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FROM THE HISTORY OF EUROPEAN PRIVATE LAW

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Abstract. *It is well known that private international law (PIL) is one of the main instruments for regulating private legal relations involving a "foreign element." Its crucial role in the integration processes of the European Union/European Community can hardly be overestimated, especially considering that their ultimate aim is the establishment of a single internal market through the free movement of persons, goods, services, and capital across the entire territory of the Union/Community.*

However, despite its undeniable significance, PIL constitutes only one element of the broader private law framework governing civil and commercial transactions within the EU. Therefore, it seems appropriate to examine the challenges faced by the Community in the field of PIL in the broader context of the EU's efforts to develop a so-called "European private law". This initiative is inherently fraught with contradictions, as EU law, by its very legal character, is public law. In this regard, it is necessary to undertake a historical overview of the issue in order to better understand the underlying preconditions that have prompted the formulation of this complex objective, as well as the obstacles the Community encounters in pursuing its realization.

Keywords: *private international law, principles of private international law, private legal relations, foreign element, EU.*

The Origins of Western European Private Law

(Ius commune and the Glossators)

The legal systems of modern Western European states are the product of a centuries-long historical process, marked by the interpenetration of the cultures of various peoples inhabiting Western Europe. Despite the diversity of these legal

systems and their often fundamental differences, they share common roots: Roman law, codified by Justinian in the mid-6th century AD, and the canon law of the Catholic Church. Legal historians refer to the phenomenon whereby Western Europe adopted the "reborn" Roman law, as compiled by Justinian, together with canon law, as the "reception of Roman law". Its origins are traditionally traced back to the 12th century — the so-called "first European Renaissance" — when legal schools and universities began to emerge and undertook the study, systematization, and scholarly treatment of Roman and canon law as the subject of "both laws" (utrumque ius). From that time on, utrumque ius gained pan-European significance as a universal legal order.

However, this development was preceded by a six-century "pause", or caesura — in the apt expression of the German scientist Wieacker — which followed the fall of Rome in 476 AD and whose significance for modern Western European law can hardly be overstated. Strictly speaking, the collapse of the Western Roman Empire had begun long before 476, under the pressure of Germanic tribes and the sweeping movement known as the Great Migration of Peoples. This was the era in which the languages and nations of Western Europe began to form. Barbarian Germanic tribes — such as the Burgundians, Visigoths, Ostrogoths, and Franks — were allowed to settle within the imperial frontiers (limes), and their settlements, often organized into separate administrative districts, frequently occupied as much as two-thirds of the provinces in which they were located. Under these conditions, the cultural level of the empire declined sharply, while elements of Latin Europe and the tribal cultures became increasingly intertwined — developments that inevitably brought fundamental changes in the legal sphere.

The Empire could not help but recognize the customary laws of the tribes that had become part of it and, consequently, had to regulate intra- and intertribal relations according to *the principle of personal law*. Thus, already in the declining days of the Roman Empire, *a system of personal laws* emerged, which would later prove to be of considerable practical significance[1]. Another result of this development was the barbarization of Roman law. In the late 5th and early 6th centuries, three major compilations of what might be called "corrupted" Roman law appeared: the Edicts of the Ostrogothic kings, the Lex Romana Burgundionum

[1] See, for example, *Vinogradov P. G.* Rimskoe pravo v srednevekovoy Evrope [Roman law in medieval Europe]. M.: Izd. A. A. Kartseva, 1910. P. 5; *Hattenhauer H.* Europaeische Rechtsgeschichte [European Legal History]. Heidelberg, 1992. S. 21 ff. In particular, after the fall of the Western Roman Empire and the formation of the "barbarian kingdoms", the Romans were granted the right to resolve civil cases according to their own law. And in modern history, during the colonial period, subjects of metropolitan countries were subject to their own law, unlike local residents of the countries in whose territory they lived.

(Roman Law of the Burgundians), and the Lex Romana Visigothorum (Roman Law of the Visigoths). The Visigothic compilation became the principal source of Roman law in Western Europe throughout the first half of the Middle Ages[1]. Overall, the most significant feature of European legal history during this period is that Roman law was initially known only in the form of imperial decrees and the simplified jurisprudence of the post-classical era.

The Catholic Church had no less, if not more, influence on the revival of legal culture in the West. Since the time of Constantine the Great, it had taken on many public, social, and moral functions. In the Church, the young people saw how, "in an unfathomable, divine way", Rome and Roman law continued to exist "in flesh and blood", even though the Empire had disappeared. Christianity exerted a decisive influence on the development of European legal thought even in cases where legislators and jurists hardly realized the interdependence between Christianity and law. It was typical of the early Middle Ages that the dissemination and editing of written law (which meant Roman law) were entirely carried out by those with a church education, which was always connected with monastic and theological schools[2]. This meant, among other things, that any written form of a precedent, law, protocol, or document was tied to the language of the Church (that is, Latin). The forms of legal transactions of vulgarized Roman law became part of the very "flesh and blood" of early medieval European legal culture. During those "dark ages", the Church remained the principal guardian of the Roman legal tradition[3]. Moreover, it was the Catholic Church, through its missionary activities, that spread knowledge of Roman law to even the most remote corners of medieval Europe after the fall of the Western Roman Empire, since basic knowledge of Roman law — as an essential part of the classical heritage — was a required element of priests' education.

The same tendency can be observed in the area *of procedural law*. Its development generally followed the development of substantive law and often influenced the formation of the latter.

After the fall of Rome, ecclesiastical courts — unlike the courts of the Germanic tribes — remained, so to speak, "pan-European" courts. All believers, regardless of their national origin, were subject to their jurisdiction. This applied primarily to matters of marriage, family, and inheritance. Not least among the reasons for this

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[1] This is the so-called "Breviary of Alaric", 506. For a brief summary, see, for example, *Vinogradov P. G.* Rimskoe pravo v srednevekovoy Evrope [Roman law in medieval Europe]. M.: Izd. A. A. Kartseva, 1910. P. 5 and following.

[2] What we today call the teaching of law included at that time the general preparation of the priest for the performance of his spiritual, ecclesiastical and secular functions.

[3] It is no coincidence that the Ripoir Pravda notes that "the Church lives on Roman law" — *Stein P.* Roman Law in European History. Cambridge, 2004. P. 40.

was the fact that only the clergy, as mentioned above, were the principal bearers of literacy and written knowledge in that period[1].

In general, it should be emphasized that the Church actively developed its own law based on Roman law, drawing both on its general principles and on specific issues directly related to faith and the clergy[2]. The tendency toward the formation of canon law can be traced from the end of the 5th century. By the 9th century, compilations appeared that included Roman legal materials concerning the Church, such as the Lex Romana Canonice Compta[3]. However, such collections were still occasional and fragmentary.

Along with the development of the legal aspects of the functioning of the Catholic Church, significant changes were also taking place in its political status. These changes were due, not least, to the energetic and ascetic activity of Pope Gregory I the Great (540–604). Under his leadership, the material foundation of papal authority was finally established. The Church became the richest landowner in Italy. He restrained the Lombard expansion and converted them to Catholicism[4]. Most importantly, in 603 he secured from the Byzantine Emperor Phocas the recognition of Rome as the "head of all churches" (caput omnium ecclesiarum) of the Western Roman Empire. In other words, Gregory I sought not only to complete the construction of religious universalism in the West and to elevate the status of the Roman Catholic Church, but also to ensure its political independence from the will of secular rulers — something that would later be fully realized by Gregory VII. It was under Gregory I that the people of Rome for the first time elected a pope as Pontifex Maximus. As a result of his administrative, organizational, and economic efforts, as well as his missionary work among the Germanic tribes, the foundation was laid for both political universalism and the Christianization of European law. Thus, a new center of supreme authority was established in Rome: the papacy. The Catholic Church became an independent political force. It is believed that with the pontificate of Gregory I (590–604), Christian antiquity came to an end and the Middle Ages

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[1] Almost 90% of educated Europeans of the early Middle Ages were educated in monasteries, which for six centuries were the only educational institutions in the West — *Azimov A.* Temnye veka. Rannee Srednevekovye v khaose voyn [Dark centuries. Early Middle Ages in the chaos of wars]. M.: Tsentrpoligraf, 2006. P. 119.

[2] For example, the legal status of monks, which is discussed in the "Novels" of Justinian's compilation. In principle, since the time of Constantine the Great, the regulation of church affairs became a branch of imperial legislation — *Pereterskiy I. S.* Digesty Yustiniana. Ocherki po istorii sostavleniya i obshchaya kharakteristika [Justinian's Digests. Essays on the history of compilation and general characteristics]. M.: Gosyurizdat, 1956. P. 25.

[3] *Stein P.,* op. cit., p. 40.

[4] Most of the Germanic tribes converted to Christianity adhered to the Arian teaching.

began[1]. They opened with a sense of Christian unity across Europe and a desire to preserve it. At the same time, however, the political autonomy of the Catholic Church gave rise to an intensification of the struggle between the papacy and secular power.

Finally, the third element of the legal infrastructure of early medieval Europe was *"local (proprietary) law" (ius proprium)*, that is, the customary law of the Germanic tribes, along with the statutes of urban communes and communities[2]. The invasions of the Goths, Lombards, and Franks into the provinces of the Empire brought with them numerous legal customs of the conquerors. These customs differed not only from Roman law but also from one another, reflecting distinct tribal and local traditions. Of course, this led to complications, especially when members of different tribes engaged in transactions with each other, as each followed its own law. Gradually, local customs became a defining feature of the early Middle Ages. Although oral tradition persisted, written customs and the compilation of official collections increasingly came to coexist with it. This contributed to a certain degree of legal stability and to the gradual displacement of those customary norms that contradicted the codified and officially sanctioned ones[3]. The Salic and Ripuarian Laws (Pactus Legis Salicae and Lex Ripuaria) and Lombard law were based almost entirely on their own tribal principles, although their texts were recorded in Latin. Despite the fact that Roman law remained "foreign" to them, Roman legal traditions began to penetrate these legal systems, primarily under the influence of the Christian Church (especially in the procedural sphere) and due to the need to regulate civil transactions. Such transactions increasingly relied on extensive borrowings from Roman legal norms to fill the gaps in local law in these areas[4].

In this context, it is also worth mentioning Charlemagne's "capitularies"[5]. These documents cannot be considered legislative acts in the modern sense of the term. Rather, they were imperial decrees — a motley collection of judicial decisions, proclamations, and both public and private agreements. They also bore a distinctly religious character. Charlemagne was strongly influenced by his spiritual mentor Alcuin and was convinced that, in creating his empire, he was building St. Augustine's

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[1] *Rozhkov V. S.* Ocherki po istorii rimsko-katolicheskoy tserkvi [Essays on the history of the Roman Catholic Church]. Izdatelstvo: M.: Dukhovnaya biblioteka, 1998. P. 53.

[2] Some modern scholars believe that the term was borrowed from the "institutions" of Justinian's Corpus iuris civilis ("quod quisque populus ipse sibi ius constituit, id ipsis proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis" (Institutiones, 1.II.1). See, for example, *van Caenegem R. C.* An introduction to private law. Cambridge, 1992. P. 46.

[3] Ibid, p. 36.

[4] *Vinogradov P. G.,* op.cit. p. 18.

[5] "Capitularies" — separation of an act into chapters, parts, sections, paragraphs, etc. From the Latin capitulum.

City of God on earth[1]. This vision was reflected in the capitularies. Their relevance to this paper lies in two main aspects. First, they introduced elements of Christian ethics into the customary laws of the Germanic tribes and sought to shape their daily lives according to the principles of mercy. Legally, the capitularies equated "sin" with "wrong" and regarded "virtue" as synonymous with "right"[2]. This served as an effective tool for enforcing native law through Christian conceptions of morality. Secondly, unlike ius proprium, which was based on the principle of personal jurisdiction, the capitularies represented a form of territorial law. This led several scholars to regard the capitularies as the first body of law worthy of being called "common" (ius commune), especially given the ongoing process of tribal assimilation and the evolution of their Germanic languages into various dialects of folk Latin[3]. This conclusion is well-founded, as Charlemagne succeeded — at least temporarily — in uniting the Western world both politically and spiritually. For him, the main purpose of political authority was to serve the Church. He viewed faith as the sole justification for political power, and through his rule, he effectively sanctioned the fusion of spiritual and secular spheres — a hallmark of the medieval era. Later, the papacy, building on this conception of social order, would assume the mission of unifying Europe.

Thus, in the early Middle Ages, three forms of law emerged, laying the foundation for the development of the legal systems of modern European states: barbarized Roman law, canon law, and the customary laws of the Germanic tribes (notably the Franks and Lombards). These three legal systems lacked proper systematization, and their content was often fragmented or inconsistent. Nonetheless, they actively interacted with one another. As a result of this convergence, a clear tendency toward the "Romanization" of local law emerged — through both the preference for Latin-written law and the gradual transformation of the European continent into a unified "Christian republic" — that is, a Christian state.

Nevertheless, ius proprium retained its autonomy, which raised the issue of its relationship with both barbarized Roman law and canon law.

In practice, a compromise presumption emerged: that the norms of Roman law, being more general in nature, should prevail — unless there was evidence limiting their applicability[4].

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[1] The government in the Carolingian Empire was in the hands of the clergy to an even greater extent than in the Empire of Constantine the Great. Bishops, along with the nobility, participated in local government. And the so-called "Royal Chapel", consisting of priests, took upon itself a large part of the state administration as a whole — *Rozhkov V. S.*, op. cit., p. 59 et seq. On Augustine's "Kingdom of God", see also *Gerye N.* Blazhennyy Avgustin [Blessed Augustine]. M., 2003. P. 340 et seq.

[2] These views formed the basis of the "moral theology" developed by the church in the XVI century.

[3] *Stein P.,* op.cit., p. 49.

[4] *Schlosser H.* Grundzuege der neueren Privatrechtsgeschichte [Fundamentals of modern history of private law]. Heidelberg, 2005. P. 5.

Roman Law and the Glossators

So, the first six centuries of the painful and difficult formation of the private law of modern Europe were not in vain. The bizarre intertwining of antiquity, Christianity, and the customs of ancient Germanic tribes gave birth to a new cultural phenomenon, one of the characteristic features of which was unity in diversity.

From this point of view, the turning point in the history of European civilization came in the XI–XII centuries. It was during this period that fundamental changes took place in the socio-economic and intellectual development of Europe. They were the result of an unprecedented economic upsurge, the intensification of international and cultural exchanges associated with the Crusades, the expansion of monetary circulation and communication routes, and the formation of the rudiments of modern statehood by the Holy Roman Emperors of the Hohenstaufen dynasty in southern Italy and Sicily, and by the French kings in the territory of present-day France[1].

But most importantly — and this should be emphasized in the context of this paper — cities and their populations were growing rapidly, and the first universities emerged. They marked the flourishing of intellectual life, which found its most vivid expression in scholastic philosophy and in the development of abstract principles of reasoning — characteristic of the spiritual development of continental Europe, as opposed to the pragmatism and concrete thinking of the Anglo-Saxons[2].

At the same time, it should not be forgotten that the development of universities in medieval Europe took place under the auspices and control of the Church. The Church also realized the idea of European unity in the XII–XIII centuries, having triumphed over secular power in the struggle for (political) investiture during the pontificate of Gregory VII[3]. The movement he initiated — for the political primacy of the Church not only in spiritual but also in temporal matters and for its independence from secular authority — fundamentally changed Western Christianity and eventually led to the separation of Church and state, something unknown to either Byzantine Orthodoxy or Islam. This development left the most visible mark on European Christendom[4].

The activity of Gregory VII is commonly referred to as the "Gregorian Reform" or the "Papal Revolution". In legal terms, it led to the expansion of papal jurisdiction

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[1] See, for example, *Kolesnitskiy N. F.* Svyashchennaya rimskaya imperiya: prityazaniya i deystvitelnost [Holy Roman Empire: claims and reality]. M.: Nauka, 1977. P. 169; *Sculze H.* Staat und Nation in der Europaeischen Geschichte [State and nation in European history]. Muenchen, 1999. Pp. 31–32.

[2] *Zhilson E.* Filosofiya v srednie veka [Middle Ages Philosophy]. M.: Respublika, 2004. P. 577.

[3] Gregory VII (c. 1020–1085), Pope from 1073 to 1085. He is called the "spiritual architect of the Middle Ages".

[4] *Le Goff Zh.* Rozhdenie Evropy [The birth of Europe]. Izdatelskiy dom Aleksandriya, 2008. Pp. 98–99.

not only over matters of faith and morality but also over the civil legal sphere — in particular, in matrimonial, family, and inheritance matters. The division, coexistence, and interaction of secular and ecclesiastical jurisdictions became a key source of the Western legal tradition[1].

Law, as an integral part of the cultural revival of Western Europe, came to play a leading role in university education. This was largely facilitated by the rediscovery in the XII century of the complete Corpus Iuris Civilis, codified by Justinian, and by its analysis and synthesis through the methods of scholastic philosophy. Roman law provided most of Europe (including England) with a significant portion of its legal vocabulary, and the scholastic method has remained the dominant mode of legal thinking in the West to this day[2].

Traditionally, legal historians distinguish three stages in the reception of Justinian's Corpus of Roman Civil Law by European legal thought and positive law. These stages differ from one another both in their approaches and in their methodologies: in the XII–XIII centuries — by the glossators; in the XIV–XV centuries — by the commentators (or "post-glossators", as some Russian legal historians continue to call them); and in the XVI–XVII centuries — by the humanists.

Glossators. The initial awakening of interest in the study of law led to the establishment of four centers of legal instruction — in Provence, Lombardy, Ravenna, and Bologna. Among these, the Bologna School of Law, which developed at the University of Bologna, achieved worldwide renown thanks to the glossators' innovative approach to studying and teaching the Corpus Iuris Civilis.

The University of Bologna was the first university in Europe. It differed from the other oldest European universities in that it was not founded by a formal act of either ecclesiastical or civic authorities but arose more or less spontaneously in response to the needs of law students for an independent organization through which they could receive quality education and a universally recognized qualification. The university corporation was composed solely of students, while the professors formed a separate collegium of doctors. For a time, the University of Bologna served as a model — a prototype of the medieval university — governed by students who hired professors to teach them. Although the university included other faculties, such as theology

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[1] Zapadnaya traditsiya prava: epokha formirovaniya. Perevod s angliyskogo [Western tradition of law: the era of formation. Translation from English] / *Berman G. D.* M.: Izd-vo MGU, 1994. P. 106. There the author notes that until 1075 the jurisdiction of the pope over the laity was subordinate to the jurisdiction of the emperor and kings.

[2] *Berman G. D.,* op. cit., p. 127. On Roman legal terminology in English law, see, for example, *Borowski F., du Plessis P.* Roman law. Oxford, 2005. P. 387 et seq. On the scholastic method in the study and application of law, see *Berman G. D.,* op. cit., p. 135 et seq.; *Le Goff Zh.* Intellektualy v srednie veka [Intellectuals in the Middle Ages]. M., 1997. P. 112 et seq.

and medicine, the faculties of civil and canon law held undisputed primacy. Their influence steadily grew throughout the XII century, and they eventually merged. Another distinctive feature of the University of Bologna was that, in an age when education was essentially a function of the Church, teaching at Bologna remained free from ecclesiastical control for more than a hundred years. This undoubtedly contributed to the university's independence[1].

By the end of the XII century, Bologna's status as the European center of jurisprudence — the "mother of law" — had become indisputable, attracting thousands of students from across the continent[2]. For the first time since the fall of Rome, law became an independent discipline in the West thanks to the University of Bologna. Those who successfully completed the demanding course of study were awarded the qualification of a professional jurist. It is no coincidence, then, that the XII century is known as the "legal century".

This was also greatly facilitated by the rediscovery of the Digest in Northern Italy, as it largely reflected the content of Roman law as a whole. The Digest became the main subject of study, elaboration, and teaching by private law glossators at the University of Bologna[3]. They saw their principal aim in adapting the sources of Roman law to the needs of their time through interpretation. This approach to the analysis and study of Justinian's compilation was dictated by the spirit of the age. For medieval people, with their religious consciousness, to exist meant to participate in "eternity". Time was considered the domain of God and immutable. Moreover, Roman law, as they understood it, was founded on natural reason and the principles of equality. For them, it was a fragment of divine light that the Almighty

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[1] The origin of the "Bologna School of Law" is attributed to the beginning of the teaching of Roman law at the University of Bologna by Irnerius (d. 1130) at the end of the XI century (around 1088) at the invitation of Duchess Matilda of Tuscany, a friend of Pope Gregory VII. Irnerius, however, (as well as his students and followers) supported secular power, for which he was excommunicated from the church. It is no coincidence that in 1154/55, in gratitude for support in his struggle with the Pope for investiture, Frederick Barbarossa granted students and teachers of the University of Bologna special privileges, similar to those of the guild: they included, in particular, the right to self-government and independence from city authorities. Only in 1219 did the archdeacon of Bologna become the nominal head of the university. But even then the power of the university corporations was based on three main privileges: the right of direct appeal to the pope (that is, autonomous jurisdiction), the right to strike and leave (which was disadvantageous for the city from an economic point of view), and a monopoly on the awarding of university degrees — *Le Goff Zh.* Intellektualy v srednie veka [Intellectuals in the Middle Ages]. M., 1997. Pp. 87, 96.

[2] The numbers fluctuate from 10 thousand (*Berman G. D.,* op. cit. P. 127) to 1 thousand (*Coing H. (Hrsg)*. Handbuch der Quellen und Literatur der neueren europaeischen Privatrechtgeschichte [Handbook of sources and literature of recent European private law history]. Muenchen, 1973, V/1., S. 81.). Nevertheless, the figure is 10 thousand. No one refutes.

[3] The ancient Greek word "glossa" in Russian means "language", "word", and also "interpretation of words". Such interpretation of texts, including legal ones, was known before. But only glossators introduced this word into scientific circulation.

had sent to humankind[1]. Therefore, the glossators viewed Roman law, created under different conditions and for another people, as an ideal existing beyond time and space, free of contradictions and applicable in an unchanged form. In other words, much like the Bible for believers, the "Corpus of Roman Civil Law", as compiled under Justinian, was regarded by the glossators as **infallible**[2]. This largely contributed to their thorough study, profound interpretation, and systematic organization of Roman legal sources[3].

The glossators brought about a revolution in jurisprudence. First, it was under their influence — and thanks to their work — that legal science was separated from legal practice. They taught Roman law exclusively as an academic discipline. Second, they took the first step towards the separation of law from ethics. Traditionally, following the views of Isidore of Seville (c. 570–636), law, dealing with human conduct, was considered a part of ethics[4]. The glossators, however, believed this was true only with regard to the content of legal norms. From the standpoint of textual interpretation, law was part of logic. In this, they relied primarily on the scholastic teaching methods of the time. Finally — and most importantly — they laid the foundations of modern interpretation, systematization, and synthesis of legal texts. They also developed methods for identifying the validity of particular provisions by means of internal cross-referencing and resolving contradictions between individual parts of the texts through a holistic analysis of their content. This was a truly innovative approach. As is well known, the Corpus Iuris is not a coherent whole and does not originate from a single author or a single time. By means of glosses, the glossators sought to establish what they considered to be the correct understanding of the text, clarifying difficult passages through didactic examples. In addition, when interpreting a particular provision, the gloss would refer to other relevant provisions that supported the interpretation. This reflected a tendency toward systematization — which, incidentally, was alien to the classical Roman jurists.

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[1] *Van Caenegem R. C.* An Historical Introduction To Private Law / translated by D. E. L. Johnston. Cambridge, 1992. P.49.

[2] Thus, the Digest calls lawyers "priests", and jurisprudence — human and Heaven knowledge — *Stein P.* Roman Law in European History. Cambridge, 2004. P. 46.

[3] The brilliant knowledge of the glossators of Justinian's compilation amazes modern researchers. The glossators could quote fragments of the "Corpus Juris" from the first words by heart. All subsequent generations of novelists could not boast of such an accurate and detailed knowledge of Roman sources — *Stein P.,* op. cit., p. 47.

[4] Isidore of Seville (570–636) — Archbishop of Seville, writer and scholar. The versatility of his knowledge allowed him to become the "teacher of the entire Middle Ages". Along with Boethius, Cassiodorus and Bede, he preserved the legacy of ancient culture. He sets out his understanding of the nature of law in his monumental work "Etymologies", or "Beginnings". He was canonized (though only in 1598) and recognized as a "teacher of the church".

The glossators strove to gather all thematically related material scattered across the Digest and to correlate its various parts in such a way that one provision would support or logically follow from another.

As for contradictions (and there were many), the glossators interpreted them as either "imaginary" or at least "insignificant" in relation to other provisions of the text, since such seemingly conflicting norms were understood to regulate different legal relationships or factual situations or could ultimately be reduced to a common legal foundation. In other words, they sought to harmonize the texts of Justinian and to resolve contradictions through the method of distinctions (distinctions), the essence of which lay in demonstrating that the application of apparently contradictory rules produced different — rather than conflicting — legal outcomes, as the underlying circumstances they governed differed. A typical example illustrating how the glossators eliminated the antinomies of Justinian's compilation is their interpretation of passages in the Digest concerning the acquisition of ownership. Thus, according to D.41.1.31, "the mere (bare) delivery of a thing (traditio) never transfers ownership. Ownership is transferred only if the delivery is preceded by a sale or another lawful *cause (purpose)*"[1]. Yet in D.41.1.36, the validity of the delivery is called into question depending on whether the parties disagree about the cause (purpose) of the transfer of ownership — for instance, whether the delivery was made pursuant to a will or a stipulation. Further in that passage, with reference to Julian, it is stated that a disagreement between the parties about the *purpose* of the "giving and receiving" (e.g., as a gift or as a loan) does not preclude the transfer of ownership (in that case, of money). However, in D.12.1.18, Ulpian asserts the opposite view: money given with the intention of making a gift but accepted as though it were a loan does not become the property of the recipient[2]. The glossators resolved such contradictions by identifying, through interpretation, the underlying legal cause (causa). Crucially, it was irrelevant whether this cause was genuine or false (falsa causa)[3]. Another example of textual conflict can be found

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[1] Digesty Yustiniana. Perevod s latinskogo. T. 6: Polutom 2: Kn. 41–44 [Justinian's Digests. Translation from Latin. T. 6: Half-volume 2: Book. 41–44] / Redkol.: *Em V. S.*, *Ivanov A. A.*, *Kopylov A. V.*, *Kofanov L. L.* (Otv. red.), *Kulagina E. V.*, *Rudokvas A. D.*, *Savelyev V. A.* (Nauch. red.), *Sukhanov E. A.* (Nauch. red.). M.: Statut, 2005. P. 37.

[2] Ibid. P. 39.

[3] *Hattenhauer H.* Europaeische Rechtsgeschichte [European legal history]. Heidelberg, 1992. P. 257. In this connection, this German legal historian cites the definition of "legal basis" in the "Gloss of Accursius", which emphasizes that recognizing a "false basis" as invalid would contradict Book 12, Title VI of the "Digest" (On the Condiction in Case of Non-Payment of What Is Undue) as a whole. And therefore, according to Accursius, the contradiction in D.41.1.31 is only "apparent", since there was still a legal basis there. By the way, D.12.VI.52 directly states: "… when I give for the reason that I received something from you…, then the recovery of money does not take place, even if the basis is false". Our domestic novelist I. B. Novitskiy, who believes that the abstract transfer of a thing (traditio) can serve

in the Constitution C.4.35.21 (in re mandata), which states that "everyone may be a judge in matters concerning their own property" (suae rei arbiter), whereas in the Digest D.8.5.1 the opposite principle is stated. This contradiction was resolved by attributing different meanings to the same expression. In the first case, the phrase means that everyone is the master of their own property and entitled to dispose of it. In the second case, the expression is interpreted as referring to a judge's duty to adjudicate the affairs of another, and thus the maxim is understood to mean that no one may be a judge in their own cause[1]. Of course, such artificial logical constructions — assigning different meanings to the same term for the sake of resolving contradictions — sometimes distorted the true sense of the texts and compromised the glossators' credibility. Nonetheless, the method of distinctions, by virtue of its abstract character, made it possible to resolve similar issues across other branches of law.

From a substantive standpoint, it should be noted that the glossators' painstaking work in interpreting Justinian's compilation enabled them to develop a general concept of contract — unknown to classical Roman jurists — and to classify specific Roman law agreements (contracts and pacts) according to their legal enforceability. Furthermore, they drew a clearer and stricter distinction than the Romans themselves between subjective rights, which they regarded as primary, and legal actions designed to protect those rights[2].

Thus, the glossators knew the text of each fragment in the Corpus Juris thoroughly, and no subsequent generation of lawyers could rival them in the depth of their familiarity with Justinian's texts. Any doctor of law from Bologna was "accustomed to keeping the entire mass of the Corpus's headings at his fingertips"[3]. At the same time, as noted above, they employed the "scholastic method" of inquiry, which was widely accepted at the time. This method became an instrument of scientific progress in the field of law. With its help, formal logic analyzed concepts and constructed syllogisms. The use of such techniques made it possible to impose logical coherence on incomplete and fragmentary classical texts. And since legal reasoning ultimately consists to a great extent in identifying dialectical distinctions and establishing

as the basis for the transfer of ownership and that it can be recognized as dominant in the literature of Roman law — Osnovy rimskogo grazhdanskogo prava. Uchebnik [Fundamentals of Roman Civil Law. Textbook] / *Novitskiy I. B.* M.: Gosyurizdat, 1956. Pp. 93–94.

[1] *Van Caenegem R. C.,* op. cit., pp. 49–50.

[2] In particular, it was the glossators who introduced the concept of "property" and "personal" rights into scientific circulation, while Roman lawyers spoke only of property and personal claims. See also *Vinogradov P. G.,* op. cit., p. 74, where the author speaks of how the English glossator G. Bracton (1210–1268) and his fellow judges, relying on the Roman teaching on real and personal claims, "took a step away from their Roman leaders".

[3] *Vinogradov P. G.,* op. cit., p. 36, in the same sense *Stein P.,* op. cit., p. 47.

comparisons between concepts, the glossators, even at the early stages of the development of modern law, achieved remarkable results[1].

Glosses on individual texts of Justinian's compilation served as a foundation for various types of legal literature. In addition to glosses, *collections of educational "cases"* (casus) were compiled, in solving which students were required to apply the norms and principles of law they had studied. Another form of scholarly activity by the glossators was the so-called apparatus (i.e., carefully worked-out materials). These were collections of glosses presented as extensive commentaries on particular titles of the Corpus Juris.

However, particular popularity was enjoyed by the summa and brocardica (brocardica, brocarda, or notabilia). A summa, unlike a gloss, was already an original and independent work that presented, in a concise and systematic form, the content of individual titles of a monument of Roman law (Digest, Code, or Institutes). Within each title, the author of the summa sought to gather all definitions related to the given subject and interpreted them in a consistent sequence, moving from general to specific concepts. In other words, the authors of the summa already demonstrated that, under the glossators, a generalizing and systematizing legal mode of thinking had begun to take shape.

By the end of the XII century, collections of brocarda had appeared — short maxims and aphorisms formulated as general principles and intended to explain the essence of the glossed text in a concise form[2]. Most of them are grouped in the final title of the 50th Book of the Digest (D.50.17), but not exclusively. They were also employed as evidence by the party in a dispute that used them to support its position. The brocarda served, so to speak, as a "guiding star" for practicing lawyers, enabling them to present their arguments in a concise and polished form in order to "dazzle the judge with the brilliance of their scholarly knowledge" and thereby incline him to adopt a favorable decision.

Due to the peculiarities of the social development of Western Europe during the feudal era, the glossators' study of the Corpus Iuris significantly expanded the scope of their inquiries beyond the boundaries of private law[3]. However, for the purposes

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[1] The foundations of scholasticism were laid by Anselm the Saint of Canterbury (1033–1109). He formulates the scientific program of scholasticism based on the principle — fides quaerens intellectum (faith questions reason). In the sphere of jurisprudence, the subject of regulation with the help of scholastic methods was primarily church law. However, their effectiveness in harmonizing contradictory legal texts contributed to the transformation of these methods into the main scientific method of secular jurisprudence. Thanks to the scholastic method, "knowledge of law" (prudential iuris) begins to transform into "science of law" (scientia iuris), and gradually its ties with theology and scholastic philosophy begin to weaken — *Schlosser H.* Grundzuege der neueren Privatrechtsgeschichte [Fundamentals of modern history of private law]. Heidelberg, 2005. P. 24.

[2] For example, actor sequitur forum rei; locus regit actum; in dubio pro rei, etc.

[3] They were engaged, in particular, the problem of (folk) sovereignty, issues of the ratio of law and justice, law and custom, restrictions on power is sovereign, issues of feudal law, etc.

of the present work, the primary interest lies in the ideological dimension of their interpretation of Roman law under the conditions of the confrontation between secular authority and the Papacy in the struggle for political supremacy.

The concept of national identity was alien to the Middle Ages. Cosmopolitanism and universalism, inherited from Ancient Rome, formed the foundation of social development at the time. In the political sphere, these ideas were represented by the Catholic Church and the Holy Roman Empire[1]. In the legal domain, they were embodied in Roman law. It was regarded as a model of absolute and universal domination, as well as a political instrument: "one law — one empire". The rivalry between the Roman popes and the emperors of the Holy Roman Empire manifested itself most vividly and sharply in the dispute over (political) investiture. This conflict reached its peak in the XII–XIII centuries under the emperors of the Hohenstaufen dynasty, who, among other objectives, sought to establish their dominion over Italy in order to strengthen their secular authority within the Empire[2]. Roman law was called upon to provide a legal justification for the imperial ambitions of the Hohenstaufen, their claims to secular investiture, and their independence from the dictates of the Roman popes. To this end, Frederick I Barbarossa invited four renowned professors (quattuor doctores) from the University of Bologna — experts in Roman law — to the session of the Roncaglia Reichstag (near the Italian city of Piacenza) in 1158, to deliver a theoretical justification of the monarch's unlimited authority. And such justification was indeed provided, grounded in Justinian's compilation, in the presence of representatives of the Pope and the northern Italian cities[3]. As a result, both the northern Italian cities and the church estates fell into

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[1] It is curious that the name "The Holy Roman Empire of the German People" appeared only in the XVI century. At the turn of the Middle Ages and the New Age. In the period under consideration, this definition was not yet. Moreover, the word "empire" did not mean dominance over any territory, but universal, "superfluous" power, not associated with any particular country or people — *Stollberg-Rillinger B.* Das Heilige Roemische Reich Deutscher Nation [The Holy Roman Empire of the German Nation]. Muenchen, 2006, P. 10.

[2] Some modern German scientists characterize the "Holy Roman Empire" as a kind of supranational state based on the religious and political unity of all (!) Western Europe. However, this seems to be an exaggeration. Territorially, it included at least in the period under consideration by Germany, Burgundia and Italy, which formally subordinate to the emperor — *Kolesnitskiy N. F.* Svyashchennaya rimskaya imperiya: prityazaniya i deystvitelnost [Holy Roman Empire: claims and reality]. M.: Nauka, 1977. P. 10. The Hohenstaufins ruled the Holy Roman Empire from 1137 to 1268, that is, during the period of the highest power of papal power. Formally sowing. and environments. Italy (with the exception of Venice) was part of it. But the dependence, especially the North Italian cities from the emperor was nominal. It was limited to monetary subsidies and the sending of auxiliary detachments to the emperor during hostilities.

[3] These famous doctors of law were the students and followers of Irnerius — the glossators Martin Gozna (d. 1166), Bulgar (1166) nicknamed "golden mouth" (os aureum), Hugo (d. 1166), Jacob (d. 1178). It was all the more easy for them to do this, since the absolute majority of statements in the Corpus Juris date back to the period of the Principate. And accordingly, the way of thinking of the Bolognese professors

complete dependence on the emperor[1]. In effect, the Bolognese professors thus recognized the Holy Roman Empire as a "legal empire" and the emperor as the "lord of the world" (dominus mundi) and the "sole supreme legislator" (conditor legum). Accordingly, the legist doctrine, according to which the legal order of the Roman Empire continued to live on in the Corpus Iuris, and Justinian's law — developed by the jurists of the XII century — remained in force, found convincing confirmation in political practice[2].

This episode from the history of medieval Roman law testifies that both secular power and the papacy regarded the Corpus Iuris as supranational imperial legislation, and university professors as arbiters capable of resolving complex legal controversies. Moreover, European rulers of states outside the Holy Roman Empire also regarded the Corpus Iuris as an instrument in their struggle for sole authority against their own feudal lords[3].

This applies even more so to Frederick II Hohenstaufen (1194–1250), the grandson of Frederick Barbarossa. However, he had to act within a changed political landscape, markedly different from the conditions of his grandfather's reign. These changes consisted in the growing strength of the papacy, the autonomy of Italian city-states, and the separatism of the German princes. Nevertheless, Frederick II made the unification of Germany and Italy (unio regni ad imperium) the principal aim of his imperial policy. Moreover, his theory of imperial supremacy was more fully developed than that of his predecessors. Frederick II became the herald of the idea of a pan-European feudal empire with the hegemony of its Italo-German

was formed under the influence of the laws of the late Roman Empire. And they themselves, as a result, were inclined to the monarchist point of view. For example, in the "Digest" there are enough maxims like — "Whatever the princeps wants has the force of law" (D. 1.4.1), or "The princeps is free from observing the laws" (D. 1.3.31).

[1] They helped Frederick I formulate the laws that secured his rule over Northern Italy: lex regalia sunt haec; lex omni iurisdictio; lex palacia et praetoria; lex tribunatum dabatur. Also *Berman G. D.* op. cit. pp. 459–460.

[2] *Schlosser H.* op. cit. Pp. 51–52. It is curious that Friedrich Barbarossa, in gratitude for the support, adopted the so-called law "Authentica Habita" (by the way, the first European law on universities), which granted privileges to university teachers and students, "…pilgrims for the love of learning" ("omnibus, qui causa studiorum peregrinantur scolaribus"). The law declared the University of Bologna an "imperial university", which ensured, as stated above, its independence and protection from the discretion of city authorities and the church for a long time, and also self-government for students, similar to that granted to guilds. Friedrich and his followers included "Habita" in the Code of Justinian in addition to the "Constitutions" of the Roman emperors, thereby emphasizing that they were the successors of the latter.

[3] *Van Caenegem R. C.* European Law in the Past and the Future: Unity and Diversity over Two Millennia. 1st Edition, Kindle Edition. Cambridge University Press, 2001. Pp. 19, 77. The author cites the example of the struggle of the French king Philip IV the Fair (1285–1314) to establish his own sovereignty over the entire territory of his kingdom by establishing the primacy of Roman law over feudal principles, which allowed him to construct a fiction equating the king of France with the emperor.

core over other states. Relying on the doctrine of the "two swords" in its secular interpretation (i.e., the primacy of the Empire over the papacy), he proclaimed the principle of the emperor's supremacy over kings as "first among equals" and appealed to the monarchs of Europe to support him as the highest bearer of secular authority in his confrontation with the papacy. He argued that a papal victory would enable the pope to more easily subordinate the rest of Europe's sovereigns to his authority.

However, neither the cities nor the feudal princes supported Frederick II in his struggle against the papacy to unite Europe into an empire modeled on that of Rome. His slogan unio regni ad imperium did not correspond to the realities of the XIII century. He failed to break the papacy as a political force. Papal theocracy proved more effective than imperial authority[1].

And although Frederick II lost the political struggle for supremacy within the Holy Roman Empire, *the legal* authority of Roman law — as the foundation of the emperor's legitimacy and the source of imperial law in Germany and in the imperial cities of northern and central Italy — remained unshaken[2]. Thus, following Frederick Barbarossa, subsequent emperors, and in particular Frederick II, submitted their laws for review by the University of Bologna. A panel of professors would decide on the inclusion of these imperial laws as authentic within the Justinian Code, alongside the ancient imperial constitutions[3].

From the perspective of this study, the above permits the following conclusions. The half-century-long dispute over investiture (from the Congress of Worms of the imperial princes in 1076 to the conclusion of the Concordat of Worms in 1122), along with the subsequent struggle of the Hohenstaufen dynasty with the papacy to unite

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[1] Frederick II was excommunicated twice (in 1227 and 1239), and Innocent IV even declared him deposed in 1245. And this despite the fact that Frederick II, thanks to skillful diplomacy, recaptured Jerusalem from the Muslims in 1229 and returned (albeit temporarily) the "Holy Land" to Christian Europe.

[2] It should be noted that Frederick II managed to implement his imperial policy ("unio regni ad imperium") within the framework of his own Sicilian kingdom, turning it into a prototype of the modern state. On the basis of the so-called "Malfi constitutions", he created a well-organized system of governing the country, abandoning the formation of the administrative apparatus on the principle of filling positions by right of feudal holding. He replaced vassals with officials, deprived the barons of a number of public-law functions, asserted his supremacy over the Sicilian clergy, limited the independence of the cities as much as possible, centralized state finances and taxation, introduced a monopoly on foreign trade and carried out judicial reform, replacing ordeals and judicial duels with the institution of juries on the model of canon law. — For more details, see, for example, *Neusykhin A. I.* Problemy evropeyskogo feodalizma [Problems of European feudalism]. M., 1974. P. 330 et seq. In addition, Frederick II founded a University in Naples similar to the University of Bologna, where the basis of legal education was the received Roman law (corpus iuris). The University prepared "legally trained" officials for the state apparatus of the kingdom. In the 18th century, the University was made famous by the genius of Giambattista Vico (1668–1744).

[3] For more details see *Schlosser H.,* op. cit., p. 52.

feudal states and free Italian cities within the Holy Roman Empire under secular authority, demonstrates that in the XI–XIII centuries Roman law, as interpreted by the glossators, played an exceptionally important role not only as an effective instrument for legitimizing political supremacy in the confrontation between the secular and spiritual swords, but also as a foundation for such unification. Moreover, the universities in which Roman law was taught — through the agency of the glossators — were directly involved in the political struggle on the side of secular power, and, among other things, helped European kings to use legal instruments to overcome feudal fragmentation and consolidate their sovereignty. In doing so, they effectively Romanized feudal law. In other words, Roman law constituted an integral part of, and one of the principal regulators of, power relations in the medieval world.

Canon Law

The glossators, being legists, justified the binding force of Roman law by the authority of secular power and did not subordinate their interpretations to canon law, which they mostly did not know and regarded as an inferior legal order — even though it was taught at the University of Bologna as a subject.

However, in medieval Europe, which was theocratic in character, the need for canon law as a regulator of social relations from the perspective of the Catholic Church was entirely evident. Initially, as noted earlier, it consisted merely of unofficial collections of disparate biblical texts, decisions of church councils, opinions of the Church Fathers, etc. These collections clearly lacked authoritative texts comparable to those of Justinian's compilation[1].

The situation changed after the publication in 1140 by the monk Gratian (d. ca. 1179) of his compilation Concordia discordantium canonum ("Harmony of Discordant Canons"). In it, he sought to eliminate obvious contradictions in the selected ecclesiastical texts and provide necessary explanations. Later, under the title Decretum, it gained recognition among the decretists[2], who immediately undertook its glossatorial elaboration. Thus, by the second half of the XII century, civilists were compelled to acknowledge canon law as an equal — yet parallel — discipline to civil law. Both disciplines were studied separately, though they had areas of intersection. The fact was that while *civil law* was an independent system and did not require supplementation from other systems, it was applied subsidiarily in courts to fill gaps in local law. *Canon law*, on the other hand, was applied in all ecclesiastical courts in matters of ecclesiastical jurisdiction. As for civil transactions

[1] This fact, apparently, served (not least) as the reason for the legalists' disdain for canon law.

[2] This is what the canonists who interpreted Gratian's "Decree" came to be called. The "Decree" itself laid the foundation for church law and became the starting point for the development of "canonistics" as an independent and theologically independent scientific discipline throughout Europe. Gratian became famous as the "father of canonistics".

in general, *canon law* could not address all arising questions, and Gratian's Decretum acknowledged the necessity of resolving issues unregulated by canon law according to the *Corpus Iuris Civilis*.

Generally, the decretists paid great attention to the work of the glossators, and by the early XIII century, they sought — relying on Roman law — to determine the legal essence and consequences of the canons[1]. At the same time, canonists saw nothing unusual in transferring private-law principles into procedural and public law. In their view, such operations were entirely permissible since the authority of these principles rested on Justinian's texts[2]. During the XIII century, in addition to the Decretum, six more books of papal decretals were adopted, and by the end of the XIV century, the main body of ecclesiastical law had taken shape — fully comparable to the Corpus Iuris Civilis and commonly referred to as the Corpus Iuris Canonici[3].

Yet even earlier, in the XII–XIII centuries, the relationship between the two systems grew increasingly close. Through the decretists' legalistic use of the concept of "sin", canon law extended its influence into many areas of civil law[4]. The strengthening interconnection between civil and canon law is vividly illustrated by developments in procedural and contract law. A particularly characteristic example is the joint elaboration of procedural law by canonists and glossators. Roman law did not distinguish between substantive and procedural law, and the relevant procedural texts were unsystematized, scattered throughout Justinian's compilation[5].

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[1] P. Stein gives the following example to illustrate their method. According to Inst. 2.8.1., the right of ownership can be transferred by a non-owner by selling a promissory note given to him by the owner-debtor, in payment of the debt. In the same way, the glossator of canon law reasons, a heretic can transfer "Heaven grace" even without possessing it — *Stein P.* Roman Law in European History. Cambridge, 2004. P. 50.

[2] Ibid., p. 51.

[3] "Corpus Iuris Canonici", along with collections of papal bulls, became the most important collection of church laws and the source of canon law in force until 1917. It included the "Decree" of Gratian, the "Decretals" of Gregory IX (Liber extra), Liber Sextus of Boniface VIII, the "Clementines" of Clement V and two private collections called Extravagantes communes. In modern times, canon law was codified twice more — in 1917 and 1983. The taxonomy of canon law is still closely linked to the classical tripartite division of Roman law (persons-things-actions). However, in the 1983 code, preference is given to norms that reveal the content of faith over the principle of legal precision, and most importantly, in order to keep up with the times, it is no longer the clergyman but the believer who becomes the main subject of regulation — Kanonicheskoe pravo v katolicheskoy tserkvi [Canon Law in the Catholic Church] / *Dzheroza L.* M.: Khristianskaya Rossiya, 1996. P. 73 et seq.

[4] According to the church, people prone to sin were those engaged in usury, trade, giving mortgages and debt receipts. The sphere of canon law also included all types of family relations, since marriage was considered sacred, and inheritance law.

[5] Strictly speaking, Roman lawyers paid much attention to the forms and formalities of considering legal cases. But the process was never an independent area of law for them, nor was it a subject of detailed study or research. And accordingly, the Codification of Justinian did not devote a special book or even a title to the process.

However, in the XII century, the need for common procedural norms increased. One of the main reasons was that the traditional method of proof through ordeals no longer corresponded to the spirit of the time. The glossators took the first steps to solve this problem. They collected texts from the Corpus Iuris Civilis and compared them with procedural norms of canons and decretals. Such collections of excerpts from Roman and canon law texts were called ordines iudicarii (judicial procedures). But the real breakthrough in this field was made by the Bolognese glossator Giovanni Bassiano (d. 1197). A student of one of the aforementioned doctors of law, Bulgarus, and himself the teacher of the equally famous glossator Azo (d. c. 1220), he wrote a short treatise Libellus de ordine iudiciorum (On Judicial Procedure). In it, he sought to clarify the essence of civil litigation and ways to avoid it, supporting his arguments with practical examples. His work essentially laid the foundation for literature on procedural law and was immediately applied in practice. Jurist-popes such as Alexander III (1159–1181) and Innocent III (1198–1216) required ecclesiastical courts to follow the rules of "judicial procedure" when considering parishioners' complaints, believing that only these rules could ensure proper protection of the parties' interests[1].

However, medieval procedural law found its highest expression in the Speculum iudiciale (Judicial Mirror) by the Provencal cleric and canonist Guilelmus Durantis (1235–1296). The Mirror provided a detailed scholarly overview of modern procedural law. This treatise worthily crowned a century of unprecedented intellectual flourishing in legal thought and long remained an authoritative source of procedural law[2]. During this period, canon law developed rapidly and took the lead from civil law in matters of civil procedure. Due to the strong mutual influence of Roman and canon law on judicial procedures, they began to be called "Romano-canonical"[3].

As for contract law, the canonists, following the glossators, made significant contributions to the development of civil law doctrine in this area. By formulating the following three principles, they laid the foundations of modern general contract law theory:

— the possibility of judicial protection and binding force of all types of contracts, including informal ones;

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[1] By the beginning of the XIII century, jurisprudence had developed a number of basic provisions regarding legal proceedings. In particular, questions had already been resolved regarding the methods and procedures for protecting subjective rights, the forms of claims, the defendant's objections to the plaintiff's arguments, etc.

[2] Durantis studied in Bologna and taught in Modena. However, he was not just a scholar. He held the office of papal judge and had the rank of bishop. His book was published twice — in 1271 and 1290 — *Van Caenegem R. C.* European Law in the Past and the Future: Unity and Diversity over Two Millennia. 1st Edition, Kindle Edition. Cambridge University Press, 2001. P. 49.

[3] P. G. Vinogradov notes, for example, that through church tribunals, "Romanist views" even made their way into the courts of customary law in France — *Vinogradov P. G.,* op. cit., p. 53.

— recognition of the moral-ethical aspect through introduction of the principle of proportionate payment for proper performance of contractual obligations (the so-called *principle of equivalence*);

— recognition of the principle *of fidelity to contracts*, which through the XVII century natural law doctrine transformed into the universal principle ***pacta sunt servanda*** and became an axiom of contract law[1].

The symbiosis of canon and medieval Roman law, owing to the transnational character of both systems, their scholarly elaboration and systematization in universities, laid the foundation for forming *a universal, unified legal order that corresponded to the spirit of the time* and was called **ius commune**[2]. This legal order was to operate on a pan-European scale as a new "universal system" having primacy over territorial (and urban) legal complexes, harmonizing them and promoting their internal development, since they typically represented a disjointed and unsystematic conglomerate of written and customary norms that did not meet the needs of civil transactions of their time.

The prerequisites for this in the XII–XIII centuries included, among other factors, a unified Christian religion headed by the centralized Catholic Church, the rapid and widespread development of universities and academic legal science, the uniform practice of ecclesiastical courts — subsequently adopted by secular tribunals — and, finally, the aspiration of both the papacy and secular authorities to assert supremacy and achieve the unification of European lands on the basis of Roman-canonical law. The unity of language also played a significant role. Latin was the language of the Catholic Church, secular authorities, the courts, canon and Roman law, and academic legal scholarship.

The glossators stood at the origins of a new type of legal thinking. Their contribution to the development of the European style and character of legal science in the modern era can hardly be overstated.

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[1] In fact, it was a question of the obligation of solemn and non-solemn promises, the violation of which, according to the teaching of canonists, was considered a lie, and accordingly a sin. And the decisive role here was played by the practice of forced execution of sworn and non-sworn contractual obligations by church courts through excommunication (from the church). Gradually, this type of spiritual coercion acquired a legal character. And from the XIV century, this principle of canonical teaching began to influence secular jurisprudence. At least, it was certainly applied to trade transactions.

[2] This term can be translated with a certain degree of conventionality as "common European law", due to the fact that both the papacy and the emperors, considering themselves the heirs of Ancient Rome, sought to unite all European lands under their rule, not least with the help of a universally and uniformly applied law. Of course, "ius commune" cannot be identified with the English "common law" or the French "droit commun", which have a completely different meaning. For example, the French "droit commun" is a term that characterizes legal norms on general criminal, but not political crimes. ("crimes de droit commun" as opposed to "crimes politiques").

Their era lasted approximately until the end of the XIII century. History has preserved only a few names from the cohort of these talented individuals who laid the foundations of modern legal scholarship[1]. In addition to the aforementioned "luminary of law" (lucerna iuris) and the "four doctors" of Bologna, Azo Portius (d. ca. 1200) also deserves mention. His Summa on the Codex and Institutes remained an authoritative source in the study of Roman law until the XVI century. His student, Accursius (1185–1263), is noted by modern scholars for his exceptional analytical and systematizing skills[2]. He gained pan-European fame for his so-called Standard Gloss (Glossa ordinaria), also known in the literature as the Great Gloss (Glossa magna) or the Gloss of Accursius. It contained nearly 97,000 glosses and synthesized the accumulated knowledge of all previous generations of glossators. It became the crowning achievement of the civil law school of glossators and was even regarded as an autonomous source of law, alongside the original texts of Justinian's compilation. An aphorism even emerged: "What the Gloss (of Accursius) does not acknowledge, the court does not acknowledge either" (quicquid non agnoscit glossa nec agnoscit forum). While Justinian's compilation was considered binding law, the Gloss of Accursius also served as the basis and point of departure for subsequent scholarly inquiry[3].

It should also be noted that research into the doctrines of the glossators of the "pre-Accursian period", conducted in the final decades of the XX century, revealed the considerable value of the legal ideas they had advanced[4]. Thanks to the glossators, the scholarly commentary on legal texts remains, to this day, an authentic source of law in the continental legal tradition.

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[1] S. M. Muromtsev, referring to Savigny (1779–1861), speaks of 47 glossators, "…about whom one could provide some biographical information".

[2] The great importance of Atso's "Summa" is evidenced by the fact that as early as the XVI century, knowledge of the material contained in it was considered a necessary condition for admission to the judicial class in a number of European cities — *Schlosser H.,* op. cit., p. 42.

[3] In this regard, it should be noted that it was the glossators who were the "founders" of the so-called "Italian style" (mos italicus) of interpreting and teaching legal texts. Its essence is well conveyed by the following Latin verse, which helps students learn the order of analysis: "praemitto, scindo, summon, casumque, figuroperlego, do causas, connote, obicio". The interpretation begins with introductory explanations (praemitto), then follows the division of the text into its constituent parts (scindo), a summary of the main content (summo), a presentation of cases, real or school (casusque) and a brief assessment of the text in this regard (figuro), comments based on reading different versions of the text (perlego), a philosophical justification of the text (do causas), additional comments on the text (connote), and finally, a comparison of similar provisions and opinions of various scholars (obicio). In conclusion, the essence of the text was revealed and there should be no doubt about its meaning. Such a detailed analysis of the text and its interpretation prepared students for solving practical problems. This "Italian style" was "adopted" by commentators and successfully used by them in practical activities. The description of "mos italicus", although in somewhat different interpretations, is given, for example, by *Muromtsev S. M.* and *Berman G. D.,* op. cit., pp. 133–134.

[4] *Stein P.,* op. cit. P. 48.

In conclusion, it should be emphasized that the glossators were, for the most part, scholarly jurists. They laid a solid theoretical foundation for the further development of European private law. The practical implementation of these ideas was undertaken by the commentators in the XIV–XV centuries.

(FIRST IN A SERIES OF ARTICLES)

References

Azimov A. Temnye veka. Rannee Srednevekovye v khaose voyn [Dark centuries. Early Middle Ages in the chaos of wars]. M.: Tsentrpoligraf, 2006. 129 p. (In Russian)

Borowski F., P. du Plessis. Roman law. Oxford, 2005. P. 387. (In English)

Coing H. (Hrsg). Handbuch der Quellen und Literatur der neueren europaeischen Privatrechtgeschichte [Handbook of sources and literature of recent European private law history]. Muenchen, 1973, V/1., S. 81. (In German)

Digesty Yustiniana. Perevod s latinskogo. T. 6: Polutom 2: Kn. 41–44 [Justinian's Digests. Translation from Latin. T. 6: Half-volume 2: Book. 41–44] / Redkol.: Em V. S., Ivanov A. A., Kopylov A. V., Kofanov L. L. (Otv. red.), Kulagina E. V., Rudokvas A. D., Savelyev V. A. (Nauch. red.), Sukhanov E. A. (Nauch. red.). M.: Statut, 2005. 564 p. (In Russian)

Gerye N. Blazhennyy Avgustin [Blessed Augustine]. M., 2003. 634 p. (In Russian)

Hattenhauer H. Europaeische Rechtsgeschichte [European Legal History]. Heidelberg, 1992. 955 p. (In German)

Hattenhauer H. Europaeische Rechtsgeschichte [European legal history]. Heidelberg, 1992. P. 257. (In German)

Kanonicheskoe pravo v katolicheskoy tserkvi [Canon Law in the Catholic Church] / Dzheroza L. M.: Khristianskaya Rossiya, 1996. 379 p. (In Russian)

Kolesnitskiy N. F. Svyashchennaya rimskaya imperiya: prityazaniya i deystvitelnost [Holy Roman Empire: claims and reality]. M.: Nauka, 1977. 212 p. (In Russian)

Le Goff Zh. Intellektualy v srednie veka [Intellectuals in the Middle Ages]. M., 1997. 166 p. (In Russian)

Le Goff Zh. Rozhdenie Evropy [The birth of Europe]. Izdatelskiy dom Aleksandriya, 2008. 58 p. (In Russian)

Neusykhin A. I. Problemy evropeyskogo feodalizma [Problems of European feudalism]. M., 1974. 536 p. (In Russian)

Osnovy rimskogo grazhdanskogo prava. Uchebnik [Fundamentals of Roman Civil Law. Textbook] / Novitskiy I. B. M.: Gosyurizdat, 1956. 231 p. (In Russian)

Pereterskiy I. S. Digesty Yustiniana. Ocherki po istorii sostavleniya i obshchaya kharakteristika [Justinian's Digests. Essays on the history of compilation and general characteristics]. M.: Gosyurizdat, 1956. 131 p. (In Russian)

Rozhkov V. S. Ocherki po istorii rimsko-katolicheskoy tserkvi [Essays on the history of the Roman Catholic Church]. Izdatelstvo: M.: Dukhovnaya biblioteka, 1998. 320 p. (In Russian)

Schlosser H. Grundzuege der neueren Privatrechtsgeschichte [Fundamentals of modern history of private law]. Heidelberg, 2005. 372 p. (In German)

Sculze H. Staat und Nation in der Europaeischen Geschichte [State and nation in European history]. Muenchen, 1999. 376 p. (In German)

Stein P. Roman law in European history. Cambridge, 2004. 137 p. (In English)

Stollberg-Rillinger B. Das Heilige Roemische Reich Deutscher Nation [The Holy Roman Empire of the German Nation]. Muenchen, 2006, P. 10. (In German)

Van Caenegem R. C. An Historical Introduction To Private Law / translated by D. E. L. Johnston. Cambridge, 1992. Pp. 30–114. (In English)

Van Caenegem R. C. An introduction to private law. Cambridge, 1992. 293 p. (In English)

Van Caenegem R. C. European Law in the Past and the Future: Unity and Diversity over Two Millennia. 1st Edition, Kindle Edition. Cambridge University Press, 2001. 184 p. (In English)

Vinogradov P. G. Rimskoe pravo v srednevekovoy Evrope [Roman law in medieval Europe]. M.: Izd. A. A. Kartseva, 1910. 99 p. (In Russian)

Zapadnaya traditsiya prava: epokha formirovaniya. Perevod s angliyskogo [Western tradition of law: the era of formation. Translation from English] / Berman G. D. M.: Izd-vo MGU, 1994. 592 p. (In Russian)

Zhilson E. Filosofiya v srednie veka [Middle Ages Philosophy]. M.: Respublika, 2004. 679 p. (In Russian)

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