stationarii exempla tenentes*, held certified copies of the texts, which they hired out to students so that they could make their own copies. When their period of study was over, they would have the basic material to take with them. In this way former students were able to disseminate a knowledge of what they had learned in their own countries.

Although the emphasis of the Bologna law school was academic rather than practical, the students who flocked there were not all motivated by a disinterested love of learning. The Gregorian reforms had stimulated many disputes of a quite unprecedented character. They could not be settled by sheer force, as had been the case in earlier centuries. There was a yearning for power to be legitimated, but standard collections of laws, whether of Roman or Germanic origin, offered little guidance on fundamental questions of jurisdiction and the like. Bishops and secular princes alike looked for men who could deploy arguments, based on principles which were objective and rational and had a universal authority. Only the Roman texts could provide such principles. The new legal learning provided its students with qualifications which won them positions of responsibility both in episcopal and princely establishments. Enlightened bishops sent their promising young chaplains to Bologna to acquire at least some knowledge of the new learning, while princes and nobles seeking to legitimate their power sought to ensure that its results were also available to them.

The University of Bologna was not founded by a deliberate act. It emerged out of the need, felt by the students of law, to organise themselves for the purpose of ensuring that they received the most effective teaching and obtained a recognised qualification. In contrast with the other twelfth-century universities of Paris and Oxford, established and governed by masters, Bologna became the model of a university governed by students, who employed the professors to teach them. Although other higher subjects, such as theology and medicine, were also taught there, law, both civil and canon, remained dominant.

Both the imperial and the papal authorities endeavoured to find favour with the Bolognese *studium*, by supporting it in its dealings with the municipal authorities of the city. The influx of students had created serious problems for the citizens but they did not want to lose the economic advantages that the students' presence brought them. The young Emperor Frederick Barbarossa, on his way to Rome for his coronation in 1155, stopped at Bologna to meet the leading doctors of law and to seek their support, in justifying certain laws that he wished to enact. Having obtained their assistance, he promulgated the *Constitutio habita*, in which he conferred privileges on law students coming to Bologna, whom he described as "pilgrims for the sake of study." In particular Frederick recognised corporations of students, who were to be allowed to govern themselves in the manner of craft guilds. This concession enabled the students to

negotiate with the professors but it also gave the *studium* as a whole a certain independence from the commune of Bologna.

By the beginning of the thirteenth century, the students were sufficiently strong that they could often get their way by threatening to secede from the town. The commune reacted by trying to keep them and it was now the turn of the papal authorities to intervene on the students' behalf. In 1217 Pope Honorius III pointed out that, instead of trying to compel the students to stay, it would be better for the commune to adopt measures that would encourage them to remain there of their own free will. Two years later, the Pope granted the archdeacon of Bologna the power to confer on successful students the right of teaching everywhere, thus indirectly subordinating the university to the Church.

The success of Bologna ensured its imitation through the foundation of law schools in other parts of Italy. There was a law school at Modena in 1175. The *studium* at Padua was begun in 1222, and the example was followed by other Italian centres, such as Pavia, where the old school of Lombard law developed into a school of civil and canon law. In 1224 the Emperor Frederick II founded the university of Naples, largely for the study of Roman civil law, and sought to ensure its success by commanding his subjects to study there rather than in Bologna. At first the order applied only to those in the kingdom of Sicily, but, in the course of his dispute with the Lombard League, to which Bologna adhered, he extended the ban on studying at Bologna to his subjects in his Lombard dominions and to those in Germany and Burgundy. This might have proved disastrous for Bologna but again Pope Honorius III stepped in and obtained a revocation of the ban.

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#### THE COMMENTATORS

Bartolus, who gave his name to the school which dominated the study of the civil law during the fourteenth and fifteenth centuries, was born in 1313 or 1314 in Sassoferrato, a small village in the Marches, and died in 1357. He began his studies of law, at the age of thirteen or fourteen, at Perugia under Cinus and later went on to Bologna, where he took his doctorate at the age of twenty. He was a judge in the small town of Todi and then devoted himself to teaching, first at Pisa and then at Perugia, where he died. His short life was completely absorbed by the law and his output was phenomenal: apart from treatises on particular topics, he wrote exhaustive commentaries on all parts of the *Corpus iuris*, which in the early printed editions fill nine folio volumes.

True, much of the material consisted of citation of his predecessors but Bartolus always added something of his own, usually a clear path through the thickets of earlier debates, indicating a practical solution to a problem. Under his influence the study of the civil law became less purely academic and more orientated towards the legal problems of the day. He and his followers continued to expound the texts in the form in which they were transmitted but their aim was no longer to explain the meaning of those texts as they stood. Rather they sought to find in them rules which would be appropriate for late medieval society but would still carry the authority of imperial law.

Bartolus realised that the law had to be accommodated to the facts. On the question of the emperor's power over the Italian cities, he was able to build on Azo's views. Although in law the emperor was lord of the world, Bartolus observed that in practice many peoples did not obey him. In the Italian city-states, the people recognised no superior, they made laws as they chose and so, he concluded, they possessed *imperium*, with as much power within their territories as the emperor had generally. If they had been exercising this power for a long time, they need not prove any concession from the emperor. Indeed, when the people confer power on their rulers, the latter are the delegates of the people, who retain ultimate authority.

Bartolus's practical tendency can be illustrated from his approach to the problems that arose where different laws came into conflict: between civil law and local law, between one local law and another and between civil law and canon law.

Bartolus confronted the issue of a conflict between civil law and local law in a discussion of a custom of Venice. This custom accorded validity to a will if it had three witnesses, which was directly contradictory of the Roman rule that required a minimum of five witnesses (C.6.23.31). Bartolus sought the reason for holding a local custom to be void, if it conflicted with imperial law, and concluded that it must be that it was thereby presumed to be a bad custom. The Roman emperors, however, are known to have allowed conflicting local customs to exist by way of privilege. It follows that it must have been possible to rebut the presumption that a conflicting custom is necessarily a bad custom. Justinian's law could only invalidate customs already in existence in his time. It is possible to prove that a later custom is good, even if it conflicts with Justinian's law. The Venetians knew their own needs best. If they thought it unreasonable to expect five merchants to interrupt their business activities in order to witness a will, a rule according validity to a will with only three witnesses should be valid or else testators' last wishes would be frustrated. In this way Bartolus used Roman arguments to stand Justinian's rule on its head.

Although Bartolus had to justify the existence of a particular law (*ius proprium*) alongside the *ius commune*, he gained acceptance for the notion that local statutes must be interpreted according to the methods established by the *ius commune* and in such a way as to derogate as little as possible from the *ius commune*. There are no rules in the *Corpus iuris* which deal expressly with the conflict between different secular laws. In Justinian's time almost all those living in the Roman empire were Roman citizens, so that problems of conflict did not arise. In the complex world of fourteenth-century Italian city-states, on the other hand, such problems were pressing and general rules were sorely needed. The glossators had held that a person's law is that of the community of which he is a citizen, but problems arose when two merchants from different cities made a contract with each other.

Bartolus took specific cases reported in the *Corpus iuris* and generalised their rulings, producing a coherent set of convenient rules, nowhere expressly stated in the *Corpus iuris* but claiming the authority of that law. The procedure in a civil action must always be governed by the law of the court in which the action is brought. As to the rules to be applied, however, the form of the contract must be governed by the law of the place where

it was made, whereas any issue concerning the performance of the contract must be ruled by the law of the place where it should have been carried out.

The conflicts between civil law and canon law had to be dealt with by conciliatory methods. One problem, in which the two laws came into conflict, was that involving a will that the testator had confirmed by an oath, in which he swore not to change its terms in a subsequent will. The canonists considered the vital element to be the oath. For Durandus, for example, there was no problem. Every oath, which could be carried out without prejudice to one's immortal soul, had to be observed. The civilians emphasised the principle of freedom of testation. A testator must be free to change his mind and revoke the earlier will, by making a new will, at any time before he dies. The oath is not binding on him since, by purporting to limit this freedom, it is contrary to the law.

Later jurists, particularly the Orleans masters, made valiant efforts to reconcile the two positions, by allowing validity to a later will under certain conditions. The basic question was whether the law should allow an irrevocable will. Bartolus was determined that it should not but, unlike some of his predecessors, he could not just ignore canon law. In his view an attempt to deprive the testator of his freedom of testation was immoral (*contra bonos mores*) and as such was not binding, even by canon law. His conclusion was stated in the general rule that whatever is disapproved by the authority of the law is not validated by the force of an oath. Eventually Bartolus's accommodation of civil and canon law was accepted.

By making explicit the rationale that seemed to lie behind the spare rulings of the Roman texts, Bartolus was able to produce a set of new rules, which could claim to enjoy the authority of imperial law. Jurists were agreed that henceforth no one could be a lawyer who was not a Bartolist (*nemo jurista nisi Bartolista*). His methods were followed by a whole school, known as Commentators, of whom the most distinguished was his pupil Baldus de Ubaldis.

Baldus dominated the second half of the fourteenth century, dying in 1400. He commented not only in the civil law but also canon law and feudal law and perfected the opinion (*consilium*), a discussion of the legal issues raised by a particular case. This form of legal literature completed the adaptation of the civil law to contemporary problems.

By the fourteenth century the *ius commune* consolidated its position as part of a common Christian culture of Europe. It is this unity of culture which explains why law and religion were so closely related in late medieval writing.

**Note: Roman law after the medieval commentators.**

For the most part, the medieval professors of Roman law thought that their task was, so far as possible, to reconcile logically every text of the *Corpus iuris civilis* of Justinian and the *Corpus iuris canonici* with every other. Philosophy was studied in the medieval universities. After the 13th century, it was commonly the philosophy of Aristotle. But the medieval jurists did not try to explain Roman law in philosophical terms.

That enterprise began in the early 16th century. A group of jurists centered in Spain and known to historians as the "late scholastics" embarked on a project which was fundamentally different.<sup>1</sup> Some of the leading figures were not only jurists but Catholic theologians: for example, the Dominican Domingo de Soto (1494–1560), and the Jesuits Luis de Molina (1535–1600) and Leonard Lessius (1554–1623). They self-consciously tried to synthesize Roman and Canon law with the philosophy of their intellectual heroes, Aristotle and Thomas Aquinas. In the process, they gave private law a theory and a systematic doctrinal structure for the first time. Instead of writing commentaries on the texts of Roman or Canon law, they wrote books with sections on property, contract and tort. The sections would begin by describing the fundamental principles that should govern these fields of law. These principles were then used to explain as many Roman rules as possible. For examples, these authors explained that contracts require the consent of the parties, and then discussed the effect on consent of mistake, fraud, and duress.<sup>2</sup> In the *Corpus iuris civilis*, mistake is discussed in couple of texts that appear under the law of sales, and fraud and duress in discussions of the Roman actions *de dolo* and *quod metus causa*. The Romans had discussed different kinds of contracts and torts without ever trying to define what a contract or tort was. The late scholastics equated contract and tort with the two kinds of commutative justice described by Aristotle. In an act of voluntary commutative justice, the parties exchanged resources voluntarily but at a price at which neither profited at his own expense. In an act of involuntary commutative justice, one party had enriched himself at another's expense against the will of his victim. Justice required that he make compensation. Having identified these philosophical ideas with contract and tort as known to Roman law, the late scholastics then used them to explain Roman rules.

In the 17th and 18th century, Aristotelian philosophy fell into disfavor in large part through the attacks of the founders of modern critical philosophy. Paradoxically, however, many of the conclusions of the late scholastics were spread throughout Europe by the northern Natural Law School founded by Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–94). The members of the school were steadily more vague about the philosophical principles that underpinned these conclusions. Thus the conclusions drifted on without the principles that had originally inspired them.

Other 17th and 18th century jurists had a more practical turn of mind. They continued to write commentaries on Roman texts which were often quite learned but had little philosophical content at all. Many of the most famous of them came from Holland or Germany, and so their work is often said to belong to a Dutch-German school of law. Leaders were Arnold Vinnius (1588–1657), Samuel Stryk (1640–1710), Johannes Voet (1647–1713) and Cornelis van Bykershock (1673–1743).

1. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), 68–111.

2. For example, Domenicus Soto, *De iustitia et iure libri decem* (1553), lib. 8, q. 2, a.1;

Ludovicus Molina, *De iustitia et iure tractatus* (1614), disp. 352; Leonardus Lessius, *De iustitia et iure, ceterisque virtutibus cardinalis libri quatuor* (1628), lib. 2, cap. 17, dubs. 5–6.

The question of how far modern law owes its specific doctrines to the Roman jurists and the schools that followed them will be faced when we turn to the law of property, tort, contract and unjust enrichment.

## II. CODIFICATION

### 1. Codification in France

#### a. The enactment of the French Civil Code

Arthur von Mehren & James R. Gordley, *The Civil Law System* (2d ed., 1977), 48–51

Plans for a unified law for France predate the enactment of the Code Civil.<sup>136</sup> But, except for the three Ordinances of Chancellor D'Aguesseau drafted between 1731 and 1747, the private law of France remained as essentially diverse at the end of the 18th century as it had been at the beginning of the 15th. Voltaire described the situation tersely: The traveler changed his law as often as he changed his horses. The reasons why legal diversity persisted in the face of considerable political and economic unity are varied. Of particular importance was the fact that the tradition of local independence remained strong in the provinces<sup>137</sup> and, as central control became more effective in some areas of life, increasingly found expression in local legal practices and through provincial institutions, especially the Parliaments.

The French Revolution of 1789 shattered the old institutional structures; in particular, the Parliaments were eradicated. Political power and the machinery of government were now centralized to a degree never before known in France.

Codification efforts began at once. On July 5, 1790, the Constituent Assembly voted "that the civil laws would be reviewed and reformed by the legislators and that there would be made a general code of laws simple, clear and appropriate to the constitution."<sup>138</sup> The first Title of the Constitution of 1791 concluded with the promise that "a Code of civil laws common to the whole Kingdom will be enacted." However, the Constituent Assembly and its short-lived successor the Legislative Assembly, never found time to undertake the task of codification.

Actual work on codification began under the Convention (1792–1795). Its Committee on Legislation was directed in June 1793 to prepare a draft

136. A useful and detailed discussion in English of the preparation and enactment of the Code Civil is contained in A General Survey of Continental Legal History 279–84 vol. I of the Continental Legal History Series, 1912.

137. "The spirit of the province always caused these projects [for a uniform civil law] to fail: each fraction of the nation regarded

its particular laws as a heritage guaranteed by the pact that had incorporated it into France." 1 J. Locré, *La Legislation civile, commerciale et criminelle de la France* 69 (1827).

138. Quoted in P. Fenet, *Recueil complet des travaux préparatoires du Code Civil* xxxvi (1827).