



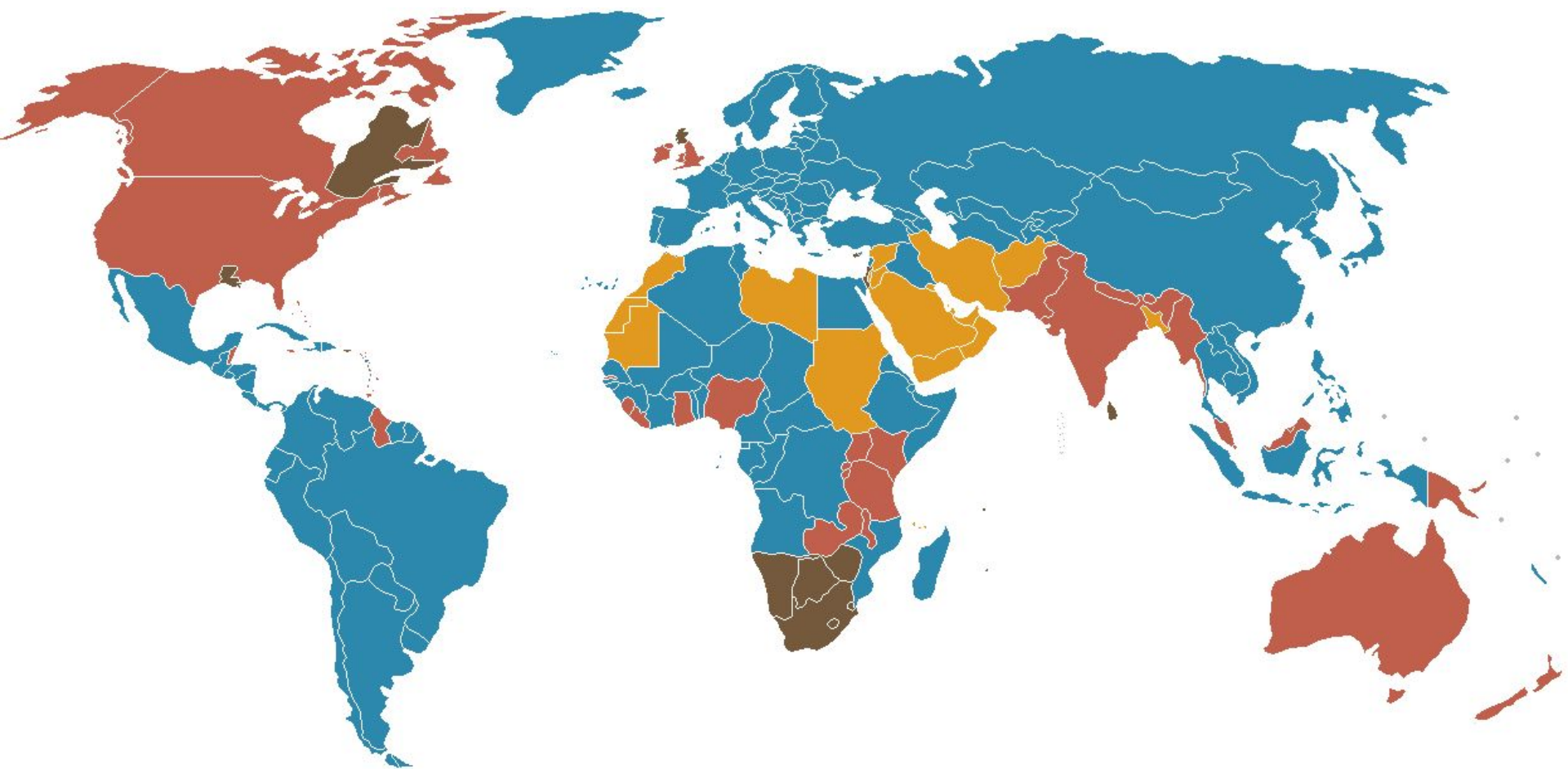
***Law in Europe in the Middle Ages:
The origins of the civil law system***

Introduction

- The expression "civil law system" refers to a big group of contemporary legal systems.
- These legal systems share fundamental characteristics because of their common origins in the elaboration of Roman law made in Europe in the Middle Ages (6th-15th centuries) and during the so-called age of the codifications (18th -19th centuries).
- Apart from common fundamental characteristics, these legal systems can have very different laws on specific matters; what is similar is the general approach to law and the interpretation of the role of jurists, legislators, and judges.

Introduction (2)

- Today the civil law systems includes the legal systems of:
 - continental Europe
 - Central and South America
 - parts of Asia
 - parts of Africa
 - Russia
 - Louisiana (USA)
 - Puerto Rico (associated with the USA)
 - Quebec (Canada)...
- The other main Western legal system is the **common law system**, that will be discussed later.
- This presentation introduces to the historical origins of the civil law system.



Blue: civil law systems; red: common law systems;
orange: Islamic law systems; brown: other systems.

A society without a state

- The social and political landscape of the Middle Ages is radically different from that of the Roman Empire.
- First of all, it is marked by the consequences of the collapse of state authority, which also means the collapse of advanced monetary economy, and by the attempts to cope with the new circumstances.
- The Middle Ages lack a robust and extensive machinery of power as the Roman Empire once had. Political power is far less pervasive. It has no ambition of controlling all forms of social behavior.
- Power is necessarily limited, decentralized, distributed.

The incompleteness of power

- 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 controlling society or actively promoting economic development.
- In the Middle Ages, despite many instances of tyranny, political power is fundamentally weak and above all incomplete.

From anthropocentrism to “reicentrism”

- This situation is accompanied by a deep change in mentality:
- Classic civilization was anthropocentric, founded upon an optimistic faith in man's abilities to subdue nature.
- The great social, economic, technological, demographic crisis of the transition period from around the end of the 4th century until the 6th lead to a rapid decrease of population, and of cultivated land.
- Nature regains its status as a wild and untamable environment.

- The anthropocentric society of Rome, 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*.
- Power was attributed first and foremost to the natural world, seen as a system of primordial rules to be respected.
- This system of rules conditioned the daily life of medieval communities.

- One of the defining events of the first centuries of the nascent Middle Ages was the intermingling of the Nordic races with Mediterranean civilization.
- 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 took a more detached view, seeing power as a practical necessity and casting the wielder of power as his subjects' guide.

- 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 weakness of political power

- The result was 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.
- 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 areas of the legal relationships which governed the daily lives of the people could not be included amongst these 'political' laws.

The law is in the things

- 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 from the bottom up, 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.

- 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 behavior 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 autonomy of law

- The second fundamental point is that the law acquires its own autonomy.
- 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 statutory law (in late modernity, for example), where the law becomes the expression of a centralized and centralizing will (legal monism), the Middle Ages are an age of legal pluralism.
- Diverse legal orders emanating from diverse social groups coexist, even whilst the sovereignty of one political authority over the territory those groups inhabit remains unquestioned.

Not “state”

- The incompleteness of the power of the Medieval political organizations advises against using the term "state".
- The object associated to the word "state" in modern and contemporary times is too different from Medieval political organizations.
- The word "state" refers to a centralized machinery of power, a concentrated monopoly of political power that aims at controlling every aspect of social life; furthermore, the modern "state" is considered as the only source of law, which is radically different from the Medieval concept of law.
- So the word "state" should not be used for the Middle Ages.



Community is everything

- In the Middle Ages individuals have no value, the community is everything.
- 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 micropolitical.
- The socio-political reality of the Middle Ages was composed of an extremely fragmented complex of communities, a society made up of societies.

The Church reinforces the idea of community

- The Church also contributes to this fundamental role of the idea and the practice of community.
- The Church defined itself as the community of the believers and of the saved; it did not admit the possibility of saving oneself as an individual, in isolation, outside of the Church.
- The Protestant Reformation (first half of the 16th century) shows its essentially modern, not medieval character in that it considers possible, or even it mandates, the direct dialogue between believer and God.

Eclipse of Roman law & the new law system

- In the early Middle Ages, the harsh living conditions on one hand, and the eclipse of the advanced classical culture on the other hand, make Roman law and legal science unavailable, not understood, useless.
- A new system of law must be created from different foundations.
- The most important aspect of the new system is the rediscovery of the factuality of law.
- The facts are material objects and events, natural features (physical, geological and climatic) and socio-economic phenomena (structures of economic exchange, customs and collective behaviors).

- This means that the law is not designed from above and projected upon the facts, fitting them or even forcing them into its plan.
- It is especially physical nature that masters the law.
- Law is not the master of nature, but adapts to the natural order of things, because man himself is not the master of nature, but a part of it (a small, weak part of it).

The primacy of custom in Medieval law

- So far we have seen two guiding principles in Medieval law: reicentrism and communitarianism.
- A third principle 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.
- A custom 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. It is 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:
 - 1. 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.
 - 2. 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.
- **Custom, being the collective repetition of an action, expresses the identity of a group, of a collective.**

- Every region has its own customs.
- 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 not in the formal sense that modern jurists use it (a written charter of legal principles) 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 princes 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.

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 is extremely fragmented, since each custom is also a reflection of the needs and interests of particular groups or specific local contexts.
- 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.



The central role of notaries

- In this context, 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.

- 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.
- Their influence is maximal in the field of agricultural law, and especially of agricultural contracts.

The limited power of the princes

- 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.

Justice

- 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 modeled 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.

- 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.

The Church and canon law

- The Church of Rome is the pre-eminent figure at every level of medieval culture: religious, cultural, socio-economic, political and legal.
- The Church of Rome 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**.

- 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 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.), the laws of the Church at first grew into a confused morass of rules, many of them 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.
- 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.
- In particular the work of one French prelate must be remembered: Ivo (Yves), Bishop of Chartres (France).
- 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.

Divine law / humane law

- 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 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 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 provided an accurate interpretation of the canon law which took account of its ultimately pastoral nature.
- For this reason, the division made by Ivo in the 11th century 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, 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.
- Canon law will be studied in the Universities and will contribute to the development of *ius commune*.





The Eleventh and Twelfth Centuries

- At the end of the 11th 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 11th and 12th 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 return of urban civilization

- 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.

The rise of the merchants

- 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.

Culture

- The early Middle Ages possessed plenty of schools and centers 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 enrich early medieval civil society.
- In the late Middle Ages schools began to appear more often in the center of cities, attached to the cathedral. Cultural learning could now start to circulate more widely.
- The 12th-century renaissance: created not by 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: Birth of the University.

- Although the cultural void has been filled, the political void remains.
- 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.

- 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.
- In the 13th century, the German-speaking lands continue with government by customary law;
- But the monarchies of France, Spain and Portugal are beginning to develop into recognizable nation-states.

- Custom is a friendly, nurturing source from which to generate law: it respects local differences and local needs.
- Nonetheless, custom has the intrinsic defect of 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.

Overcoming fragmentation

- 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.
- 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: lawmaking 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.

- 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.
- During the early Middle Ages, Roman law was not useful, not understood, and practically abandoned.
- In Italy in the late 11th century it is rediscovered and put at the center of legal science.
- Medieval jurists developed a real veneration for the *Corpus iuris civilis*. But how to put it to use under social, economic, and cultural conditions that were so distant from Justinian's times?

The Glossators of Bologna

- A school of jurists in Bologna has special importance; they are now known as the "glossators of Bologna."
- The first glossator and founder of the Bologna School is Irnerius or Wernerius (born about 1050 – dead after 1125).
- Irnerius found the forgotten *Corpus iuris civilis* and based his teaching on it (a very significant advantage over current texts).
- He can be considered as the father of Medieval law.
- Glossators and their work were significantly different from their earlier Roman counterparts.

The jurists of the Late Middle Ages are University professors

- An important difference with the Roman jurists, important to the development of the civil-law system, was the nature of Medieval jurists themselves.
- In Rome, jurists were private, upper-class citizens performing a public service without pay.
- In medieval Italy they were primarily teachers, members of the law faculties of the universities, drawn not from the nobility but from the general public.
- They generally carried the title of doctor.
- These legal scholars became the midwives in the birth of a new system of law for an emerging Europe.



Medieval jurists transform Roman law

- Medieval jurists respected the form of Roman law, but interpreted it often in different ways that were more suitable to their times.
- To some extent, they used Roman law and classical culture as a shell that gave dignity and authority to a content that was more a product of their interpretation than the original intention of Justinian.
- Their work of interpretation of Roman law is not a simple explanation of ancient texts, but a more creative activity, more a mediation between ancient law and novel facts.

A systematic work

- While the basis for the opinions of early Roman jurists is not readily apparent from their works, it is clear that they were case oriented and not dedicated to building a system of law.
- In contrast, the Italian glossators emphasized system building and logical form, with the *Corpus Juris Civilis* serving as the basis for construction of legal doctrine.
- Their basic technique was the "**gloss(a)**," an interpretation or addition to the text of the *Corpus Juris Civilis*, first made between the lines and later in the margins.
- They also used some of the substance and argumentative techniques of medieval theology.

Accursius and his “Great Gloss”

- The "Great Gloss" (also known as "*Glossa ordinaria*" or "*Glossa magistralis*") of the leading glossator of the period, Accursius, who wrote his classic of medieval legal literature from 1220 to 1260, can be compared to the Institutes of Gaius and even Justinian's *Corpus Juris Civilis* as an attempt to create a comprehensive statement of the law.
- The Accursian Gloss totaled over 96,000 commentaries to the entire text of the *Corpus Juris Civilis*.

Role of custom

- When the *Corpus Juris Civilis* and theological doctrine could not supply them with the necessary rationale for their opinions, they turned to local custom to fill the void and incorporated it into the system.
- The reliance on custom was a significant contribution of these jurists, since Roman jurists did not appreciate custom as a source of law.
- Significantly, Gaius made no mention of custom in Book One of his Institutes when he listed the bases of Roman law.

- With their work on the *Corpus iuris civilis* the "**glossators**" and later the "**commentators**" created new law.
- This new law is the *ius commune* (literally "common law" but it is NOT the same as the English tradition of common law which has another origin and history).
- *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 made themselves available as advisers to those who wielded power; as legal counsel to the parties in a case or to the judge; or as practicing advocates or notaries.

Medieval cosmopolitanism

- The *ius commune* was 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 center 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.



The Universities

- 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.
- A city of great influence in the medieval world, Bologna was not only a major commercial city in Italy, but was also located at the crossroads of major trade routes.
- 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.

- A problem that had to be addressed was 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 13th century, when the first efforts at lawmaking 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.

- In this period, monarchs tended to concern themselves with matters of public import ignored by the *ius commune*, or dealt with only scantily.
- 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.

Legal pluralism

- 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.
- 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 13th 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.

Feudal law

- 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.

- 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.

- 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.
- 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.
- 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.
- There emerged 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 12th 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: e.g. Baldo degli Ubaldi, a great Italian commentator of the 14th century.
- The **School of the Commentators** is the second leading European school of jurists (two centuries after the Glossators).
- The most famous commentators are Bartolo da Sassoferrato and Baldo degli Ubaldi.
- The *ius commune* will be used in continental Europe for 8 centuries.

