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HISTORY OF LAW – MODULE 1

20°CLMG

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The Corpus Iuris Civilis: origins, structure, style.

Justinian wants to bring Roman law together into a managed unit, and so he appoints a group of jurists. And what they do is they go through all the previous works of the jurists, the works of the legislation of the emperors, and they come up with a very big book.

In the Digest, that's where we find nearly all of classical Roman law. We find the writings of a jurist. The way they codify it, it doesn't go like a code, but it looks like they're little pieces. They're little passages pasted out together.

Nothing very long and from various people. Various classical jurists. Now in order to make that book, the Digest, they took about 5% of what the classical jurists wrote. . The other 95% is gone forever. Nobody recopied the other manuscripts and they disappeared. And eventually, in the East, where Justinian ruled in Constantinople, people replaced the Corpus Juris, Justinian, and the Digest by shorter Greek versions of Roman law and then by a still shorter versions of Greek Roman law.

The Corpus Iuris Civilis: rediscovery

Eventually, nothing of Roman law was left, except the Corpus Juris Civilis. And that survived in one manuscript. There's only one copy of the Corpus iuris that has ever been discovered. And if that copy had disappeared, we wouldn't know anything about Roman law and the history of the West would be unimaginably different from the way it is. That one copy happened to be in Italy. Justinian had tried to reconquer Italy from the Ostrogoths, so sent people over to reinstate Roman law. One of whom brought that Digest and there it was.

For six hundred years nobody knows where it was. But at the end of six hundred years in 1088 , that manuscript showed up. And it was the one that was read by Irnerius, so he began lecturing on it in Bologna. And that was the beginning of learning the law in the West. That was the beginning of what most of us think of as the legal tradition. The feudalism is gone. The law merchant has been replaced by civil law. But there's still living law that was taken from the digest of Justinian primarily. That's really a true story the one manuscript is called the *Pisano.*

You can find it in the Lorenzian Library of Thoughts. That's the one that's left and of course it's been copied many, many times for students, professors, and so forth.

Gaius' ***institutiones*****: rediscovery**

One day, a German student was sitting reading a sermon of St. Ambrose in some German library. And thought oh my. There's something underneath it. And given the techniques they had in the 19th century they could restore the original text.That's the second thing that survived the Roman Empire: The Institutes of Gaius. But of course, that was the 19th century. So that came later.

Law in the early stages of the Roman Cvilisation (*legis actionibus* trial):

By the time you reach Justinian, you're talking about the law of the beginning of what we call Byzantine civilization. Then, If you wanted to be a lawyer, you'd go to law school for get a degree. When you're in law school, before the corpus juris, you read all this stuff by the classical jurists and then you get to be a judge or you get to be on the imperial court and you draft all this legislation. These are highly competent. Highly trained people. The classical period instead ends around 250, maybe 230 AD. All this comes later: Having regular courts, having jurists with law degrees, legislation, filling the gaps of the law. This is all after 250.

"The people involved were extremely well-trained and intelligent, but they were not particularly innovative. Professors focused solely on teaching the classical texts, without exploring new approaches or using these texts creatively, as medieval scholars had done. Their role was limited to teaching, while all innovation came

primarily from legislation. This legislation was very specific and accompanied by regular courts—this defines the post-classical era.

Now, let’s go back to the very beginning. Before classical Roman law even developed, early Roman law looked quite different. We will see a similar pattern when we study the law of the Germanic invaders. There is a recurring characteristic in the early laws of the Germanic peoples, and this was also present in early Rome. However, there are few records from that period. What we do know is that the way procedures worked was structured in this way.

"The procedure worked as follows: the first step required you to appear before a specific official and state your complaint using a precise, formal formula. The complaint had to be recited word for word, as only certain types of complaints were recognized. For example, if someone had wronged you, you had to state, 'He did [specific wrongdoing],' and then follow with the exact established wording that matched your case. You had to ensure your complaint fit within one of the predefined categories of grievances.

Gaius provides an example of how this procedure worked in its early days. Suppose someone damaged your vines. You would go before an official, known as the Praetor, to present your case. However, the formula might say, 'If someone destroyed your trees.' In such a case, you couldn’t say, 'He destroyed my vines,' because that wouldn’t fit the recognized formula, and you would lose your case. Instead, you would say, 'He destroyed my trees,' hoping that later in the proceedings they would interpret 'trees' broadly enough to include your vines. This shows how rigid the initial stage of the process was, relying entirely on standardized formulas.

These formulas were widely known among the tribes, and in Rome, they were even written down in books. These books served as guides, listing the exact formulas you were supposed to use. To proceed, you had to identify the correct argument and state it verbatim during the first stage of the procedure. Accuracy was paramount—any deviation from the prescribed formula could invalidate your claim. At this stage, the Praetor’s role was limited to verifying with priests or other officials whether the correct formula had been used. The process was highly formalized and left no room for interpretation or flexibility in its initial steps."

Law in the second part of Roman civilization (post archaic or pre-classical and classical) (formulary trial):

Next, we have a second stage of the procedure, which is no longer mechanical. In the very early days, the Romans abolished the mechanical phase and introduced a figure called the **iudex**, a judge. The **iudex** was appointed by the praetor for one single case: there were no precedents, and the judge's decision did not create law. His role was limited to resolving that specific case. The praetor would give a formula to the judge, and the parties would present their case before him. For example, one might say:

"I formally accuse [name of the person] of trampling on trees." The accused might respond, "That’s not true." Then both parties would appear before the judge, who had complete discretion. He could decide however he wanted, which was the opposite of the rigidity of the mechanical formulas.

Moving into the classical period, the procedure evolved further. The first major change was the introduction of flexible formulas, allowing the praetor to create new ones. This led to a much larger variety of legal actions and significantly increased flexibility in the system.

One curious aspect of this legal structure was that neither the praetors nor the judges had any formal legal training. Even the "lawyers," if they could be called that, were not formally trained in law. This lack of formal legal education was a distinctive feature of Roman society.

The Birth of the Jurists’ Group

Roman society was dominated by men from elite families, trained to perform any role: they could be praetors, priests, consuls, judges, or even military commanders. These men were highly versatile and confident in their ability to take on any task. However, at some point, a shift occurred: a member of the elite began to

receive specialized training, different from the generalist education of his peers. This marked the birth of the **jurist**.

The jurist could have pursued the same roles as the rest of the elite, but his focus was on law. He advised the praetor on creating new formulas and guided judges during trials. Interestingly, the jurist did not hold any official position. One became a jurist by studying with a senior jurist. This training was informal: one would sit on the jurist's front porch or in the forum and discuss cases. Questions were posed to the senior jurist, who, having studied under another experienced jurist, knew Roman law and provided answers based on his expertise.

The Roman Method for Developing New Law

The method used by the Romans to develop new laws was based on analyzing one case at a time. As a result, Roman law looks like a collection of particular cases, almost like a series of "What if…?" questions. To these questions, the jurist would provide an answer. Sometimes the jurist would say, "Here's what another jurist said, but I think differently." There were some written laws, but they were very few, and they were not the primary tool for creating or reforming law. Instead, the process relied on the praetor introducing new formulas and the advice of jurists.

Today, we have well-defined rules, but the Romans did not have a system of general rules. They addressed each case individually. A jurist would be consulted, and the jurist would provide an answer. This unique method has uncertain origins, and what stands out is that it was not strictly necessary. For example, in ancient Greece, in Athens—a highly civilized society—300 jurors were convened, paid a salary, and the court resembled a theater. The claimant would stand before the jury and declare, "I accuse…". Arguments would follow, but those speaking were not jurists.

The Roman method, however, allowed them to structure human relationships with great precision, using a series of clear concepts: liability, tort, forms of property, and so on. These concepts were developed by jurists, often with the support of their clients.

These concepts are still in use today, but if you had asked the Romans to define them abstractly, they would not have been able to do so. Instead, they used a method that analyzed case by case. They had the concepts, but to explain their meaning, they relied on a series of concrete examples. The Roman method, therefore, was to combine concepts with particular examples. However, these examples should not be confused with modern common law precedents, as they had no binding power and no complete definition of the facts. In some cases, it's even unclear whether an example was based on a real case or was simply invented.

(Pag. 6)

Digest 50.17.1.

[T]he law is not taken from a rule, but a rule is made according to the law. Consequently, by a rule a brief description is given of things [*res* – facts or cases], and, as Sabinus said, a rule is a connection of cases [*causae*] which loses it force when it becomes defective in any way.

He's saying that law is not to be found in rules. Rather rules are to be found in the law, the person of the law.

And then, a rule might turn out to be defective. So, let's see examples of that.

(Pag. 7)

12. Wild beasts, birds, fish and all animals, which live either in the sea, the air, or the earth, so soon as they are taken by anyone, immediately become by the law of nations the property of thecaptor; for natural reason gives to the first occupant that which had no previous owner.

That's a rule.

But, what would happen if an island goes out of the sea and then somebody took possession of the island?

(Pag. 7)

22. When an island is formed in the sea, which rarely happens, it is the property of the first occupant; for before occupation, it belongs to no one.

Which is a particular case that the previous rule didn't contemplate: the Romans said "don't trust rules." Law doesn't come from rules. They believe that if you put particular cases, people can see what the answers are.

In Roman law, you could sue for tort under the Lex Aquilia. You could recover from harm that was done in a certain way: with *dolus* and *culpa*. And dolus means intention; *culpa* means accident, negligence. These concepts were borrowed from the Romans by every modern legal system, but the Romans didn't define them, instead they gave an endless number of cases that involved fault.

Most of the times common sense gets you the answer. And this is another weird thing about Roman law. It's supposed to be highly conceptual. But the concepts taken into consideration are simple. One of them is consent. It is obvious that in contracts of sale there must be consent. The sale is valid if there is an agreement as to the fact of sale. Any dissension, or the price, or any other matter makes it invalid. And yet there's no definition of consent.

Law in the last part of the Roman civilization

All major concepts are elaborated in the classical period and explained in books written by classical jurists. Around the year 250, however, jurists stop writing new books. Roman law is now what those jurists say. Law schools are born, in which students study what those jurists said.

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The Roman method

In the civil law tradition, the approach to legal argumentation is shaped by concepts developed in ancient Rome. Roman law was not based on rules initially; rather, rules were derived from the law itself, which existed before the formal rules came into play. Law, in this context, came from a group of experts known as jurists. In ancient Rome, when someone wanted to sue, they would approach the praetor, who would provide a formula that defined the legal action, such as making someone pay for a transaction they failed to fulfill. These formulas were the foundation of Roman legal practice, with the praetor able to create new ones as needed.

The iudex, who presided over individual cases, had no legal training and made decisions without the guidance of written rules or formal procedures. If uncertain, the iudex would consult a jurist, who would offer legal advice based on their expertise. This process lasted from 100 BC to 250 AD, during which jurists would often write commentaries to clarify the praetor's formulas, but they did not write down strict rules.

There are three key points about this system: first, rules were only used when necessary; second, those in positions of authority, like the praetor or iudex, lacked formal legal training, while the jurists had such training but did not hold power; and third, the jurists' method of legal reasoning was both concrete and abstract. Concrete because it involved practical decisions based on specific cases, but abstract because jurists would distill legal matters into simple, relevant facts, ignoring irrelevant details.

This system persisted from 100 BC to 250 AD, focusing on practical, case-specific solutions rather than codified rules.

Roman law uniquely balanced abstract principles with concrete case analysis, a method unmatched in other ancient civilizations. For example, a jurist might analyze a scenario where a man cuts a branch in a tree, causing damage. The abstract issue of liability arises, but it is always rooted in a specific, real-world context. Unlike Greek approaches that focused on philosophical discussions or common-sense judgments by large juries, Roman jurists developed legal concepts through practical case resolutions.

Core ideas like possession, fault, sale, and consent were not formally defined but emerged as jurists addressed concrete disputes with abstraction. These concepts, which remain central to modern legal systems worldwide, were intuitively rational, reflecting everyday experiences like distinguishing between ownership and possession.

By the end of the Republic in 27 BC, the classical period of Roman law was largely established, culminating in the prolific writings of brilliant jurists. This era ended around 250 AD, leaving a legacy unmatched by other advanced civilizations. Common law systems, for instance, only began adopting these Roman legal concepts in the 18th and 19th centuries.

Later, Emperor Justinian codified this tradition in the *Corpus Iuris Civilis*, particularly the *Digest*, which simplified and preserved juristic writings. Rediscovered centuries later in Italy, this work reignited legal scholarship in medieval Europe and solidified Roman law's foundational role in shaping the global legal landscape.

Roman law experienced a revival after the rediscovery of a single surviving manuscript of Justinian's *Corpus Iuris Civilis* in Italy, 600 years after its creation. This manuscript became the foundation for legal lectures in Bologna, sparking the reintroduction of Roman legal principles to the West and their subsequent spread outward.

The Roman method, unfamiliar to medieval thinkers, eschewed formal definitions and proofs. Instead, it relied on practical reasoning grounded in real-world scenarios. For example, if someone cut a branch in a public street without warning, causing damage, Roman jurists would determine fault and liability based on the concrete situation. This intuitive and example-driven approach ensured that even those without legal expertise could understand and apply the principles, illustrating the pragmatic genius of Roman law.

The concept of Roman categories

Roman law introduced foundational legal categories that continue to influence modern legal systems. One major breakthrough came in AD 150 when the jurist Gaius categorized many legal actions as either **torts** or **contracts**. This distinction likely drew on Aristotle's concept of commutative justice, which divides actions into two types: involuntary, such as taking or destroying something, and voluntary, such as breaching an agreement.

Gaius applied this framework to Roman law but remained rooted in its traditional methods. Rather than inventing entirely new definitions, he adapted the concepts to describe torts and contracts in the context of Roman legal practice, bridging classical philosophy with practical jurisprudence. This organization of law laid the groundwork for the systematic legal structures we use today.

Property

Roman law categorized property into distinct types, emphasizing its use and communal function rather than absolute ownership. Here's how Gaius outlined the different kinds of property:

Common Property: Includes resources like the seashore, which cannot be privately owned. Everyone can use it for walking, fishing, or to build temporary structures like huts. If a structure is destroyed or abandoned, the land reverts to common property.

Public Property: Examples are rivers and ports, which belong to everyone for communal use. While private ownership near such areas is possible (e.g., houses on riverbanks), the public retains rights to access and use them, such as tying boats or drying fish.

Municipal Property: Owned collectively by the city or its citizens, municipal property includes theaters and streets. Citizens have shared rights to use them, such as choosing a seat in a theater or traveling down a street, with associated protections against obstruction or exclusion.

Temple Property: Temples are consecrated and removed from private or state ownership permanently. Permission from the city is required to build and consecrate a temple, as it becomes irreversibly dedicated to its sacred purpose.

Religious Property: Graves fall under this category. Once someone is buried, the grave ceases to belong to the property owner, and its sanctity must be respected. However, individuals can create graves on their land without government approval.

Holy Property: Includes city gates and walls, which are not owned by individuals or the government but hold a sacred status. These structures serve communal and defensive purposes, and private use (e.g., attaching a house to a wall) comes with no rights or compensation if they are destroyed.

This classification reflects the Romans' nuanced view of property as a shared resource rather than an absolute private right. Their distinctions differ significantly from medieval systems, which would later organize property through feudal structures like fiefs.

Torts

Roman law's division of torts began with actions created from concrete cases rather than abstract principles. Gaius played a key role in identifying torts as distinct legal actions, laying a foundation for modern concepts of liability. The Lex Aquilia, a pivotal Roman statute, introduced the idea that harm caused by fault—whether intentional (*dolus*) or negligent (*culpa*)—required compensation. Additionally, causation and harm were essential elements to inquire into, in order to assess this liability.

The Lex Aquilia provided a framework for seeking compensation for harm, focusing on practical cases rather than abstract legal principles. While it had broad application, Roman jurists didn't define principles but illustrated cases through stories. Most of the examples involved property harm, such as a branch falling on someone, which was treated as damage to property if the injured person was a slave. Likewise, burning down a house was considered property harm. Free persons recurred only in few examples: when a shoemaker injured his apprentice or in rare instances like injuries sustained in a boxing match, which were exempt from liability due to the voluntary nature of the activity (causa gloria).

Causation was a key issue for Roman jurists. For direct harm, such as hitting someone with a hammer, liability was straightforward. In cases of indirect harm, like starving a slave or overworking a horse, the law adapted through an actio utilis, extending the Lex Aquilia to handle new situations.

The Evolution of Tort Law:

In the Middle Ages, jurists took a different approach, abstractly recognizing both personal injury and property damage as actionable harms. They relied on textual proofs and began formalizing personal injury actions. This represented a departure from Roman reliance on storytelling and pragmatic adaptation of the Lex Aquilia's framework.

Roman tort law, with its reliance on practical examples and its cautious approach to expanding legal tools, provided a foundation for modern legal systems but left certain complexities—such as personal injury—largely underdeveloped. The medieval shift to abstraction and textual argumentation eventually filled these gaps, creating a more comprehensive legal framework for addressing harm.

Roman tort law demonstrates a remarkable flexibility and creativity, driven by jurists rather than rigid statutes. Instead of defining overarching principles, Roman jurists addressed disputes through concrete cases, expanding the scope of the law as new situations arose.

Liability wasn't limited to physical harm caused directly by one person to another. For example, if someone opened a barn door and allowed a horse to escape or untied a slave who then ran away, these acts didn't involve physical damage but still resulted in loss. To address such scenarios, the praetor introduced the *actio in factum*, a remedy designed for cases where harm wasn't caused directly by a physical act. This creative solution inspired medieval legal systems and even influenced the development of feudal property law.

Another critical category was *iniuria*, which focused on personal affronts and harm to dignity or reputation. Initially narrow, with penalties for actions like slapping someone's face, it expanded to include trespassing, defamation, indecent proposals, stalking, and verbal abuse. The jurists avoided general definitions, preferring to illustrate *iniuria* through examples, much as modern laws address issues like privacy violations and defamation.

Roman law also recognized strict liability, holding individuals responsible for harm without needing to prove fault. For instance, someone who brought a wild animal to Rome was liable for any damage it caused. Similarly, harm from falling objects or substances spilling into the street was attributed to the property owner, and innkeepers were held liable for thefts in their establishments, regardless of their involvement.

Underlying all this was the jurists' role in shaping the law. Core statutes like the Lex Aquilia and *iniuria* offered frameworks, but jurists expanded them by developing new actions, such as the *actio directa* and *actio utilis*, to cover more complex or indirect scenarios. This adaptability, rather than reliance on fixed legislation, allowed Roman tort law to evolve, providing a foundation for many modern legal concepts of fault, negligence, and strict liability.

Contracts

In Roman law, contracts were not categorized by overarching principles, as we might expect today, but rather by specific types based on how they were made. Gaius, a prominent Roman jurist, explained that Roman contract law was essentially a collection of distinct, particular contracts, each governed by different rules. Instead of one broad idea of "contract," the Romans had various ways of organizing agreements, and they classified them mainly by the method of formation.

One key category was *contracts consensu* (contracts by consent), where the contract was formed simply by mutual agreement. The moment two parties agreed on the terms, the contract became binding. Examples of these included sale, lease, partnership, and mandate. In these contracts, once there was consensus, the agreement took effect, regardless of any physical exchange or formal ceremony.

Another set of contracts was called *contracts re* (contracts by thing), which required the transfer of an object or property for the agreement to be valid. These were typically gratuitous contracts, meaning they were not primarily for financial profit. For instance:

- **Mutuum** was a contract in which one party lent money or goods (like grain) to another. The borrower didn't return the exact same coins or goods, but instead was expected to return an equal quantity of the same thing.
- **Commodatum** involved lending an object, like a horse, with the stipulation that the borrower would return the exact same item, not something of equal value.
- **Depositum** was a contract where one party left their property (like a car or a horse) in the care of another without the intention of using it. The custodian was only required to protect and care for the property, not use it.

Then there were *formal contracts*, which required a specific procedure for the contract to be valid. The most general of these was stipulatio, which was a verbal contract where one person asked the other to promise something, and the other person responded affirmatively, following a precise phrasing structure to make the stipulation valid. This simple question-and-answer format made the promise legally binding, and it could be used for any agreement, from borrowing to selling. The stipulatio did not require writing or witnesses, though it was wise to have them for proof.

Roman law also distinguished between good faith contracts and strict law contracts. The contracts of sale, lease, and partnership were all considered "good faith" contracts. In these, the parties were bound by a range of obligations that a person acting in good faith would be expected to honor. For example, if you sold a horse, you were expected to ensure it was fit for the buyer's intended use and deliver it on time. If you sold a defective horse, this would be a breach of the contract, because in good faith, you were expected to deliver

something that met certain standards, even if not explicitly written in the contract. The jurists had a role in defining what "good faith" meant, but there was flexibility for parties to expect fairness beyond what was written.

On the other hand, **stipulatio** was a contract of strict law, meaning it was binding only on what was specifically stated. If you made a stipulatio to sell a horse for a fixed price, you would only be liable for what was explicitly agreed upon, such as the price and the horse's condition as described. This type of contract didn't carry any assumption of good faith obligations. For example, if the horse was sick, three-legged, or not yours, you could still legally demand that the buyer fulfill the terms of the contract, as long as those terms were agreed upon.

This kind of strict contract became more problematic in later periods, especially when contracts were formalized through notarization. In the Middle Ages, people began to use written documents to formalize agreements that were once oral. This created a shift where parties could be bound by terms they hadn't fully understood or intended. For instance, a buyer could sign a contract to purchase a horse without realizing that they were accepting a defective animal, simply because the terms of the contract had been rigidly written down, without any expectation of "good faith."

Roman contract law was highly practical and flexible, but the introduction of written documentation and notarization in later periods added a layer of complexity, leading to issues that weren't present in the Roman period. Roman law focused on concrete agreements and did not get bogged down by abstract legal principles, offering a pragmatic and adaptable system that worked for the time.

Barter

Barter, which is considered a relic of Roman law, highlights the more primitive nature of early Roman legal practices. Unlike a sale, where money is exchanged for goods, barter involves trading one item directly for another, like swapping a horse for a mule. This practice, known in Latin as *permutatio*, reflects a simpler transactional structure. The idea behind barter isn't necessarily about price comparison or market shopping, but rather the simple fact that two people happen to have items they want to exchange. When money enters the picture, however, it creates markets where prices fluctuate, and people begin to shop around for better deals. In a sale, this risk of price changes becomes part of the transaction, while barter, by its nature, is just about exchanging goods without worrying about market value or future price changes. It's a more direct, less complicated form of exchange where the risk of finding a better deal is irrelevant. Essentially, barter is about having something someone else needs, rather than navigating the complexities of market-driven sales.

The Barbarians

The history of Western law took a significant turn after the fall of the Western Roman Empire, and it was during this transitional period that Justinian's legal work, the *Corpus Iuris Civilis*, played a crucial role. As the Western Roman Empire collapsed, Justinian, the Byzantine Emperor, attempted to reconquer the lost territories but ultimately failed. Despite this failure, one of his major achievements was the codification of Roman law into the *Corpus Iuris Civilis*, a comprehensive collection of legal principles and texts that would later serve as the foundation for much of modern Western legal systems.

However, after Justinian's army withdrew from Italy, the empire was overtaken by barbarian groups. As a result, the *Corpus Iuris Civilis* was largely forgotten in the chaos that followed. It was kept in monasteries, perhaps stored in basements, away from the public eye. For several centuries, the legal tradition of the Romans seemed to be lost, as the Dark Ages descended upon Europe and various barbarian kingdoms emerged across the former Roman territories.

During this period, law in the West was influenced by various cultures. While the barbarian invasions and the collapse of Roman institutions might suggest a lack of a unified legal system, Western law during the Middle Ages was, in fact, a mixture of several traditions. The law was influenced by Roman law, but also by the Christian Church and canon law, which became binding on all Christians throughout Europe. Roman law, with its focus on principles of justice and fairness, evolved into more moral principles as the Church took an increasingly central role in organizing legal matters.

In addition to Roman and canon law, Greek philosophy also began to play a role in shaping medieval legal thought. Greek philosophers, particularly Aristotle, had a lasting influence on medieval scholars. However, the study of Greek philosophy did not significantly impact legal education directly until much later, when a legal school, known as the Late Scholastics, rose around the 16th and early 17th centuries. During this time, scholars like Thomas Aquinas sought to blend the ethical teachings of Aristotle with Roman legal traditions, creating a more doctrinal and systematic organization of law based on moral principles.

The barbarians, despite their lack of a sophisticated legal system, contributed to the development of Western law by introducing important procedural ideas. Their influence is especially evident in the concept of *due process of law*. In contrast to the Roman focus on substantive law—what is right and just—the barbarians emphasized the importance of procedure. The idea was that if the correct legal procedures were followed, the outcome of a case would be lawful, regardless of the substantive issues. This procedural focus would later influence the development of medieval and, eventually, modern legal systems, where the adherence to established processes and rules of law became a cornerstone of justice.

In the Middle Ages, the legal system had to be reinvented, particularly in terms of procedure. The early Roman legal system, which relied on a judge (*iudex*) to make decisions, and the later Byzantine legal procedures, which were codified under Justinian, were not easily applicable in the medieval world. As a result, new procedures were developed, influenced by both Roman law and the barbarian tradition. The key takeaway from this period is that while the Roman legal heritage was preserved in some ways, it was also significantly altered by the circumstances of the time, including the influence of the Church, the rise of Greek philosophy, and the procedural innovations introduced by the barbarians. This blending of traditions would shape the legal landscape of the Middle Ages and lay the groundwork for modern Western law.

The regression of post-Roman society into a local dimension

The period following the collapse of the Western Roman Empire saw a dramatic shift in the political and social structure of Europe. The barbarian invasions are often remembered as a time of chaos, but the reality was more complex. As groups like the Ostrogoths swept across Europe, they didn't simply massacre and destroy—many settled in former Roman territories and established reigns that primarily extracted wealth through taxation, often without directly disrupting the daily lives of the Romanized people who had been living in these regions for centuries. These barbarian groups, despite their violent conquests, typically didn’t radically dismantle the social and economic systems they encountered; rather, they integrated with and adapted to the local structures, which were already heavily influenced by Roman culture.

This period marked the end of a world that had been dominated by large urban centers and centralized bureaucracies. Rome, at its height, had a highly organized system with a central administration based in Constantinople, a well-functioning tax system, state courts, and a vast, professional army. But after the fall of Rome, this centralized system collapsed. The cities shrank or disappeared, commerce almost vanished, and large-scale defense forces were no longer possible. The society became increasingly local. Landowners, instead of being part of the bustling urban world, now managed self-sustaining estates, and smaller, local armies replaced the massive forces of the Roman era.

The effects of this decentralization were profound. One of the most notable shifts was the fall in population; urban centers shrank drastically, and many areas of Europe became depopulated compared to their Roman predecessors. This all contributed to a much smaller, more localized society.

In places like Spain, intellectual life began to revive somewhat. Scholars such as Isidore of Seville (c. 636 AD) contributed to preserving knowledge and teaching, and similar efforts began in other regions. In England and Ireland, scholars started writing around 736 AD, continuing the tradition of learning. These efforts were crucial for preserving and transmitting knowledge during this period.

As time went on, figures like Charlemagne emerged to help bring some stability to the region. Charlemagne, king of the Franks, expanded his power and unified a large part of Europe, including the defeat of the Lombards in Italy. His reign saw a revival of scholarship and literacy, with scholars working under his patronage and literacy gradually beginning to return to Europe. Charlemagne's rule marked an important point in the

attempt to reintroduce a form of centralized authority that had been absent since the fall of Rome. Scholars like Alcuin, who worked with Charlemagne, helped shape the intellectual landscape of the time by contributing to the development of liturgy and the preservation of manuscripts.

However, this period of relative stability was not to last long. The 9th and 10th centuries brought a resurgence of invasions from various groups that threw Europe into turmoil again. The Moors invaded Spain and occupied most of the Iberian Peninsula, leaving only a few Christian kingdoms intact. Meanwhile, the Magyars, who were the ancestors of modern Hungarians, began their raids from the East, even reaching as far as Italy and France. At the same time, the Vikings began their raids in the North, starting with the notorious attack on the monastery of Lindisfarne in 793 AD. These invasions were particularly devastating because of the Vikings' unique method of warfare, which involved highly mobile raids from long ships, making them almost impossible to resist.

The Vikings came close to conquering large parts of England, but were eventually halted by King Alfred of Wessex, who fortified towns and developed strategies to defend against the Viking attacks. Similarly, Charles of Boulogne in France successfully fought back against Viking attempts to invade Paris by building bridges and fortifications. Over time, the Vikings were pushed back, and the Magyars were defeated by Otto I in 950 AD. The Saracens were driven out of southern Italy by 999 AD.

By the year 1000, the chaotic period of invasions and disorganization started to subside, and a more stable, though still fragmented, political order began to emerge in Europe. The remnants of the Roman world, along with the intellectual and religious traditions preserved by the Church, would soon undergo a major transformation. The Latin language, though no longer widely spoken, remained in use within the Church, and many of the old Roman texts were preserved in monasteries. Around this time, Europe began to witness the rise of feudalism, the formation of trading empires, and the rediscovery of Roman law.

This resurgence of interest in Roman law was a crucial development, as scholars in the 11th century began studying and reviving the *Corpus Iuris Civilis*, the great legal work compiled under the Byzantine Emperor Justinian. This revival laid the groundwork for the legal systems of the Middle Ages, marking a new chapter in the evolution of Western law.

Thus, the period from the fall of Rome to around the year 1000 was a time of immense change, but also one of continuity in the preservation of knowledge and law. Despite the chaos brought by invasions and the decentralization of authority, the foundations of a new Europe were being laid—one where the intellectual and legal heritage of Rome, combined with new systems of governance and trade, would soon begin to take shape.

FONTI

James Gordley, *introduction to european legal history from the 6th to the 18th century*, 2024

- **General introduction to Roman Law:** pages 1-6
- **Property Law:** pages 6-8
- **Law of obligations:** pages 8-14
    - **Delictual obligations:** pages 9-12
    - **Contractual obligations:** pages 12-14

LEZIONE DEL 13/09

THE TURBULENT PERIOD BEFORE 1100

Between the 6th and 10th centuries, Europe experienced widespread disorder. The barbarian invasions led to the **collapse of Roman authority**, and for nearly 500 years, various groups—such as the Ostrogoths, Franks, and others—settled and ruled territories. These tribes often brought their entire populations, including women, children, and livestock, creating significant shifts in the local landscape.

When the Ostrogoths invaded, they reportedly numbered around 100,000, with every adult male **a potential warrior.** This allowed them to assemble armies of 20,000–30,000, sufficient to defeat the Roman forces, which were often spread thin. Unlike total conquest, these invaders sought integration. Landlords and peasants were allowed to remain, but they were required to pay **taxes or tributes**.

Over time, however, these large warrior bands disintegrated. Settlements became localized, and society fragmented into small, self-sustaining units. These groups were led by captains or warlords who managed warriors and clans. **The economy collapsed**, becoming highly localized and barter-based. Law and order broke down, yet a rudimentary legal tradition began to take shape.

THE BARBARIAN LEGAL TRADITION

The **laws of the barbarian** tribes were distinct from Roman law. They were heavily **procedural**, with little distinction between substantive and procedural law. **Substantive law** defines rights and obligations (e.g., property ownership or contractual agreements), while procedural law dictates how those rights are enforced (e.g., methods of filing a claim or obtaining redress).

In the barbarian system, these distinctions were blurred. A legal complaint had to follow specific verbal formulas recognized by the community. For example, if someone claimed a wrong had been done, the community judged whether the claim was valid based on how well it conformed to recognized patterns. The process was not about gathering evidence or establishing facts in the way modern trials do; instead, it revolved around affirming the legitimacy of claims within established norms.

This lack of distinction between fact-finding and legal rulings reflected the realities of a warlike society. **Clan loyalty** and **survival** took precedence over abstract legal principles. Disputes were often settled through negotiation or warfare, with revenge as a primary motivator. If one clan killed a member of another, a cycle of retaliation often ensued unless both sides agreed to a settlement.

THE WARRIOR ETHOS AND ITS CONSEQUENCES

Barbarian society was shaped by a warrior ethos. For men, proving themselves as warriors was a central goal, while women sought to avoid being captured and enslaved during raids. In this environment, constant warfare between clans was common. Warriors raided cattle or engaged in skirmishes to maintain their status, often igniting feuds that could spiral into prolonged conflicts.

This perpetual state of war had broader societal implications. Trade and civic life stagnated, as trust between groups was minimal. Even within clans, respect and protection were paramount. If a clan failed to avenge a slain member, it risked appearing weak and losing the loyalty of its members. Thus, cycles of revenge often perpetrated violence.

SETTLEMENTS AND THE EMERGENCE OF LAW

Amid this chaos, the need for order occasionally led clans to negotiate settlements. These agreements were a rudimentary form of justice, aimed at breaking cycles of violence. Over time, such practices laid the groundwork for the Western legal tradition, which became a composite of Roman law, church law, Greek philosophy, and barbarian legal customs.

While the barbarian laws lacked the sophistication of Roman jurisprudence, they reflected the realities of a fragmented and warlike society. The focus on procedural forms and community recognition of claims mirrored the collective need to balance power and maintain order in an otherwise unstable world.

WERGELD AND THE SETTLEMENT OF BLOOD FEUDS

One of the primary mechanisms for resolving disputes in early Germanic societies was the concept of **wergeld** (W-E-R-G-E-L-D). Wergeld refers to the monetary compensation paid to a family or clan for the loss of a kinsman. If someone killed a member of my family, I could demand 100 pieces of silver as compensation. Acceptance of this payment would ensure peace between our clans. Refusal, however, would lead to war.

Negotiations over wergeld were mediated by third parties who might suggest a compromise—say, 50 pieces of silver instead of 100. This process was not just about greed or honor but also about maintaining balance. Accepting too little could make a clan appear weak, inviting future aggressions, while demanding too much might lead to continued conflict.

The earliest written barbarian laws, recorded once they encountered literate societies, included detailed wergeld price lists. For example, the price for killing a man might be set at 20 shillings, cutting off a hand at 10 shillings, or wounding someone visibly at a specified amount. Injuries concealed by clothing were valued less because the visibility of the wound mattered in proving harm.

These laws served as guidelines for resolving blood feuds and were issued by kings such as those of the Franks, Burgundians, and Anglo-Saxons. For instance, King Alfred of England formalized such laws. They helped establish acceptable compensation amounts, ensuring that if a clan accepted the standard payment, their honor remained intact. If they demanded more and succeeded, the offending party might appear weak. Thus, wergeld acted as both a practical and symbolic tool for maintaining order.

FORMALITY IN LEGAL CLAIMS

As disputes increasingly moved from outright violence to negotiated settlements or lawsuits, a formal process for presenting claims became essential. In these societies, trust in neutral judges was virtually nonexistent. Instead, the focus was on adherence to specific procedures. A valid claim had to be stated precisely, using recognized formulas and specific wording. Failing to do so, even through minor errors, could result in the claim's dismissal.

This rigid formalism paralleled practices in ancient Roman law. For instance, Gaius, a Roman jurist, explained that an incorrect wording—such as describing damaged vines as trees—could invalidate a lawsuit. The same procedural rigidity characterized early Germanic law, where a valid claim was judged more on its adherence to established forms than on factual accuracy.

TRIAL PROCESSES AND THE ROLE OF JURIES

Once a claim was accepted, it proceeded to a trial phase, which was largely procedural rather than evidentiary. Early Germanic societies lacked neutral judges to weigh evidence or interpret laws. Instead, trials often relied on **mechanical procedures**, the least arbitrary of which involved juries.

In a jury trial, a set number of individuals were chosen to hear the case. They were asked to determine the outcome based on the claim and counterclaim. For example, if one party alleged, "He stole my cattle," and the other denied it, the jury would decide whether the claim was valid. However, this process often conflated questions of fact and law.

If the jury ruled that the cattle were not stolen, it was unclear whether they meant the accused had never taken the cattle (a factual issue) or that the cattle legally belonged to the accused (a legal issue). Once the jury rendered its decision, it was final. The emphasis was not on creating a legal framework for ownership but on following a procedural mechanism to resolve disputes.

THE EXAMPLE OF NJÁLS SAGA (Trial by non-professional judges: Pages 15-19)

The Icelandic sagas, such as **Njáls Saga**, provide vivid examples of these legal customs in action. Njál, a prominent Viking chief in Iceland, became embroiled in a violent feud with a rival clan. Eventually, his enemies surrounded his home, setting it ablaze and killing him, his wife, and his servants.

Following Njál's death, his surviving relatives and allies chose to seek justice through a lawsuit rather than direct revenge. Their goal was to either obtain compensation or have the attackers outlawed. In Icelandic law, outlawry meant that the individual had to leave the island permanently. If they refused, they could be killed without fear of retribution, as no blood feud would follow.

BRINGING A LAWSUIT IN VIKING ICELAND

Lawsuits in Viking Iceland were initiated during gatherings held at a central legal assembly. Representatives from all clans convened at a designated location, often around a **law rock**, to hear and settle disputes.

To begin a case, the claimant formally announced their intent, naming witnesses and specifying the grievance. For example, one might declare: “I bring an action against Flosi Þórðarson for unlawful assault. He assaulted Helgi Njálsson at a specific location, inflicting internal injuries, including a brain wound, which caused Helgi’s death. I demand that Flosi be sentenced to full outlawry, not to be fed, sheltered, or aided by anyone. I also claim all his possessions as forfeit.”

This statement followed a precise format, and any deviation could undermine the case. If the lawsuit succeeded and the defendant was declared an outlaw, they lost all legal protections and were essentially condemned to exile or death.

EARLY GERMANIC LEGAL PRACTICES

The transition from clan-based revenge to formal legal systems in early Germanic societies was marked by the use of wergeld, procedural claims, and rudimentary trials. Although these practices lacked the neutrality and evidentiary standards of modern courts, they reflected the need for structured dispute resolution in a fragmented, warlike society. The rigidity of these legal traditions underscores the importance of form and procedure in maintaining social order.

In legal disputes of this nature, the right to receive corporate goods hinges on initiating a formal demand and order. This step marks the first phase of proceedings.

During a notable instance at the Law Rock, Mort delivered an eloquent and forceful argument, which received loud approval from the assembly. Though Mort's statement consisted of merely five lines, its precision and accuracy were critical. A single misstep would have resulted in an immediate loss of the lawsuit. His argument progressed systematically: first, Mort testified that this was an action against Flossy, who had inflicted harm upon individuals such as Helgi and Nielsen. Then, he emphasized further transgressions, testifying that Glom Hildeson kindled a fire, applying it to the buildings in Versacom Hall, and causing fatalities, including authorities and others. Mort’s articulation laid out three distinct counts, each forming the basis for the legal action.

THE ROLE OF THE JURY

The conclusion of the initial stage of proceedings comes with the appointment of a jury. The role of the jury is pivotal—they determine the outcome by declaring who wins the case. However, this process raises questions about the nature of the jurors. Are they neutral arbiters chosen to uncover the truth, or are they aligned with one party, thereby guaranteeing that party's success once selected? Historical evidence offers some insight but no definitive answers.

If we examine the Salic laws from the 600s A.D., predating the Viking era, we find early instances of jurors referred to as "rock invaders." These individuals played a crucial role in the legal process. When a court case commenced, the participants would invoke the jurors, asking them to administer the Salic law. In cases where the jurors hesitated or refused to speak the law, the complainant could formally request adherence to the Salic law. If the jurors continued their silence, they faced personal liability—120 dinars per individual, equivalent to three Solidi. This provision suggests that jurors were not necessarily biased but may have sought to avoid taking sides out of fear of reprisal. Deciding in favor of one party risked alienating the other, potentially endangering the juror's position or safety. This hesitancy highlights a recurring challenge in using jurors: ensuring impartiality while safeguarding their personal well-being.

By the 12th century, the English judicial system adopted procedures for settling claims in common law courts, including trial by jury, a practice still in use today. The modern jury consists of twelve neutral individuals who hear evidence, determine facts, and follow the judge's legal instructions. Originally, however, juries functioned differently. The king’s justices would arrive in a town or village, summoning twelve locals to

serve as jurors. These individuals, often reluctant, were confined to a room and instructed to evaluate disputes and crimes that had occurred in their community. For example, they might decide whether William's accusation against John Battery was truthful or determine guilt or innocence in criminal cases. At times, jurors refused to render a decision, possibly to avoid offending influential parties. This pattern reflects broader concerns about fairness and accountability in medieval legal systems. Judges, unlike jurors, were not motivated by personal safety or anonymity but aimed to enforce the law, punish wrongdoers, and secure financial penalties. These justices operated on circuits, traveling between villages to oversee trials. They relied on local informants—peasants or minor lords—to identify crimes and complaints. Some lawsuits originated in London and were subsequently addressed in rural communities, where conflicting testimonies added complexity to proceedings.

In summary, historical and legal practices reveal the evolving role of jurors and judges. The tension between impartiality, personal risk, and the pursuit of justice has been a perennial challenge in judicial systems, from the Salic laws to medieval England.

TRIAL PROCEEDINGS AND DECISION-MAKING IN MEDIEVAL COURTS

At the trial stage, the justice, equipped with a rack full of documents, enters the courtroom. He places the papers before the jurors and poses the critical question: “Did John D. Miller commit this act?” Each juror swears an oath to tell the truth. However, on occasion, the jurors fail to reach a decision. This indecisiveness creates significant challenges. In one recorded instance, the justices brought 12 jurors back into the room, pressed them for clarity, and demanded they deliver a verdict. Yet, uncertainty remained.

This hesitation reflects a broader issue with the jurors of that era—they were not automatically aligned with one clan or another. Instead, their appointment followed a detailed set of procedures designed to ensure impartiality, at least in theory. Saga traditions offer some insight into these processes, but details are often ambiguous or incomplete.

APPOINTMENT OF JURORS: MORT’S STRATEGY In one notable case, Mort, the plaintiff, navigated through the procedural hurdles to gain the right to appoint jurors. He began by naming four dozen individuals to serve as jurors, an unusually large number. These jurors, often referred to as judges in contemporary records, were eventually reduced in number through a series of eliminations.

Mort’s strategy in appointing such a large group suggests his reliance on the support of his clan. By naming a significant number of jurors, he ensured that the case would proceed only with the backing of a substantial faction of his clan. This approach highlights the importance of collective clan support in initiating and sustaining legal actions during this period.

CHALLENGES AND PROCEDURAL ERRORS

As the trial progressed, the opposing side—referred to here as the "bad guys"—anticipated a procedural misstep by Mort’s team. The process required both parties to remove six jurors alternately, reducing the panel from 48 to 36 jurors, the correct number for a trial. While Mort’s side removed six jurors as required, the opposing side feigned satisfaction and chose not to remove any. This tactic put the burden on Mort’s side to adjust the numbers further.

Mort’s team failed to act correctly, proceeding with 42 jurors instead of 36. This procedural error proved disastrous. After the verdict was delivered, the opposing side declared the trial invalid due to the incorrect number of jurors. This allowed them to bring an action against Mort’s group, accusing them of filing a false suit. The consequence was severe—Mort and his supporters faced outlawry for their mistake.

THE ESCALATION TO VIOLENCE

Confronted with the possibility of outlawry, Mort’s side sought advice from Thornhill, a wounded ally bedridden due to his injuries. Despite his condition, Thornhill took decisive action. He grabbed a spear, attacked a member of the opposing faction, and incited a violent clash between the two groups. This confrontation resulted in casualties on both sides, eventually compelling the factions to negotiate a settlement.

REACHING A SETTLEMENT

The leaders of both sides convened to reach an agreement. They decided to offset the killings on both sides, treating them as equal and canceling them out. Specific crimes, such as the burning of Yal, required compensation. Yal's burning, which would typically require a payment of 100 units, was escalated to 300 due to the severity of the act. Payments for other victims were also determined, ensuring restitution.

Finally, the lawyer who had devised the procedural trap was outlawed for his manipulative tactics, signaling a resolution that, at least symbolically, restored justice.

ISSUES WITH JURY SYSTEMS AND PROPOSED ALTERNATIVES

This case highlights the inherent challenges of using jurors in medieval legal systems. Jurors could be biased or intimidated, undermining the fairness of proceedings. Even when jurors were selected impartially, the potential for procedural errors or manipulation by skilled litigators created significant problems.

One proposed solution to these issues was to implement trial by oath. In this system, the plaintiff would begin by swearing an oath asserting their claim, while the defendant would swear an oath denying it. This method simplified proceedings and reduced the reliance on potentially biased or intimidated jurors.

THE PROBLEM WITH BIAS

When individuals are biased, they become susceptible to intimidation. This creates a serious issue in any system that relies on fairness and impartiality. If people can be influenced or coerced, it becomes easier for others to manipulate outcomes by garnering enough support for their allies.

This issue is particularly concerning in judicial settings. Jurors, as human beings, are not immune to bias or intimidation. They may be swayed by external pressures, personal interests, or prejudices. This raises a fundamental question: how can we ensure fairness in a system where human discretion plays such a pivotal role?

MECHANICAL PROCEDURES AS AN ALTERNATIVE TO JURORS

One proposed solution is to minimize reliance on jurors and replace their role with a more mechanical and standardized procedure. The rationale is that human discretion introduces uncertainty and potential for bias. A mechanical system, by contrast, could ensure greater consistency and fairness.

TRIAL BY OATH

One historical example of a mechanical approach is the system of trial by oath, a method used in earlier legal traditions. Here's how it worked:

1. **Initiation of the Trial**
   The process began with an accusation. For instance, I might accuse you of stealing a cow by swearing an oath to that effect: "I swear you took my cow."
2. **Denial by the Defendant**
   The defendant would then formally deny the accusation, also under oath. This exchange constituted the initial pleading stage.
3. **Introduction of Oath Helpers**
   To resolve the dispute, both parties would appeal to oath helpers. These were individuals who would swear to support one party's claim.

THE ROLE OF OATH HELPERS (Trial by oath-helpers: pages 20-22)

Oath helpers played a crucial role in this system. Their primary function was to lend credibility to the party they supported. For example, if I accused you of taking my cattle and you denied it, you might bring 12 oath helpers to swear in your favor.

But what exactly were these oath helpers affirming? Were they swearing that you never touched the cattle? Or that you had a valid reason for your actions? The system often left such nuances unclear. This lack of

precision blurred the lines between fact and moral judgment, making it difficult to distinguish between actual guilt and perceived integrity.

THE CONSISTENCY OF LEGAL PROCEDURE

In historical legal systems, the consistency of procedure was a critical element. For example, in a trial by oath, I could swear that the accused did nothing wrong—or that they did nothing at all. Regardless of the specific claim, the procedure followed a consistent format:

1. **The Claim and Denial**
    - I would make my accusation.
    - The accused would deny it under oath.
    - The case would then proceed to involve a predetermined number of oath helpers to support either side.

This structured process aimed to maintain order and reduce arbitrary judgments. One notable aspect of this procedure was the formalization of oaths, which often included written documentation to ensure accuracy and minimize errors.

CHRISTIANIZED OATH FORMS

As the legal traditions evolved, particularly in medieval England, oaths became "Christianized." This meant incorporating religious elements to emphasize their solemnity and truthfulness. Some examples of these oaths are documented in historical texts. Here's how they typically worked:

- The person swearing an oath would do so on a holy relic, invoking divine authority.
- A typical oath might include phrases like:

"I swear by the Lord and by the sanctity of this relic that I prosecute my suit with full right, without fraud, deceit, or guile. As was stolen from me—my designated cattle—I claim justice."

This Christianized language added moral weight to the procedure and underscored the seriousness of perjury.

THE ROLES OF CLAIM AND DENIAL

The legal process revolved around two core actions: the claim and the denial.

1. **Making a Claim**
    - The plaintiff would formally accuse the defendant of wrongdoing, using a specific formula.
    - For instance, in a property dispute, the plaintiff might swear:

"By the Lord, I accuse him not out of hatred, envy, or greed, but because I truly believe he is the thief of my property."

2. **Denial of Guilt**
    - The defendant would respond with their own oath, denying the accusations.
    - A typical denial might sound like:

"By the Lord, I am guiltless of this charge and have no involvement in the theft."

The defendant's denial, often reinforced by the support of oath helpers, was a pivotal stage in the process.

STARTING A CASE

The initiation of a case was straightforward. The plaintiff would declare the wrongful act, such as theft of property, and swear an oath affirming their belief in the truth of the claim. The defendant, in turn, would counter with their own oath of innocence.

This back-and-forth established the groundwork for resolving the dispute, with oath helpers or other procedural mechanisms used to determine the outcome.

THE ROLE OF OATH HELPERS

Oath helpers were integral to this system. These individuals swore to support the truthfulness of the party they sided with. Their involvement lent credibility to claims and denials, functioning as a kind of primitive evidence or character reference.

EXAMPLES FROM LEGAL TEXTS

Some historical examples of these procedures can be found on pages 21 and 22 of relevant legal manuscripts. For instance:

1. **A Sale Dispute**
    - In cases involving the sale of goods or property, the oath might reference the legitimacy of the transaction.
    - The process required participants to affirm their claims or denials in a highly ritualized manner.
2. **Property Claims**
    - The plaintiff might declare:

"These cattle are mine by lawful acquisition, and I deny leading them away unlawfully."

- 1 The defendant would then deny the claim and present their own oath helpers to support their case.

VERBAL CONTRACTS AND PRECISION

In early legal traditions, verbal contracts required careful wording to be considered valid. For example, a plaintiff might begin a claim with a phrase such as:

"*In the name of the living God, I demand the money owed to me*."

Although the word "money" here may not always perfectly translate into modern terms, it signifies a demand for payment or restitution. The plaintiff would argue that they sold goods or services to the defendant, who then failed to pay. The defendant, in turn, would have to deny the claim, adhering to a precise and formal structure.

Another example might include:

"*In the name of the living God, I release him from all that I owe him, as far as our verbal contracts initially established*."

This language demonstrates the importance of precision and tradition in such verbal agreements. The phrasing often followed specific formulas that were both intricate and steeped in legal tradition.

ANGLO-SAXON RHYTHMS

The wording of these contracts and legal declarations was not only precise but also rhythmic. In the original Anglo-Saxon, the language often contained poetic elements, making it easier to memorize and recite.

- The rhythmic nature of these statements served a practical purpose: it ensured accuracy in oral traditions where written records were scarce.
- For example, declarations might rhyme or use alliteration, making them both memorable and difficult to alter without detection.

This poetic quality extended beyond legal contexts, influencing rituals such as marriage ceremonies.

MARRIAGE RITUALS

Traditional marriage vows are an excellent example of the rhythmic and formulaic language inherited from older traditions. For instance, vows such as:

"I take this woman (or man) to be my wife (or husband), to have and to hold, in sickness and in health, for richer or poorer, for better or worse, from this day forward, forsaking all others, until death do us part."

These words, still used today, carry the same structured rhythm as Anglo-Saxon legal declarations. They emphasize solemnity, clarity, and tradition, ensuring the intent of the parties is unmistakable.

POETIC FORMULAS IN LAND CLAIMS

Similarly, land claims followed established, almost poetic formulas. A landholder might swear:

"I hold this land as he held it before me, and as his ancestors held it before him. I shall never, never relinquish it—not the bold, nor the furrow, nor the plot, nor the plowland."

This structured repetition conveyed the claimant's firm assertion of their rights to the property. The formula served to formalize the claim and prevent disputes by providing a clear and authoritative declaration.

- These formulas were designed not only to resolve disputes but also to prevent them by providing consistent, widely understood language.
- If a party wished to deny a claim, they would likewise use a set formula, ensuring the denial carried the same weight and precision.

THE IMPORTANCE OF TRADITION AND PRECISION

In conclusion, the use of rhythmic and poetic formulas in verbal contracts, marriage ceremonies, and land claims reflects the deep importance of precision and tradition in early legal systems.

- The consistency of language helped ensure fairness and reduced misunderstandings in societies where oral agreements held significant weight.
- The rhythmic nature of these declarations added an element of permanence and solemnity, making them both memorable and binding.

These practices highlight the interconnectedness of law, language, and culture in shaping early legal systems and rituals, many of which still resonate in modern practices today.

DISPUTES IN ANGLO-SAXON TIMES

In Anglo-Saxon times, disputes could arise over seemingly trivial matters, but the resolution of these conflicts was often formalized through oaths and judicial procedures. For example, a dispute might involve the sale of a goat. One person could claim, "*You sold me a goat*," and the other would have to respond by swearing their innocence or defending their actions. However, disputes were not limited to livestock—conflicts could arise over many other issues, from personal quarrels to family matters.

In some cases, disputes could be highly personal. For example, someone might accuse another person of causing strife between a man and his wife, claiming to have had an affair with her. There are even accounts where disputes were related to intimate matters, such as a man complaining to the judges that his wife was embarrassed to undress in front of him, which could lead to a lawsuit.

ASTONISHMENT IN COURT

The judges of the time were often astonished by the nature of these disputes, especially when they involved private or intimate details of family life. In one particular case, a man brought his complaint before the judges, explaining that his wife had refused to undress in front of him because she was embarrassed. The judges were surprised, as they did not expect such matters to be taken into the court. However, they also recognized the need to address personal grievances in some form. Despite their astonishment, the judges still listened to the complaints and attempted to mediate a solution.

THE FAMILY-LIKE NATURE OF DISPUTES

The judicial process in these cases resembled family dynamics in many ways. It was often a situation where someone had a personal issue with another, and the role of the judges was to mediate and restore peace, much like resolving family disagreements. After both sides had spoken, the judges would deliberate and express their opinions, starting with the youngest elder and progressing in order of seniority until reaching the oldest elder. The oldest elder's decision was considered the final judgment.

The judgment could take various forms. The elder might order one party to compensate the other, or they could suggest a more conciliatory approach, advising the parties to stop insulting each other and move forward without further conflict. The main objective was to restore peace and harmony, much like resolving a domestic dispute within a family.

This procedure was not about strict legal enforcement but about ensuring that relationships were mended and that people could continue to live together in relative peace.

GERMANIC LAW VERSUS FAMILY PROCEDURES

Germanic legal procedures were drastically different from those based on family traditions. While family-based legal systems focused on restoring harmony and resolving personal disputes, Germanic law was built on a very different premise: distrust and procedure over substance.

In Germanic law, the subject matter of a case was often not the primary concern. Instead, the process was what truly mattered. In this system, you might never fully understand the legal issue at hand because the focus was entirely on ensuring the right procedure was followed. If you had the right number of people to swear the appropriate oaths, you could secure a favorable result. The emphasis was on structure and ritual, rather than the nature of the dispute itself.

SOCIAL CONDUCT VERSUS LEGAL RULES

In contrast, family-based legal systems focused more on social conduct rather than codified legal rules. The laws in such systems were primarily concerned with guiding behavior—how individuals should act towards one another. For example, there were clear guidelines on how a person should treat their spouse, their in-laws, and their community.

These systems aimed to prevent insult and conflict. If, for instance, a person treated their spouse with disrespect, it could lead to a lawsuit. However, the focus was on restoring peace rather than punishing wrongdoers. The parties involved in the dispute would not only seek compensation or reparation but would also aim to reconcile and restore social harmony. This constant tendency to litigate was a hallmark of the system: disputes were frequent, but they were settled with the goal of achieving balance and peace within the community.

THE LAW OF THE WEST

Not all pre-commercial legal systems were the same, but the Germanic system represented a specific set of values rooted in the Law of the West. This system, with its emphasis on procedure and distrust of individuals, was heavily influenced by the society's cultural and historical context.

One important feature of the Germanic legal tradition was its extreme focus on procedure. The emphasis was not on whether the outcome was just or fair, but whether the legal process was followed to the letter. This

focus on procedure would later contribute to the development of the idea of due process, especially in the Middle Ages. In due process, the focus was on the fairness of the procedure itself, even if the result was not necessarily "right" by modern standards.

This system laid the groundwork for later legal systems, where we see an emphasis on training judges, developing legal expertise, and making sure the procedure is properly followed. Modern complaints about the legal system often center not just on the outcomes but on whether proper process was followed. This focus on procedure over substance has deep roots in the Germanic tradition, and it is essential to understand this legacy when examining the evolution of law.

TRIAL BY BATTLE (Trial by combat: pages 22-27)

One of the most dramatic and iconic methods of dispute resolution in the Germanic legal tradition was trial by battle. This form of justice, which may seem bizarre to modern sensibilities, dates back to some of the earliest barbarian legal sources, such as the Burgundian Laws.

In a trial by battle, the resolution of a lawsuit did not involve lawyers or a courtroom, but instead, a physical confrontation between the parties involved. The belief was that divine intervention would guide the victor, proving their innocence or guilt based on the outcome of the fight. The procedure itself, as with other aspects of Germanic law, was valued more than the actual dispute being resolved. If you won the battle, you won the case.

BURGUNDIAN LAWS AND OATH BIAS

Let us now turn our attention to the Burgundian Laws and examine what they reveal about the legal procedures of the time. The Burgundian legal system recognized a significant issue in the application of oaths. It acknowledged that many people were corrupted by their inability to prove a case and driven by their instinct for greed. As a result, they would often take oaths regarding uncertain matters or even perjure themselves about well-known legal issues.

This presented a problem: bias. The oath-holders, or those called upon to swear an oath on behalf of the parties involved, could be influenced by personal interests, relationships, or financial incentives. The concern was that these oath-holders could be easily corrupted, undermining the integrity of the legal process.

So, what could be done about this issue of bias in the oath-taking process? One solution proposed in the Burgundian Laws was the introduction of trial by combat as a means of resolving disputes. According to this provision, if a party to the dispute refused to accept an oath, claiming instead that the truth could only be established through physical combat, the law allowed for trial by combat to determine the outcome. The right to engage in battle could not be refused.

TRIAL BY COMBAT: A MORE RELIABLE PROCEDURE

This method of dispute resolution was seen as a more reliable and unbiased procedure compared to relying on oath-helpers. While oaths could be influenced by relationships or bribery—essentially showing how many friends or how much money one could bring to sway the decision—trial by combat removed these elements. In the case of a battle, the outcome was seen as a direct reflection of divine judgment, ensuring that the party in the right would prevail without the influence of personal connections or wealth.

By shifting to trial by combat, the Burgundian legal system aimed to create a cleaner, fairer process for resolving disputes—one that was not tainted by the potential biases of oath-holders. It sought to provide a more unbiased and definitive means of determining the truth, one that could not be manipulated or corrupted.

EMPEROR FREDERICK BARBAROSSA

Emperor Frederick Barbarossa, a significant Holy Roman Emperor, implemented a structured approach to justice, notably through the concept of the “established peace.” This system sought to maintain peace across his empire by punishing individuals who violated it, particularly through severe consequences for killings committed in specific circumstances or places. If someone killed another person under these conditions—

such as within the emperor's army, palace, or on the highway—the penalty was death, unless they could prove self-defense in a duel.

However, Barbarossa did not see trial by combat as a satisfactory method of justice, as he opposed arbitrary violence. Even if someone claimed self-defense, if the killing was in violation of the established peace, they would be hanged without trial. This decision marked a departure from traditional dispute resolution methods, establishing a more centralized and structured form of justice where the emperor had ultimate authority, and individuals could not easily escape punishment by appealing to trial by combat. This approach aimed to ensure accountability and promote respect for law and order in his empire.

WILLIAM THE CONQUEROR

During the reign of William I (William the Conqueror) in 1066, trial by combat became an established legal practice in England, particularly to resolve disputes between the newly dominant Normans and the Anglo-Saxons. The idea behind this practice was that combat served as a form of divine judgment, where the winner was believed to have divine favor, thus proving their innocence or right to the contested matter. The Normans, a warrior society, introduced trial by combat as a means to settle disputes, especially when a Norman challenged an Englishman to a duel. In such cases, the Englishman had the right to defend himself in the same manner, with the winner's claim deemed valid by the divine outcome.

However, trial by combat wasn't the only option. The conquered Anglo-Saxons could choose between combat, oath helpers, or an ordeal to prove their innocence. While trial by combat was respected as a legitimate method of resolving conflicts, it was not considered infallible. If the defendant didn't trust the outcome of the combat, he could opt for oath helpers to support his case or choose an ordeal—another form of judgment based on divine intervention. This flexibility in the legal system, offering combat, oaths, or ordeals, suggests that trial by combat was not seen as a foolproof solution, even though it remained a significant and symbolic practice, especially in settling disputes between the Normans and the Anglo-Saxons.

In summary, trial by combat in William I's England was not only a legal procedure but also a cultural expression of power, reflecting the martial society of the Normans and their dominance over the Anglo-Saxons. It was a central part of the social and legal fabric, allowing individuals to resolve disputes through physical confrontation, while also offering alternative methods such as ordeals or oath helpers.

THE TRIAL PROCESS

So, in this scenario, the **Englishman** could choose **combat** to settle the dispute. If he chose combat, he could either call upon **oath helpers** or proceed with the duel alone. If he decided against combat, he could opt for an **ordeal**, which was another form of divine judgment.

This flexibility highlights that trial by combat was not seen as the **only** reliable procedure. Even though it was an established legal practice, there were alternative ways to prove one's innocence or resolve conflicts. **Ordeal by iron** (or other forms of ordeals) would then come into play for those who rejected combat or could not engage in it.

UNDERSTANDING THE ORDEAL

We will delve deeper into the specifics of the **ordeal** system later, but it's essential to understand its significance here. In some cases, when **trial by combat** was not chosen, the **ordeal** could serve as a substitute. This practice involved a variety of tests, such as carrying a piece of hot iron, walking on hot coals, or plunging one's hand into boiling water. The belief was that divine intervention would protect the innocent and reveal the truth.

SONG OF ROLAND (SOURCE'S PAGES FROM 24 TO 27)

The next reading is an excerpt from the Song of Roland (French: Chanson de Roland), which was written between 1120 and 1140. The excerpt takes place during the period of emerging feudalism, knighthood, and the continued practice of trial by combat. Charlemagne, the powerful emperor, leads his knights in a long struggle against the Muslims in Spain. The Muslim king Marsilius attempts to deceive Charlemagne by

offering a false peace, but his true intention is to betray Charlemagne and strike when his forces are vulnerable.

The Song of Roland emphasizes the role of combat in resolving disputes and proving honor. It reflects the feudal values of the time, where knights embodied chivalric virtues. Throughout the narrative, trial by combat remains a central theme, often used to resolve conflicts. Marsilius's deceptive peace proposal is supported by Gamelan, a member of Charlemagne's court, who plays a pivotal role in this betrayal. Gamelan, resentful of Roland, accuses him of sending him to his death and ultimately betrays Charlemagne by revealing their vulnerable position to Marsilius. This treachery leads to a devastating attack on Charlemagne's rear guard, which includes Roland and his companions.

As Roland and his forces face overwhelming odds, Roland blows his horn to alert Charlemagne, who returns to the battlefield and punishes the enemy forces. Gamelan's treachery is uncovered, and he is put on trial for his actions. In his defense, Gamelan justifies his betrayal by claiming he acted out of self-preservation, arguing that Roland sent him to his death and he killed Roland in return to protect himself. However, the French are unconvinced and question his justification.

According to Frankish custom, Gamelan's defense leads to a trial by combat, with Charlemagne selecting Count Thierry as his champion to prove Gamelan's guilt. Gamelan must find a champion to defend him in combat. He gathers 30 supporters to validate his defense. The combat is intense, and after a fierce battle, Charlemagne's champion emerges victorious. The outcome is interpreted as divine judgment, affirming Gamelan's guilt. As a result, Gamelan is executed in a brutal manner, hanged and then torn apart by four horses, a punishment for traitors.

The Song of Roland thus illustrates medieval legal concepts, including the trial by combat as a method of resolving treason accusations, with the outcome seen as a divine sign affirming the justice of the process. It emphasizes the brutal realities of medieval justice, where the result of a physical confrontation could determine guilt or innocence, and ultimately, the fate of individuals.

REFLECTIONS ON TRIAL BY COMBAT

Trial by combat, while brutal and violent, reflected the values and beliefs of medieval society. It was seen as more than a test of physical strength; it was a way to defend one's honor, land, and life in a world where peaceful dispute resolution was often impossible. Many believed that the outcomes of such trials were determined by God's will, with victory serving as a divine sign of justice. This practice was deeply tied to the medieval worldview, intertwining physical combat with the assurance of divine judgment. Although it may not align with modern standards of justice, trial by combat offered the people of the time a sense of fairness and certainty in resolving disputes.

19/09

THE EVOLUTION OF FEUDAL LAW AND THE ANALOGY WITH CONTEMPORARY LAW

FEUDAL LAW AS A PROPERTY SYSTEM

Over the course of history, feudal law developed as a complex property system, used for various purposes, including economic, military, and political. It emerged around 1200, when most land was held in **fief**, subject to specific restrictions and obligations. This system evolved thank to the judges and legal practitioners of the time, incorporating elements of Roman law and adapting them to the needs of medieval society.

The birth of the feudal system:

- The customs and documents of the time, such as those drafted in the courts of Bologna, contributed to the formalization of feudal law.
- Bologna, founded as a law school around 1088, played a crucial role in rediscovering and adapting Roman law to medieval reality. Here, students studied both Roman and feudal law, with a strong emphasis on integrating the **Libri Feudorum** (also called *Books of Fiefs*) into the Justinian *Digest*.

The universality of the fief as a legal instrument:

- The fief proved to be a versatile tool, used to recruit knights, establish landlord-tenant relationships, or provide legal and military consultancy.
- This made it somewhat similar to modern legal instruments like **joint-stock companies**, which, despite having a common structure, are used for very different purposes.

CORPORATE LAW AS A CONTEMPORARY ANALOGY

Modern corporate law can be seen as an analogy to feudal law, as both represent universal tools adaptable to various needs.

Structure of joint-stock companies:

- Joint-stock companies are built around three main figures: **shareholders**, **directors**, and **officers** (such as the president). Their organization varies significantly:
  - **Large corporations:** Shareholders vote to elect the board of directors, which in turn appoints the officers.
    - **Small companies:** Shareholders, directors, and officers may overlap (e.g., a small family-run store).
    - **Holding companies:** They do not operate businesses but own shares in other companies.

In practice, some companies deviate from formal principles, such as presidents choosing board members who later ratify their roles. This cycle reflects the adaptable nature of corporate law, much like feudal law's ability to suit varied contexts.

FEUDALISM AS A VERSATILE SYSTEM

Similarly to corporate law, medieval **feudal law** was a flexible tool:

- **Economic:** It allowed land management through grants to vassals, who committed to cultivating it or providing resources.
- **Military:** It enabled lords to recruit knights in exchange for lands or privileges.
- **Political:** It established hierarchical relationships and obligations of loyalty, essential for maintaining power.

The feudal model arose during an era of economic and technological transformation, marked by innovations like the horse yoke and advanced plows around 1050. These tools enabled the cultivation of previously inaccessible lands, which the feudal system legally structured through fiefs. Through the fief, land was granted to a vassal in exchange for specific obligations, such as rents or services, establishing a formalized relationship between the owner and the user.

THE FIEF AS A LEGAL INSTRUMENT

The fief, originally conceived as a type of property, proved to be an extremely versatile tool, usable in various domains:

1. **Landlord-tenant relationships:** A lord could grant land to a vassal, ensuring them the right to improve and use it without fear of arbitrary loss.
2. **Guarantees and obligations:** The fief could serve as collateral, similar to a modern mortgage. For example, a lord might grant land on the condition that the vassal joins a crusade.

3. **Diplomatic tool:** The fief could be used as a wedding gift or to seal peace treaties. A well-known example is King John of England declaring himself a vassal of the Pope to establish more favourable relations.

LEGAL INSTRUMENTS OF FEUDALISM

Feudalism was based on a solid legal framework that provided specific legal instruments to protect the rights of the parties involved:

1. **Investiture and the right of possession:**
    a. The formal investiture granted the vassal the right to possess and use the land, ensuring its protection in the lord's courts.
    b. Rights could be asserted through judgments among peers or assemblies.
2. **Legal actions:**
    a. The system included instruments such as the ***Indicatio***, a Roman action that allowed the owner to reclaim an asset found in the possession of another.
    b. Other tools included **usufruct**, which allowed one to use a property (e.g., land) for life without acquiring full ownership.

Feudal relationships revolved around mutual obligations. A significant example is land leasing, which represents a predominantly contractual relationship. When a lord leased land to a vassal, a relationship based on mutual obligations was established: the vassal had to honor the agreed terms, while the lord committed not to violate the vassal's right of possession. However, leasing did not grant the vassal ownership of the land but rather a personal contractual right against the lord. If a third party occupied the land, **the vassal could not act directly against them but had to turn to the lord for justice.**

Beyond leases, **service contracts** required specific duties, such as military service or monetary payments, reinforcing mutual obligations.

However, the feudal system was not limited to contractual relationships. Another category of rights existed, known as **interim rights**, which represented a broader legal dimension. These rights were not based on a contract but gave the vassal legally **protected possession**, which could be defended against third parties. The lord always retained ownership of the land but transferred to the vassal the right of usufruct, guaranteeing them the use and enjoyment of the property. Unlike Roman law, this right was often inheritable, creating a more stable and lasting relationship. The fundamental need was to ensure the stability of property relationships and the respect of mutual obligations

An interesting aspect of the feudal system is that, despite being rooted in a medieval context, it demonstrated notable flexibility and adaptability to different needs. Feudal law, formalized in the *Books of Fiefs*, was constantly enriched by jurists who sought to give coherence to the system. Baris the Oracle described the relationship between lord and vassal as a form of **quasi-ownership**.

THE REDISCOVERY OF THE DIGEST AND THE BIRTH OF MEDIEVAL JURISPRUDENCE

Around 1070, a man named Irnerius made an extraordinary discovery: a manuscript of the *Digest*, a fundamental part of Roman law. This discovery sparked an intellectual movement that culminated in the founding of the School of Bologna in 1088, the first university dedicated to the study of law. Emery began giving lectures on Roman law, attracting students from across Europe. It is in this context that figures like Accursius emerged as pioneers of medieval jurisprudence.

Accursius was the author of the *Glossa Ordinaria*, a fundamental work for understanding Roman law. His gloss was not merely a collection of notes but a true reinterpretation of the law. Justinian's texts were placed at the center of the page and surrounded by comments explaining their meaning. This method, created to address concrete issues, became the heartbeat of medieval legal thought.

THE ROLE OF THE JURIST IN THE MIDDLE AGES

In the Middle Ages, the jurist was seen as an expert in texts. Their training, often long and rigorous, was based on the study of Justinian's works: the *Digest*, the *Codex*, and other compilations of laws. Unlike Roman jurists, who provided practical responses based on customs and case law, medieval jurists worked to document and demonstrate each assertion through textual analysis. This methodology became central to common law and to the development of jurisprudence as a scientific discipline.

Legal issues and interim actions:

One of the problems faced by medieval jurists was integrating new legal situations into the framework of Roman law. A significant example concerns **public lands** leased indefinitely and the rights of **surface tenants**, those who cultivated the land and were entitled to a share of the harvests.

1. **Public lands:**
    a. These were public lands leased out, often to senators or wealthy citizens, who exploited them without becoming owners.
    b. Roman law recognized these tenants' **interim action**, allowing them to defend possession against third parties or even against the municipality.
2. **Surface tenants' rights:**
    a. Surface tenants were farmers working the land of a wealthy owner in exchange for a share of the harvests, resembling sharecropping.
    b. They too were granted interim rights, allowing them to claim the harvests or, in case of agreement violations, to assert possession of the land.

Accursius and his contemporaries sought to integrate these new realities into Roman law. They were able to solve complex problems by adapting existing legal norms to new situations. In doing so, they developed a legal system that, while rooted in Roman tradition, addressed the needs of medieval society.

THE CONCEPT OF *DOMINIUM* AND INTERIM ACTIONS

In the context of feudal law, medieval jurists sought to address issues related to ownership and possession by developing a detailed theory of the concept of ***dominium***. This theory was based on the idea that ownership could be divided into two main types:

1. **Dominium Directum:** The lord's superior ownership right
2. **Dominium Utile:** A vassal's derived possession, defensible through interim actions like *actio utilis.*

This division arose from the analysis of Roman legal texts, particularly the *Digestum*, which provided instruments like the *action utilis* to guarantee possession for those with a legitimate interest in public assets, leased lands, or agricultural yields.

THE *ACTIO UTILIS*: A LEGAL SOLUTION

The *actio utilis* was an interim action allowing the protection of possession rights for those who were not the direct owners of a property. This tool was already present in Roman law for specific cases, such as:

- **Leasing of public assets:** Wealthy lessees of municipal lands could defend their possession against third parties or the municipality itself.
- **Rights of surface tenants:** Farmers working the land of an owner had rights to a share of the harvests and could use the *actio utilis* to claim what was owed to them.

These legal precedents were adapted by medieval jurists to the feudal context. If a surface tenant or lessee of public lands could use an interim action, why not recognize a similar right for a vassal holding a fief? This question led to the formalization of the distinction between *dominium directum* and *dominium utile*.

APPLICATION OF THE THEORY TO THE FEUDAL SYSTEM

In the feudal system, the lord always retained *dominium directa*, or the superior ownership of the property, while the vassal held *dominium utile*, granting them the right to possess and use the property. This classification did not alter the existing feudal relationships but provided a more precise legal framework for describing them.

- **Rights of the lord:** The lord maintained ultimate control over the fief and could revoke it if the vassal failed to fulfil their obligations.
- **Rights of the vassal:** While the vassal was not the owner, they could defend their possession through an interim action based on the principle of *actio utilis*.

This theory allowed medieval jurists to reconcile the feudal system with Roman law principles, giving a formal structure to property relationships. The classification of *dominium* into two categories was one of the most significant innovations introduced by medieval jurists, providing a conceptual framework for understanding and organizing the feudal system. This approach was applied not only to fiefs but also in other legal contexts, such as **perpetual leases** and **sharecropping contracts**.

LEGAL ACTIONS IN THE FEUDAL SYSTEM

The feudal system introduced a key distinction in ownership-related legal relationships, focusing on actions available to fief holders and their connection to possessory or contractual rights.

When a lord dies, the vassal can claim investiture from the new lord. This right does not originate from a contract but ensures the continuity of the fief. A vassal holds possession under the *law of peace*, which guarantees *in rem* rights, allowing them to reclaim the fief irrespective of its current holder. **This connection to the land, rather than to personal relationships, sets feudal rights apart.**

Unlike a tenant who must appeal to the landlord to reclaim property, a vassal's rights involve hereditary and possessory claims, transcending mere contracts and making feudal relationships unique.

FEUDALISM AS A SYSTEM OF GOVERNANCE AND LAND MANAGEMENT

Traditionally viewed as an economic, political, and social system, feudalism is increasingly seen as a legal framework for managing land.

1. **Hierarchical structure:**
    a. At the top of the feudal pyramid were the king and great lords, who controlled vast territories and could mobilize knights and vassals for military purposes.
    b. At the base were the peasants, who worked the land and gave part of their produce to the lords in exchange for protection and access to the land.

a. **Mutual obligations:**
    a. Vassals were required to provide services, often military, to the lord in exchange for the fief.
    b. Peasants paid taxes or rents to landowners in exchange for the right to live on and work the land.

This structure, though hierarchical, established a system of rights and duties that bound different levels of society together.

THE ROLE OF LORDS AND VILLAGES

From the 12th century onward, the role of lords in villages became more active. Lords were not only landowners but also central figures in local governance. Medieval villages, often granted a form of autonomy, had their own self-governing structures, but lords exerted significant influence in daily management.

1. **Local governance:**
    a. Villages had local councils and regulations that ensured a degree of autonomy in resource management and dispute resolution.
    b. Lords helped maintain order and ensure justice.

a. **Relationship with peasants:**
    a. Peasants, though at the base of the social pyramid, played a crucial role in agricultural production and the feudal economy.
    b. Their relationship with lords was regulated by mutual obligations, including the payment of tributes and military protection.

THE CRITIQUES OF THE CONCEPT OF FEUDALISM

In the 1970s, historians such as Elizabeth Brown and Susan Reynolds criticized the traditional view of feudalism. Brown's "The Tyranny of a Construct" and Reynolds' "Fiefs and Vassals" argued that feudalism was not a unified economic or political system but a set of legal and social relationships.

1. **Critique of the Marxist view:**

The description of feudalism as a system to exploit peasants and transfer their products to nobles does not capture the complexity of the system. Although peasants paid tributes to lords, this occurred in many other societies, not just in the feudal system.

2. **New interpretation:**

Feudalism was primarily a legal system centred on property relations and reciprocal obligations. The management of lands and military protection were central elements but did not fully define the system.

WHAT IS A FIEF? A COMPLEX ANSWER

The question "What is a fief?" is central in the historical and legal debate. According to scholars Elizabeth Brown and Susan Reynolds, this is the key question to understanding the feudal system. They explain that a fief is not simply an economic, political, or social system but a particular type of property. This characteristic distinguishes it and makes it a versatile tool, usable for political, social, and legal purposes.

In the Middle Ages, it was believed that kings and emperors had the exclusive right to legislate and exercise criminal jurisdiction over all their subjects. However, over time, the central government fragmented, and power shifted toward more local realities, where the fief played a crucial role.

FEUDALISM'S INNOVATIONS IN LAND AND JUSTICE

Feudalism introduced some important key concepts:

- **Right to property and possession:** Holders of a fief had the right to own and maintain their land. If the lord tried to take it away, the vassal had the right to a fair trial at the lord's court.
- **Political use of the fief:** Fiefs were often used as political currency. An emblematic example is the restitution of conquered lands as fiefs to consolidate alliances or peace treaties. This mechanism had nothing to do with a system of governance but was rather an agreement between parties that maintained mutual interests in the land.

THE FIEF AS A POLITICAL TOOL

A fief could serve various functions:

1. **Peace treaties:** After a defeat, a king might cede his lands and receive them back as a fief, thus consolidating a peace agreement.
2. **Marriage alliances:** The granting of lands as fiefs was often part of marriage agreements, where the rights to the land symbolized a political and familial bond.
3. **Papal relations:** A famous example is that of John Lackland, who handed over England to the Pope and took it back as a fief, with the aim of solidifying an alliance.

WHAT, THEN, IS A FIEF?

A fief is neither a system of government nor a complete economic system. It is a legal and political tool that binds the lord and the vassal through reciprocal rights and duties. Essentially, it is shared property where:

- The **lord** maintains a superior interest in the land (*dominium directum*).
- The **vassal** holds rights of possession and use (*dominium utile*).

THE RIGHT OF THE VASSAL IN FEUDALISM

In the feudal system, the vassal enjoyed rights that represented a significant innovation compared to the past. If the lord attempted to take away the fief, the vassal had the right to a hearing at the lord's court. This mechanism introduced a form of internal justice within the feudal system and can even be regarded as a form of "**local government**." However, it was not necessarily a military system nor an obligation of service that was always valid.

THE KNIGHT AND MILITARY SERVICE

Contrary to common belief, not all knights were obligated to provide direct military service. Obligations were often limited or nominal unless their lord faced direct attack.

1. **The transformation of military service into money:**
   a. Over time, mandatory military service was often replaced with a monetary payment called *scutage*.
   b. This system allowed the lord to use the funds to recruit knights willing to fight voluntarily or for compensation.
2. **Motivations of the knights:**
   a. Many knights joined wars to gain honor, rewards, or booty.
   b. Others were economically incentivized by payments from their lords.

In the context of feudalism, the king and lords used the hierarchical structure to summon armies. However, the system adapted to the needs of the time, transforming the traditional obligation of military service into a more flexible and monetized model. This system ensured a constant flow of combatants while keeping internal stability of the feudal lands.

MILITARY OBLIGATIONS AND REVOLUTIONS IN THE FEUDAL SYSTEM

In the feudal system, the relationship between vassals and knights was regulated by agreements that varied significantly. While knights had to provide military service to their lords, vassals could be exempted from this obligation. However, the last documented example of direct feudal conscription dates to 1210, when a king summoned vassals and knights for a war. **After that, all wars were fought with armies composed of hired and paid combatants**. This change allowed for maintaining operational armies for prolonged periods, surpassing the traditional limit of 40 days of feudal service.

From the 11th century, the European military area underwent a radical transformation:

- **The advent of armored knights:** Thanks to innovations like high-quality steel, stirrups, and resistant armor, knights became the dominant force on the battlefield. Their charge, combined with the power of the horse and the precision of the lance, could overwhelm entire infantry contingents.
- **Castles as symbols of power:** From simple wooden palisades, castles evolved into majestic stone structures, becoming the center of local military and administrative power.
- **High costs:** Equipping a knight and maintaining a castle required significant resources, contributing to the transformation of the feudal military system into an increasingly professional and money-based model.

THE CONCEPT OF THE FIEF

According to historians like Susan Reynolds, the fief was not simply a military or political system but a special form of property. The first document to clearly define the concept of a fief is the edict of Emperor Conrad II, issued in Milan in 1037-1038. This document, born to resolve a local conflict, became the prototype for the feudal system in Europe.

THE EDICT OF CONRAD II: THE FEUDAL MODEL, THE SPREAD OF FEUDALISM

The edict was issued in response to a revolt in Milan in 1037-1038, where knights subordinate to the captains demanded to maintain control of the lands they had received. The edict established fundamental principles that define the fief:

1. **Heritability:** The fief could be transmitted to heirs, ensuring stability and protection from arbitrary confiscations.
2. **Legal protection:** The lord could not remove the vassal or his heirs without valid cause, and any expropriation had to be preceded by a fair trial.
3. **Process of creation:** The fief was formally established through:
   a. **Investiture:** The official assignment of the fief to the vassal.
   b. **Assignment of the field:** The precise designation of the land.
   c. **Possession:** The effective delivery of the land to the vassal.
4. **Feudal justice:** Any dispute over the fief had to be resolved in the lord's court.

Although the edict was initially intended to resolve the Milanese rebellion, its principles quickly spread throughout Europe, becoming the model of the feudal system. In less than a century and a half, the concept of the fief had taken root across Europe, profoundly transforming political, social, and legal relations.

THE EVOLUTION OF THE FEUDAL SYSTEM

At the beginning of the 12th century, not all land in Europe was organized as fiefs. This system developed progressively. Initially revocable or temporary, fiefs evolved into hereditary property, passing to sons and eventually entire family lines.

THE INVESTITURE

Investiture formalized a vassal's right to a fief through a symbolic act before witnesses. Upon the death of a lord or vassal, investiture had to be renewed:

- **If the lord dies:** The vassal must request the investiture from the son or successor of the lord within a year and a month.

- **If the vassal dies:** The son of the vassal must present himself to the lord to obtain the investiture and confirm the hereditary rights over the fief.

The transmission of a fief does not occur automatically as with normal property. Upon the death of the vassal, the son does not directly inherit the fief but acquires the right to request it from the lord. This right must be exercised through a new investiture, which constitutes the fundamental element to establish the relationship between lord and vassal. Until the investiture occurs, the right to the fief remains suspended.

THE OATH OF FEALTY

Fealty represents the core of the feudal relationship. Through an oath, the vassal formally commits himself to the lord. This oath assumes different forms and implications, often determined by the specific context or the role of the vassal:

1. **Generic fealty:** The vassal promises not to harm the lord nor reveal confidential information. This oath is essential to establish a relationship of mutual trust.
2. **Military fealty:** In cases where the vassal is a knight or a member of the lord's family, the oath also includes the obligation of physical and military protection. This commitment can include both the direct defense of the lord and support in battle.
3. **Counsel and aid:** Some oaths require the vassal to participate in the lord's decisions, offering counsel in courts and military assistance when requested. This obligation, however, was not always present in all oaths.

THE CONTROVERSY OVER THE FORM OF THE OATH

Medieval jurists debated the form and content of fealty oaths. Bishop Fulbert of Chartres contributed by codifying the oath's obligations:

- **Negative obligations:** The vassal must not harm the lord nor hinder his actions.
- **Positive obligations:** The vassal must provide counsel and military support as requested.

THE *LIBRI FEUDORUM*

The letter of Fulbert and other provisions related to fiefs were subsequently collected and integrated into the *Libri Feudorum*. These texts became the standard reference for the regulation of the feudal system in Europe.

The *Libri Feudorum* represent a synthesis of feudal practices, transforming them into a codified legal system. Their influence extended well beyond the local context, defining the model of European feudalism and ensuring its consistency over time and space.

INVESTITURE, POSSESSION, AND DISPUTES OVER FIEFS

Investiture, the formal granting of a fief by the lord, was central to feudalism, but possession relied on more than investiture alone:

1. **The right of investiture:** Before the investiture, a vassal has only a "relative" right to the property: the right to be invested. This right does not confer automatic possession nor property but establishes a legal relationship that must be formalized by the lord.
2. **The role of possession:** In the feudal system, possession confers a significant advantage. Whoever is in possession of the fief has the possibility to avail themselves of oath witnesses to defend their right. This aspect applies to both the lord and the vassal, creating a dynamic in which actual possession becomes crucial in disputes.

THE OATH OF WITNESSES AND THE JUDGMENT OF PEERS

Two fundamental mechanisms regulate disputes over fiefs:

1. **Oath with witnesses:** If possession is contested, the holder can call 12 oath witnesses to support their position. These witnesses, chosen among "good friends," reinforce the legitimacy of the possession, making it more difficult for the opposing party to claim the fief.
2. **Judgment of peers:** Alternatively, the dispute can be resolved through the judgment of peers (*iudicium parium*). This method involves individuals of the same social rank (other vassals or knights) evaluating the case and deciding who has the right to possession. However, the decision does not follow fixed criteria, reflecting the flexible nature of the feudal system.

DUE PROCESS IN FEUDAL LAW

The feudal system introduces the concept of due process, ensuring that no one can be deprived of their fief without valid cause. This principle develops in two directions:

1. **Protection of possession:** A vassal in possession of the fief can retain it until the lord demonstrates, with witnesses or through the judgment of peers, a valid reason for dispossession.
2. **Loss of the fief for just cause:** In the *Libri Feudorum*, the reasons for which a fief can be lost are listed. These include serious violations of the oath of fealty or actions that harm the lord. However, even in these cases, the lord must follow a formal process to reclaim the fief.

THE LEGACY OF THE FEUDAL SYSTEM IN LAW

The concept of due process in the feudal system profoundly influenced constitutional law. The Magna Carta (1215) codifies the principle that no one can be deprived of their land without due process or the judgment of peers. This principle, originating in the feudal context, evolved over time to become a cornerstone of modern legal systems.

CONDITIONS FOR THE LOSS OF THE FIEF

According to the *Libri Feudorum*, specific behaviors and infractions lead to the loss of the fief. These obligations define the duties of the vassal towards the lord and reflect a detailed legal system designed to regulate feudal relations. Here are some of the main situations:

1. **Failure to fulfill duties in battle:**
    a. If the vassal abandons the lord on the battlefield, especially if the latter is dead or mortally wounded, he loses the fief.
    b. It is important to note that simply not responding to a call to arms does not result in the loss of the fief. However, desertion in battle is considered a serious violation.
2. **Personal infractions against the lord:**
    a. If the vassal seeks to have intimate relations with specific members of the lord's family, such as his wife, daughter, daughter-in-law, or sister, he loses the fief.
    b. This clause reflects an interest in protecting not only the lord's honor but also the stability of family relationships within the feudal system.
3. **Direct attacks on the lord:**
    a. If the vassal attacks the lord's castle while the lord or his family members are present, he loses the fief.
    b. If the vassal kills members of the lord's family, such as his brother or nephew, the fief is revoked.

INTERPRETATION OF THE OBLIGATIONS

These clauses reveal much about the nature of the feudal system:

- **Not a purely military system:** Contrary to what one might expect, the feudal system is not a simple mechanism to mobilize an army. Not all infractions related to failure of military service entail the loss of the fief. For example, a vassal who fights for the opposing side does not automatically lose his fief unless he commits specific actions against the lord.
- **Precise legal details:** The list of infractions is very detailed. Specifying the members of the lord's family with whom a vassal cannot have relations, for example, reflects a legal interest in preventing disputes and ambiguities.

THE ROLE OF LAWYERS IN THE FEUDAL SYSTEM

According to Susan Reynolds, the feudal system and its complexities are the direct result of the intervention of medieval lawyers. This assertion highlights some fundamental aspects:

1. **Creation of specific obligations:** Lawyers formalized feudal relationships, transforming them into a set of clearly defined and documented obligations. This ensured greater predictability and stability.
2. **Enforcement mechanisms:** The system incorporated legal tools, such as the lord's court, to resolve disputes and enforce the rules. The presence of "due process" protected the vassal from arbitrary abuses by the lord.
3. **Limitation of the lord's power:** The clauses regulating the loss of the fief serve to limit the lord's ability to arbitrarily remove a vassal. This balance of power is rooted in legal, not political, considerations.

THE FEUDAL SYSTEM AS A CONTRACT

Reynolds views feudalism as a contract, with clear terms enforced by arbitration in the lord's court.

On August 4, 1789, the French National Assembly decreed that it "completely destroyed feudalism." Merlin de Douai explained, in a report from the Feudal Committee to the National Assembly: "In destroying the feudal regime, you did not intend to strip the legitimate owners of fiefs of their goods, but you have changed the nature of this property: they have ceased to be fiefs and have become allodial."[1] A decree of March 15, 1790, established that payments previously due as part of feudal law were now "simple rents and land charges."

Even Alfred Cobban, one of the staunchest critics of traditional accounts of the French Revolution, **interpreted the Committee's action as an attempt to preserve "the lordly rights and duties by renaming them**." However, it is difficult to see what else the Committee could have done. In abolishing feudalism, it did not intend to launch a general persecution of the nobles or a modern-style agrarian reform program. "Feudalism" referred to certain rights over the land that were "feudal" and, therefore, oppressive. It happened that the rights that seemed most "feudal" were also the least economically significant.

HISTORY 20/09/2024

If we look at the evolution of cities and trade, the extent of the transformation in the 13th century is enormous.

As the merchants develop their commercial empires, they are also going to start creating their own system of courts. And you notice the first two documents on 46 have this form. Merchants needing capital are going to create the first collaborative companies called ***commenda***. The first one is interesting because it s made between two brothers, Stabile and Ansaldo. And they call it a *societas*, which is the Roman word for partnership.

A Genoese commenda (1163)

[Genoa,] September 29, 1163

Witnesses: Simone Bucuccio, Ogerio Peloso, Ribaldo di Sauro, and Genoardo Tasca. Stabile and Ansaldo Garranton have formed a societas in which, as they mutually declared, Stabile contributed £88 [Genoese] and Ansaldo £ 44. Ansaldo carries this societas, in order to put it to work, to Tunis or to wherever goes the ship in which he shall go--namely, [the ship] of Baldizzone Grasso and Girardo.

On his return [he will place the proceeds] in the power of Stabile or of his messenger for [the purpose of] division. After deducting the capital, they shall divide the profits in half. Done in the chapter house, September 29, 1163, eleventh indication. In addition, Stabile gave his permission to send that money to Genoa by whatever ship seems most convenient to him [to Ansaldo].

Look at how the capital is raised in the second document.

A Genoese commenda (1198)

Genoa, December 22, 1198

We, Embrone of Sozziglia and Master Alberto, acknowledge that we carry in accomandatio for the purpose of trading £ 142 Genoese to the part of Bonifacio and through or in Corsica and Sardinia; and from there we are to come [back]. And of this [sum], Genoese belong to you, Giordano Clerico; and £ 10 to you, Oberto Croce. And to you, Vassallo Rapallino, [belong] £ 10; and to you, Bosignore Torre, £ 10. And [belong] to Pietro Bonfante; and to you, Michele, tanner, [belong] £ 5; and to you, Giovanni del Pero, £ 5; and to Ara Dolce, £ 6; and to Ansaldo Mirto, £ 5; and to Martino, hemp-seller, £ 5; and to Ansaldo Fanti, £ 8; and to you, Lanfranco of Crosa, £ 20; and to Josbert, nephew of Charles of Besancon, £ 10. And £ 6 belong to me, Embrone; and £ 2 to me, Alberto. And all the pounds mentioned above are to be profitably employed and invested, and they are to draw by the pound.

If we look at the contract on page 48 an 49 we see a set up for a shop. By Francesco Maria Datini, a famous merchant from the city of Prato. The contract covers every detail you can think of. It involves travel, whether you have to borrow, whether you have to buy policies. What about hiring people to work in the shops? A very long document. It reminds me of the way contracts are drafted today, where you have a very long contract. You have a franchise, you operate McDonald' s or whatever, covering almost every detail that you can think of, the operations, so forth. Not a modern phenomenon. This shows how great importance was given to considering every possible eventuality, since large quantities of money were involved.

This is the legalistic society. Commercial ventures are being done according to the written contracts. On page 49 we see an insurance contract for a vessel from Palermo to Genoa, for the value of 200 gold florins. And they describe how it cannot change its route unless an act of God occurs so to speak. If part of it is lost, a proportion is owed, and the cost of the policy is of 28 florins.

The romans made contracts enforceable by having it notarized. Because with a **stipulatio** you can make anything enforceable. Roman law is rediscovered since it is compatible with medieval commerce.

Letters of credit (pages 50-51)

On pages 50-51 we have three letters of credit that can be examined.

In one of them, Guccio in Palermo is supposed to have funds with Bonanno. And he gives this letter to somebody. He says that Bonanno in Genova is supposed to pay the funds. And it turns out the funds aren't there.

Now I' m going to give you another example: a check book. This is on a bank in America where I have deposited money. And it says, pay to the order of... you have to write in your name. If I give it to you, you can sign it on the back - and you can sign it over to another person. And we' re still using it in America.

Imagine I want to have money. I'm Francesco Marco. And I want to have money in England. What do I do? The answer is I find an Italian who knows the bank in England and I deposit money with the Medici in Florence who already have money, gold, in England. And I give a letter, which my representative, an agent

in England, can give to the person who' s selling the gold and say, here, $10,000 in the gold, and you have this letter. This letter entitles you to go to agent to the Medici, to the Sienese, bank in England, and say, give me $10,000 florins.

What you develop is the **negotiable instrument** or the letter of **credit**, like you're seeing. I just instructed somebody I know in England to pay the money.

And we've **developed banking**. Because once the Medici and the Sienese banks have money, which everybody's given them, because at some point they'll want to pay for their order. And they can start loaning that gold to all sorts of people because they don't expect everybody to come at once to the Medici world with the cost of their money. This is banking. his is a **fractional reserve system**. Nobody had that in the ancient world. It enables a wonderful thing to occur. **Government debt**. It' s now possible for the kings of England to raise a huge amount of money from Italian bankers to possibly pay it back later. And the Italian bankers make money. And the money they' re loaning isn't exactly owned by them. It' s money put on deposit by other people for them. In the Roman Empire, when there was trouble with the barbarians, their emperors would start to do the shaving of currency to dilute its value. Now, **I'm a great believer that when there' s a social or economic need, people invent the necessary legal instruments**.

Gratian and the Foundations of Canon Law

Gratian, an influential figure in the development of canon law, compiled a significant collection of authoritative documents related to Christian teachings. This compilation became the foundational text for canon law, which was administered by church judges and courts under the authority of bishops, who themselves were subordinate to the Pope.

Oaths and Church Courts

One of the church courts' primary responsibilities was adjudicating matters related to oaths, given their divine origin. For example, if a feudal lord violated an oath, the matter could be brought before a church court. This was because oaths were seen as binding under God, and the church was charged with determining whether such an act constituted a sin.

If a dispute arose over an oath, such as a claim that it was not violated, the church court would decide. Its judgment could then be used to support a party's position in other jurisdictions, such as municipal or feudal courts. This interplay of jurisdictions was a recurring challenge throughout the Middle Ages, as cases often moved between church and secular courts, depending on the nature of the issue and the desired outcome.

The Investiture Controversy and Jurisdictional Conflicts

A notable example of the church’s assertion of jurisdiction was the Investiture Controversy. During the early medieval period, the papacy's authority outside Rome was limited, often influenced by powerful Italian families. However, around the year 1000, reformers within the Church sought to extend papal power and address issues such as clergy marriage, concubinage, and the independence of priests and bishops from secular nobles.

This reform movement led to a confrontation over the right to appoint bishops. The Pope claimed sole authority to appoint bishops, relegating emperors and kings to a secondary role in this process. This claim was coupled with efforts to expand the church courts' jurisdiction. For example, beginning in the 11th century, the Church argued that cases involving clergy, such as the trial of a priest for a serious crime, should be heard exclusively in ecclesiastical courts.

The Broader Implications of Jurisdictional Disputes

The overlap and competition between secular and ecclesiastical jurisdictions created significant challenges throughout the medieval period. For instance, the church's assertion that only ecclesiastical courts could try cases involving clergy often clashed with secular authorities, who claimed jurisdiction over all criminal

cases, including those involving priests. This tension underscored broader struggles for authority between the Church and the state during this era.

The Investiture Controversy serves as a prominent example of these conflicts, reflecting broader narratives of papal reform and its influence on medieval society. This period marked a critical evolution in the Church's authority, its legal framework, and its role in shaping both religious and secular governance.

Jurisdictional Conflicts and Factional Rivalries

The emperor held no jurisdiction over priests, even in cases of serious crimes such as murder. This limitation was a key factor in the power struggles of the time. Many German counts and barons sided with the pope, as a weaker emperor increased their own influence. Church officials also supported the pope's authority, and within three years, the emperor faced defeat.

The political conflict divided factions: the **Ghibellines**, who supported the empire, and the **Guelphs**, who supported the pope. Both groups were also invested in protecting the interests of the newly emerging cities.

Jurisdictional disputes added to the complexity. Three courts could weigh in on whether an action violated an oath to a lord:

1. **The Lord's Court**, judged by vassals or oath-helpers.
2. **The Municipal Court**, like that of Milan, which applied Roman law.
3. **The Church Court**, which interpreted oaths as matters of divine law.

These overlapping authorities created a tangled and contentious legal system, with cases often moving between courts. This complexity reflected the broader struggles for power during the Middle Ages.

The Influence of Bologna and Roman Law

In Bologna, a significant transformation of Roman law occurred. Many older Roman laws were discarded, and a law school was established, attracting students from various regions. Graduates of this school became judges, first in Italy, then in southern France, and eventually in Germany. These judges applied the law they were trained in, which was based on the formal texts of Roman law, particularly those compiled by Justinian.

In Germany, Roman law was justified as the law of the Roman Empire, inherited from Justinian. In France, however, Roman law was applied under the principle of reception—it was treated as customary law received through tradition. Despite regional variations, Roman law spread widely across Europe, coexisting with other legal systems such as feudal law, merchant law, and local customary laws.

Key Concepts of Roman Law

Central to Roman law were doctrines like *vindicatio*, which granted the property owner the right to reclaim their property, regardless of how it was acquired by another party. This principle allowed the owner to retrieve property they had never physically possessed. Additionally, concepts like *usufructus*—the right to use and benefit from property without owning it—provided the basis for *in rem* actions, which were legal claims based on the property itself rather than contractual obligations.

In feudal law, similar principles applied. A vassal who lacked possession of a fief could sue to reclaim it, much like an owner suing to retrieve personal property under Roman law. This approach underlined the adaptability of Roman legal principles in addressing feudal and proprietary disputes.

Accursius and Medieval Legal Thought

Accursius, a prominent medieval jurist, exemplifies the legal reasoning of the period. Medieval jurists adhered strictly to authoritative texts, particularly the Justinian Code. Every legal argument or conclusion had to be backed by textual evidence, reflecting a deep reliance on precedent and formal authority.

Accursius's analysis addressed whether a vassal holding a fief could have an *in rem* action under Roman law. His answer drew from Roman legal precedents involving non-owners who were granted such rights. For instance:

1. **Perpetual Leaseholders**: Individuals who leased land in perpetuity from a city were granted *in rem* actions, as their holdings were considered akin to ownership. This was particularly relevant for Roman nobles, whose familial leases required legal protection.
2. **Recognition of Non-Owners**: Roman law acknowledged the practical necessity of granting *in rem* actions to certain individuals who lacked outright ownership but maintained enduring ties to the property.

By finding these parallels, Accursius demonstrated the compatibility of Roman legal principles with feudal contexts, thereby bridging the gap between ancient law and medieval legal systems. This method of reasoning, grounded in textual evidence, highlights the distinctive approach of medieval jurists.

And what are the glosses? We'll see a lot of glosses later. But the characteristic form of legal literature in the medieval courts is called a **gloss** remember. And what it looks like, we'll see some examples.

The Development of Dominium Utilis and Actio Utilis
Medieval jurists, such as Accursius, played a pivotal role in adapting Roman legal principles to address the needs of feudal society. A key innovation was the division of **dominium** into two types:

1. **Dominium Directum**: The ultimate ownership held by a lord, enforceable through the *actio directa*.
2. **Dominium Utilis**: The beneficial ownership held by a tenant or vassal, protected through the *actio utilis*.

This framework allowed vassals to defend their rights to land, even in the absence of full ownership. As Accursius demonstrated, a vassal could sue to recover land based on precedents like those found in the **Libri Feodorum**, a legal text foundational to feudal law. By constructing arguments grounded in Roman law, such as perpetual leases granted by cities, Accursius justified extending rights through the *actio utilis*. This approach exemplifies how medieval jurists adapted classical legal principles to meet contemporary societal demands.

The Scholastic Approach to Legal Texts

Accursius adhered to the scholastic method, which sought to reconcile conflicting legal texts through logical consistency. Central to this method was the decontextualization of Roman law. Medieval jurists often took passages from Justinian's Digest or other sources, removed them from their original contexts, and synthesized them into a coherent system. As Accursius argued, the validity of legal statements was not tied to historical context but rather to their logical integration into a broader framework.

For instance, Accursius approached *dominium utilis* by combining texts centuries apart and reconciling them to construct a solution applicable to his era. The focus was on ensuring that tenants' rights to reclaim land aligned with feudal structures, even if the Romans had not envisioned such circumstances.

Humanist Critique and the Rise of Philology
This scholastic approach, while innovative, came under scrutiny during the Renaissance. Humanists, guided by the discipline of **philology**, challenged the disregard for historical context and authorial intent. They argued that understanding the original purposes, cultural settings, and intentions behind legal texts was essential. This represented a significant departure from the medieval method, which prioritized logical consistency over historical fidelity.

Despite humanist critiques, the legal structures shaped by Accursius and his peers endured for centuries. The distinctions between *dominium directum* and *dominium utilis* remained central to European legal systems until the French Revolution, which abolished feudal legal frameworks altogether.

The Abolition of Feudalism and Its Consequences

The French Revolutionaries, in their quest to eliminate feudalism, believed that the system was not only economically outdated but also morally wrong, as it contradicted the concept of equality among human beings. They viewed feudalism as a social and economic structure rooted in superstition and barbarism, a system that allowed nobles to seize land from peasants. Their goal was to abolish this social hierarchy, believing it to be incompatible with the principles of equality and justice.

However, the abolition of feudalism did not necessarily result in the redistribution of land or a reduction in rents. Instead, the focus was on eliminating the specific form of feudal landholding. The revolutionaries did not seek to fundamentally alter the broader social or economic system. As such, the real effects of abolishing feudalism were limited, as rents remained high and the general economic system largely continued as before.

Social and Economic Structures in the Villages

In the villages, the situation was complex. By the 12th century in France, it was generally assumed that if a peasant owned land, it was considered the property of a noble. This distinction between peasants and nobles was a critical element of the feudal system.

The villages were largely self-sustaining and operated under informal laws that were not written down but were understood within the community. This system had much in common with the older traditions of barbarian laws, where villagers depended on strong leaders for protection in exchange for service. This mutual relationship between the leader and the villagers was a key feature of social organization during the early medieval period.

As society evolved, the roles of individuals within these communities changed. Not everyone could be a warrior, and thus some individuals became knights, while others did not. The religious classes, for example, were often under the protection of feudal lords, further reinforcing the complex social structure that existed in the villages.

Legal Codification and the Rise of Written Law

Around the 11th century, the process of legal codification began, leading to the emergence of written laws. By the 13th century, England had developed legal texts that included instructions on how to conduct courts. This marked the beginning of a trend toward the formalization of legal practices in feudal society.

Written laws helped solidify the governance structures in place, particularly in relation to property and land ownership. These legal developments were a significant shift from earlier, informal systems of governance and played a crucial role in the evolution of European legal systems.

<u>Analysis of the Village Court System and Its Procedures</u>

excerpt from the treatise De Placitis et Curiis Tenendis (How to Hold Pleas and Courts), found on pages 42-45 of the soucrces

The Role of the Steward and Bailiff

The process begins with the steward of the lord, Sir N, writing a letter to the bailiffs, notifying them of an upcoming court session. The bailiffs, acting as the lord's representatives in the village, are responsible for ensuring the attendance of all relevant parties, including the peasants. On the appointed day, all villagers are expected to attend court at the manor or castle, with the bailiff ensuring that the court's business is conducted efficiently. This setup demonstrates the authority the lord held over both the legal and social aspects of village life.

Franchise and Local Disputes

One of the key issues discussed in the court is the enforcement of the *franchise*, which refers to the rights of the village in relation to neighboring villages. Specifically, it is noted that the sergeant of Sea was preventing villagers from fishing in the Cherwell, a right that had been historically upheld. The court orders that the

bailiff, along with the villagers, should ensure that the fishing rights are respected and that any breaches are addressed. The involvement of the sergeant, a figure akin to a local constable, highlights the blend of legal and military authority that characterized medieval governance.

Regulation of Trade: Assizes of Bread and Beer

Another important aspect of the court's role is the enforcement of market regulations, specifically the *assizes* of bread and beer. These regulations were set by the king to control prices and ensure fairness in local markets. The source mentions that the price of bread and beer was not being adhered to, and as a result, the court imposed fines on brewers, such as W. Hunter, whose recent brew did not meet the established standards. Additionally, the court addressed broader complaints regarding the mismanagement of the assize, responding by issuing a new proclamation to regulate prices more effectively across the villages and towns. This reflects the court's involvement in not only resolving personal disputes but also maintaining economic order.

Procedural Law and the Role of Oaths

The court's procedures, as described, reflect a legal system that relies heavily on community participation and the swearing of oaths. The text indicates that when one party brings a case before the court, the defendant must respond by denying or defending the accusation. There is no judge to interpret the law in a modern sense; instead, the court relies on the presentation of oaths and the support of witnesses. The procedural nature of this system meant that decisions could be made quickly—sometimes within just a few minutes—based on the testimony of oath helpers and the defense's ability to dispute the plaintiff's claim.

This lack of judicial discretion presents both advantages and drawbacks. On one hand, the absence of a judge ensures that the procedure remains straightforward and devoid of personal bias. On the other hand, it means that the outcome could be influenced by social dynamics, such as the number of friends a person could gather to swear on their behalf. In smaller villages, this could lead to unfair outcomes if the defendant had fewer supporters or was less well-liked.

Substantive Law vs. Procedural Law

A critical aspect of the medieval court system, as highlighted in the source, is the blending of procedural and substantive law. While the system was procedural in nature—decisions being based on the formal process of swearing oaths and gathering witnesses—it also had substantive elements, such as the specific laws governing fishing rights and market prices. However, the text argues that in practice, procedural law often took precedence. There was no clear judge to enforce substantive law, and much of the legal understanding was based on local customs and mutual agreements among villagers.

This dynamic underscores the informal nature of the medieval legal system, where the boundaries between what constituted law and what constituted fact could be fluid. The villagers themselves played an active role in determining what was considered "right" through community discussions and the informal settlement of disputes.

Efficiency of the Court System

The court's procedures were highly efficient, allowing for quick resolutions of disputes. According to the source, a case could be settled in a matter of minutes, particularly when parties presented their cases clearly and supported them with the appropriate number of oath helpers. The speed of these proceedings, however, came at the cost of detailed legal reasoning and the opportunity for a more thorough investigation into the facts of each case. This efficiency contrasts sharply with modern legal systems, where even small claims can take years to resolve.

In conclusion, the medieval village court system, as described in the source, was a pragmatic solution to managing disputes in a small, tightly-knit community. It was a system that relied on procedural rules, community involvement, and swift decision-making. While this approach had its limitations, it allowed for the effective regulation of both personal disputes and economic practices, such as fishing rights and market

prices. The court's ability to function without a formal judge or written law highlights the unique nature of medieval legal systems and their reliance on local customs and social cohesion.

Analysis of Case Two: The Fish Pond Dispute

In this case, the plaintiff, R. of N., complains that C. and his son trespassed on his land and took fish from his fishpond. The fish were valued at 40 shillings or more, but R. alleges that the damage caused was far greater, claiming the total damage was worth 100 shillings. This claim goes beyond the value of the fish itself, with the plaintiff also arguing that the shame caused by the theft was worth an additional three marks (approximately 40 shillings). This reflects how damage and shame are considered in medieval legal disputes.

The Value of Damages: Fish vs. Shame

The plaintiff's argument raises an interesting point about how damages are assessed. While the value of the stolen fish is clear, the damage to R.'s reputation or honor (shame) is harder to quantify. Medieval legal systems often involved assigning financial value to both material loss and non-material harm, such as reputation or dignity. The claim of 100 shillings in damages suggests that the plaintiff is not just seeking compensation for the fish but also asserting that his personal dignity or property rights were violated. The mention of "shame" as a form of damage is significant—it highlights how seriously personal honor was treated in these legal systems. The claim of 'shame' in medieval law can be likened to the Roman legal concept of iniuria, which was a violation of one's personal dignity or rights. In Roman law, iniuria was considered both a personal wrong and an offense against one's reputation, much like the 'damage and shame' claimed in this case. The plaintiff's demand for a large sum to compensate for 'shame' reflects a broader tradition of valuing personal honor in legal disputes, much as iniuria would have been treated in Roman times.

The Role of Oath Helpers in Determining the Value of Claims

The process of determining the legitimacy of such claims is left to the oath helpers, a key element of medieval procedural law. The plaintiff's demand for 100 shillings may be questioned by the defense, and the oath helpers will have to decide whether the amount is appropriate or inflated. This reliance on community members to provide testimony and adjudicate the claim instead of a single judge creates a system where social standing and relationships could heavily influence the outcome.

The Hayward Case: The Importance of Precision in Legal Claims

In another case, Alice, the widow of R., complains that her neighbor, E., allowed his pigs to damage her garden. The pigs rooted up her beans and cabbages, causing damage worth 2 shillings and shame valued at 12 pence. Alice demands that amends be made. This case highlights an important aspect of medieval legal proceedings: the precision with which claims must be presented.

In this instance, the defendant, E., denied the charge of damage but did not respond with the full legal language required to dispute the damage and the associated shame. His failure to properly deny the terms of the complaint resulted in a judgment against him, including a fine for insufficient denial. This practice reflects the strict formalism of medieval law, where failure to use precise legal language could result in losing a case.

The Roman Law Influence: Precision and the Archaic Procedure

The necessity of precise language in these legal proceedings calls to mind the influence of ancient Roman law, specifically the *Archaic Procedure*. In Roman law, if a claim was made in an imprecise manner (for instance, if the plaintiff did not specify the type of injury), the case could be dismissed outright. This tradition seems to be echoed in the medieval system described in the source, where exact wording is crucial to the success of a claim. The text compares this legal requirement to ancient Roman law, emphasizing that without exact terminology, the claim could fail, even if the defendant was clearly at fault.

In conclusion, the cases analyzed demonstrate how medieval legal systems, though simple in procedure, required great attention to detail and precision in the presentation of claims. The cases of stolen fish and damaged crops highlight the complex relationship between material damage and personal honor, and the need for community participation in legal decisions. The influence of Roman legal traditions, particularly

the emphasis on precise language and formal procedures, underscores the enduring legacy of ancient legal systems on medieval law.

23 September 2024

Pages 52-53: Cases Decided at the Fair Court of St. Ives in the Late 13th Century

A fair court is a special type of court with jurisdiction over merchants and commercial disputes. It is granted authority by the king, who designates a town or area where the fair court can be held. For example, St. Ives might hold such a court, or the town of Bristol might have a similar court, or act as a "view" to another fair court. **The court is responsible for ensuring fairness**, with jurisdiction extending only within the boundaries of the fair. Merchants who organize the fair appoint a marshal, who oversees the fair's activities and marks its boundaries. This is done by setting up poles or markers, and everything inside those poles is considered under the jurisdiction of the fair court.

Everyone is aware of whether they are inside or outside the court's jurisdiction.

At these fairs, merchants set up booths, display their goods, and engage in trading, often entering into contracts. However, disputes also arise, and merchants often sue each other in the fair court. A merchant may establish jurisdiction over a dispute by attaching goods involved in the dispute, thereby preventing the other party from selling or disposing of them until the case is resolved.

Four cases from the St. Ives fair court illustrate how this system worked:

The First Case: Richard claims that he has a document under seal from Allen, confirming the sale of two casks of wine. The document under seal is a written promise, legally binding, used both by merchants and lords. In this case, when Richard shows the sealed document to Allen, Allen acknowledges that he cannot win the case and backs down. This document is a type of covenant, where the sealed writing serves as proof of the agreement.

The Second Case: A broker bought canvas from a merchant named English, on behalf of Richard and Robert. They paid him a "God's penny" — a small token that, like a handshake, made the agreement binding. When English later claims he sold the canvas to someone else, Richard and Robert argue that he broke the contract. Here, the court uses an inquest (a fact-finding process) where trusted merchants are appointed to determine the facts of the case.

Inquest: This refers to an investigation where trusted individuals are sworn to gather facts. The use of inquests in legal matters became a prominent part of English law, helping to resolve disputes without relying entirely on formal legal training.

The Third Case: Martin and Carter entered into a joint venture to buy and sell coal, sharing the profits and losses. Carter buys coal but sells it at a 12-shilling loss. He demands that Martin pay his share of the loss. Martin denies responsibility, but the court decides he must pay 6 shillings — his share of the loss. Here, the accord comes into play, where Martin agrees to settle the dispute, even if it means giving up his lawsuit.

The Fourth Case: John accuses Robert of defaming him, calling him a false merchant, which allegedly caused him to lose a potential deal. John claims he lost 6 shillings and 8 pence due to this defamation. Robert denies the accusation, and John is ordered to pay 12 pence for bringing a false claim.

Key Legal Concepts:

- Covenants and Documents Under Seal: The use of written documents, sealed by the parties, to make agreements legally binding was common among merchants and lords. These documents could include promises of payment or the transfer of goods, and if one party did not honor their promise, the court could enforce it.

- Inquest: A process where a group of trusted individuals is appointed to investigate facts in a case. This was used in both commercial and criminal disputes, showing the growing role of fact-finding in English law.
- Accord and Satisfaction: When one party agrees to settle a dispute, they may enter into an accord — an agreement to end the legal action, even if they do not fully agree with the outcome.
- Commercial Defamation: Defamation cases in a commercial context, where a merchant's reputation could directly affect their ability to conduct business.
- Damages: In these cases, merchants often sought compensation for losses caused breaches of contract. For instance, if a merchant failed to fulfill their contract, they could seek damages not only for the goods themselves but also for any potential profits they lost.

Damages in Merchant Disputes:

In these cases, the concept of damages is crucial. Merchants understood that if they were wronged, they needed to be compensated for both the immediate loss (like unpaid money or goods) and for the potential future profits they lost due to the breach.

In each case, some kind of damage is paid, here are some of the most interesting from a legal perspective:

- In the first case damages are claimed for the inconvenience and additional costs incurred in going to court.
- In the second case damages are awarded for lost profit
- In the third case, the inquest adjusted the amount owed, determining that only 6 shillings were due.
- In the fourth case, the court determined John was entitled to damages for the lost opportunity to make a deal.

The Role of the King and the Court System:

The king played a central role in the administration of justice. He delegated authority to local courts, such as those held at fairs, and could call for inquests or appoint officials to enforce judgments. The king also had control over the legal system, issuing writs (formal written orders) to resolve disputes over property and contracts. These writs were vital in maintaining order and ensuring that justice was served in an efficient manner, especially in feudal England.

LEZIONE 26-9

The lesson provides a comprehensive historical overview of the evolution of the English common law legal system, particularly focusing on the different types of trials and legal remedies available from the Middle Ages to the 19th century. This evolution reflects the changing nature of legal risks, the development of contract law, and the gradual shift from primitive methods of dispute resolution to more sophisticated legal concepts.

EARLY RISKS AND REMEDIES

In the early stages of the English legal system, the primary methods of resolving disputes were trial by combat and wagered law.

Trial by combat: The Burgundian Laws (c. 45) decree that if a person denies an accusation and refuses to take an oath but suggests that the truth can be proven through combat, the case may be settled by trial by combat. If the accused person does not back down, one of their witnesses who previously offered to swear an oath must fight in their place. If the combatant is defeated, all witnesses who agreed to take the oath must pay a fine of 300 solidi. If the accuser (who refused the oath) is killed in combat, the victorious party is entitled to nine times the amount of the debt in damages from the property of the deceased. This law aims to discourage perjury and promote truth.

These methods were eventually abolished in the 19th century, but they played a significant role in the legal landscape of the Middle Ages. The early legal risks included:

- **Novel Disseisin**: The "assize of novel disseizin" was a legal remedy, a writ, available in English courts to someone who had been recently dispossessed of land. If a tenant lost possession of their land, they could seek the king's court to help them regain it. This writ did not claim ownership (dominium), but instead focused on recovering the land from the current occupant, with the assumption that the dispossession was unjust. It was specifically used for cases where the dispossession occurred recently, aiming to restore possession rather than adjudicate ownership rights. If a person inherited land but someone else occupied it, they could bring the "assize of mort d'ancestor," claiming that their ancestor had died and seized the land.

- **Writ of Right**: This writ allowed individuals to claim land based on ancestral possession. It was a fundamental tool for resolving disputes over land ownership. A party would allege that he was claiming the land through someone who had been seized of it before the party now occupying the land or anyone through whom that party could claim the land.

- **Trover**: it was a common law action used to recover damages for the unlawful taking or conversion of personal property. It was brought when someone had wrongfully taken or retained property that belonged to another, but not by stealing it directly. The action allowed the original owner to claim compensation for the value of the property that had been converted to the defendant's use. Trover arose when someone found or took possession of goods that belonged to someone else and either refused to return them or used them in a way that deprived the owner of their use. Unlike **detinue**, which was used to recover specific goods that were wrongfully withheld, trover focused on the value of the goods, treating it as a form of conversion or misappropriation. *Trover* eventually evolved into the modern action for **conversion**, where a person can seek damages when their property is wrongfully taken or used by another.

EVOLUTION OF LEGAL CONCEPTS

As the legal system evolved, it began to address more complex commercial and personal issues. Over time, these writs fell out of use, replaced by writs of entry and, later, the action of ejectment, which allowed claimants to assert rights without needing to prove ownership.

Writs like debt and *detinue* enabled claimants to recover money or goods owed to them, and trial was conducted through oath-helpers. These writs enforced contracts when one party had already performed but promises not made under seal could only be enforced through a writ of covenant.

This included the development of concepts like:

- **Assault and Battery**: *I de S et ux. v. W de S, At the Assizes (1348) (pag.56)* → In the case described, a claimant brought a writ of trespass for assault and battery. The writ required the claimant to allege that the defendant assaulted and battered them "by force and arms against the peace of the king." The defendant denied striking the claimant, but the court allowed the writ to proceed. This case led to the legal distinction between "assault" and "battery," which persists today. **Battery** is defined as physical contact with the body of another person without consent, leading to harm or injury. In the case, if the defendant had made physical contact with the claimant, it would be considered battery. **Assault**, on the other hand, occurs when a person fears an imminent battery, but no contact has yet been made. Initially, assault was defined as an act that made a person reasonably fear they would be the victim of a battery, while battery involved unauthorized physical contact. The professor then provides an example from the 14th century where a man got drunk, went to an inn, and the landlady swung an axe at him but missed. The court ruled that swinging the axe constituted an assault, even though no contact was made, due to the fear established in the woman.

- **Trespass**: it is a legal action referred to a wrongful or unlawful act committed against someone's person, property, or land. It was originally a broad legal term used to describe a variety of civil wrongs, but over time it became more specific in its applications.

Trespass can be divided into two main categories:
-**Trespass to the Person**: This involves direct harm or threat of harm to an individual. It included actions such as assault, battery, false imprisonment, and intentional infliction of emotional distress. For example, if someone physically attacked another person, this would constitute trespass to the person.
-**Trespass to Land**: This occurs when someone unlawfully enters or interferes with another person's land or property. This could involve physical entry without permission or causing harm to the land (like damaging it).
In both cases, trespass could result in the defendant being liable for damages, or in the case of trespass to land, even for an injunction to stop the wrongful conduct. Unlike **trover**, which dealt with the unlawful taking of personal property, trespass focused on immediate harm or intrusion, whether physical or on property.

Trespass can be better understood focussing on this passage (pages 43-45): The case involves several complaints addressed by a medieval court, where **trespass** was used to resolve various wrongs:

1. **Alice, Widow of R. N.**: Alice complained that her neighbor's pigs entered her garden and damaged her crops, including beans and cabbages. She sought compensation for the harm caused. The court recognized this as a **trespass to land**, where someone unlawfully enters and damages another's property. Alice was allowed to seek redress, and her neighbor was ordered to make amends for the damage to her garden.

2. **N. vs. R.**: N. accused R. of entering his house at night with two serfs, causing a disturbance, and physically assaulting him. N. claimed that the assault caused him both physical harm and public shame. This was a case of **trespass to the person** (assault). R. denied the accusation, and the court ordered him to "wage his law," which was a process where he had to prove his innocence by taking an oath with support from witnesses. The case was adjourned until R. could make his defense.

3. **R. vs. C.**: R. complained that C. entered his fishpond at night and unlawfully took fish, causing damage. This was also a **trespass to property**, where C. interfered with R.'s rightful possession of the fish. R. was granted the right to seek damages, and C. was summoned to defend himself.

4. **The Hayward's Complaint**: The hayward (a servant in charge of managing the lord's land) complained that a person had unlawfully grazed animals on his lord's meadow, causing damage. The person denied the accusation, but the hayward had witnesses to support his claim. The court found the defendant's denial insufficient, as it lacked proper defense. The defendant was fined for failing to justify his actions.

In each case, **trespass** was the legal action used to address wrongful interference with a person's property or person. The court used procedures like "waging law" (to defend one's innocence through an oath) and summoned witnesses to determine the outcome. Ultimately, the court sought to ensure that those who caused harm or violated others' rights were held accountable, providing a legal remedy for the injured parties.

CONTRACT LAW

We then discuss the importance of contracts and promises in the legal system. Initially, contracts could only be enforced if they were under seal, meaning they had to be written and sealed with wax. However, the concept of "consideration" became fundamental for contract enforcement.

Consideration meant that there had to be a bargain or some other good reason for the promise to be enforceable. This allowed for promises to be enforced even if they were not under seal, as long as there was some form of consideration. As time progressed, especially in the 19th century, English law began to impose limits on the enforcement of promises. It became clear that not all promises could be enforced, as people often made promises without any formal or tangible exchange. In response, the law began to emphasize that for a promise to be legally enforceable, there needed to be consideration—a bargain or exchange of value between the parties involved.

This made the contract enforceable only when there was a concrete exchange, such as the sale of goods or services. Consideration became essential in distinguishing enforceable contracts from mere social promises or casual commitments that lacked a legal basis. The 19th century legal reformers, aiming to create a more rational and organized system, focused on the idea that a contract required a bargain, ensuring that there was a mutual exchange for promises to be legally binding.
This shift towards consideration was also influenced by Roman law principles and the development of natural law during the medieval and early modern periods, which suggested that promises should be enforced only if there was a mutual exchange or agreement. Thus, consideration gradually became a cornerstone of English contract law, shaping how contracts were enforced. By the 19th century, the common law solidified this principle, and it became a key element in distinguishing legally binding contracts from unenforceable promises.

Rationalization in the 19th Century

In the 19th century, the English legal system began to rationalize and adopt a structure more similar to civil law. This included:

- **Distinguishing Intentional Torts and Negligence**: Intentional torts required intentional actions, while negligence involved a failure to exercise reasonable care. This distinction helped clarify the different types of legal wrongs and the appropriate remedies for each. For much of history, English courts had difficulty distinguishing between these two concepts. Courts often handled cases where harm was caused by accident, and it wasn't clear whether the defendant should be held liable based on intent or carelessness. In one example, a person accidentally shot someone, and the courts did not know whether to treat it as a case of intentional harm or negligence. Over time, however, intentional torts and negligence became clearly defined legal categories. The shift occurred in the 19th century when English law began to systematically separate intentional torts (where harm is deliberate) from negligence (where harm is the result of carelessness or failure to act responsibly). This distinction allowed courts to develop clearer rules for liability, based on the defendant's actions and intent. The distinction between intentional torts and negligence became an essential part of the modern legal system, influencing how cases involving harm and liability are judged today.
- **Reclassification of Writs**: The legal system reclassified writs to create a more organized and rational structure. This led to the modern concepts of contract law and tort law, making the legal system more coherent and easier to navigate.

Differences Between English and American Legal Systems

Some of the key differences between the English and American legal systems, particularly regarding trials, are the following:

- **Jury Trials**: In the United States, jury trials are common, and the jury is responsible for determining the facts of the case. This requires both sides to present all aspects of their case to the jury. In contrast, the English system relies more on judges to determine the facts and apply the law.
- **Discovery Procedure**: The American legal system includes a pre-trial discovery procedure where parties can depose witnesses and request documents. This can be very costly and time-consuming, but it helps ensure that both sides have access to all relevant information before the trial begins.

Expert Witnesses: In the United States, expert witnesses play a significant role in trials, especially in complex cases like product liability or medical malpractice. These experts are often cross-examined extensively to test the validity of their testimony.

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<u>Roman canonical procedure</u>:

Roman substantive **law persisted**, but the **procedural methods** of the early Roman Empire became **less understood** and were eventually replaced.

Starting in the **11th century**, there was a revival of Roman law. Legal scholars and courts creatively reinterpreted Roman sources, leading to the development of a procedure called the "**order of the inquirius**" standing for **inquiry,** later known as the **Roman canonical procedure**. This procedure was shaped significantly by **canon law courts** and spread across Europe (Italy, France, Germany), becoming a cornerstone of legal practice for centuries.

Abolition of Ordeals:

In 1215 **Ordeals** (trial by **fire** or **water**) were abolished following a decree from the **Fourth Lateran Council**, partly due to theological considerations (avoiding "testing" God) and a growing preference for **rational legal procedures** over trials by ordeal or combat and because they weren't used in the Old Testament. **Priests** were **prohibited** from **participating** in ordeals, as it was seen as "putting God to the test," which is forbidden in Christian doctrine.

The shift from ordeals to structured procedures marks the birth of rationality in law, that introduced **standardized methods** to replace arbitrary and violent means of dispute resolution, laying the foundation for modern legal systems. Manuals from the early 13th century, like the one mentioned, guided judges and lawyers in these practices.

13th-Century Legal Procedures:

Process of suing someone in the 13th century, under the evolving legal norms:

1. A **plaintiff** files a **complaint** in the court where the defendant resides, as the defendant has the right to be tried in their local court. The court issues a **summons** requiring the defendant to respond. (The defendant may delay proceedings by presenting valid excuses, but persistent absence leads to a judgment in the defendant's absence;
2. There is the presentation of **exceptions** (defenses) and before the trial begins (at the start of the case); failing to do so implies consent to the court's jurisdiction;
3. **Calumny Oath** were both parties swear they genuinely believe in the validity of their **claims** or **defenses**. This oath ensures sincerity and reduces frivolous litigation;
4. **Formulation of Positions** where the **plaintiff's** lawyer outlines specific **claims** or "**positions**" they intend to prove (e.g., ownership of a horse, a loan given to the defendant). The defendant's lawyer must acknowledge or deny these claims, stating whether they are true or false. The judge guides this process to ensure clarity and completeness;
5. **Confession or Denial**: if the **defendant** confesses to the claims, the trial proceeds to determine the **plaintiff's legal entitlement**. If the defendant denies the claims, a trial is held to resolve the **factual disputes**.

Witness Requirements and Testimony:

- Judge's Role in **Interrogation**: judges were required to question witnesses diligently to uncover the truth. Interrogation involved examining: the time, place, and context of the event, what was seen, heard, known, or believed (differentiating between rumor and certainty). The goal was to thoroughly document the testimony

and evaluate its credibility. Judges' aim is to determine the credibility of testimony based on its alignment with the **transaction's nature** and the **witness's sincerity**.

- **Number of Witnesses**: seven witnesses for a valid will. Witnesses were essential for establishing facts and truth. But you needed to be careful with eventual contradictions

- Between witnesses' statements (ex: one says "Martinez did it," another says "Peter did it").Judges employed a logical process to identify inconsistencies, rather than relying solely on the witness's reputation for honesty.

Legal experts like **Lord Otso** advised on the scope of questioning: "witnesses should not be questioned on irrelevant or overly detailed matters (e.g.: whether the day was clear or cloudy, or the exact date and time) because excessive questioning aimed at trapping the witness in contradictions was discouraged unless there was a reason for suspicion.

Similarities were drawn with the **modern American courtroom practices**, where lawyers often use detailed questioning to test a witness's memory and consistency.

Witnesses are required to testify **only about** what **they have personally seen**, heard, or experienced, they must provide testimony based on direct observation. Challenges arise if a witness cannot positively identify a person or event.

Testimony based on ***second-hand information*** (hearsay) is generally **invalid** unless certain exceptions apply, for example, a witness can report that someone made a statement if the statement itself is relevant, not its truth.

Resolving conflicting testimony:

If the witness's testimonies are in conflict judges attempt to reconcile contradictions by examining the **circumstances,** if irreconcilable, judges rely on their judgment, considering factors like sincerity and alignment with the transaction's nature.

The hierarchical nature of society influenced rules that the testimony from free individuals was given ***more weight*** than from others. Judges followed **societal norms** in evaluating the reliability of witnesses.

So higher weight was given to testimony from individuals with perceived higher status or reliability. The final decision combined **subjective judgment** and adherence to these hierarchical rules.

More credit was given to:

- **Free-born** individuals over freed slaves;
- **Older individuals** over younger ones;
- **Nobles** over non-nobles;
- Men over women;
- **Wealthy** individuals over paupers;
- **Neutral parties** over those with personal stakes (friends or enemies);
- Truthful and faultless individuals over those with reputations for dishonesty or licentiousness;

Judges followed a **systematic process**:

1. Identify contradictions in testimonies (a **logical assessment)**.
2. Evaluate the relative **credibility of witnesses** based on societal and individual factors.
3. **Resolve conflicts** using judgment and rules.

Written documents held **significant weight** in the evidentiary process because a single document was equivalent to the testimony of two witnesses. Documents were subject to scrutiny, and conflicting witness testimonies could override them if compelling. While **detailed rules** guided **decision-making**, judges retained discretion, they could weigh evidence based on their sense of the case's merits. This flexibility allowed judges to adapt rulings to specific circumstances, even within a rigid hierarchical framework.

Legal Arguments:

The plaintiff (accuser) was responsible for presenting **initial evidence and arguments** supporting their claim. The defendant (accused) countered by challenging the evidence, disputing legal interpretations, or presenting their own evidence. Judges played an active role by investigating, asking questions, and clarifying points overlooked by lawyers. Reflection and criticism to this model: the system allowed for **nuanced judgments** but was deeply rooted in a socially stratified framework. Modern readers may view this as unfair or biased due to its reliance on hierarchy and gendered assumptions. Despite the biases, flexibility provided a mechanism for considering unique case details, however, as societal structures evolved, the need for more standardized legal processes became apparent.

From legal procedures from feudal systems to more structured and rigid frameworks:

Feudal legal systems emphasized social hierarchy, with fixed equivalencies between ranks and over time, procedures evolved to address inequalities and reduce rank-based discrimination, though remnants of hierarchical principles persisted.

Judges were expected to step in when lawyers failed to make complete legal arguments, allow parties to present their cases fully without interference, write a decision by finding facts and applying the relevant laws or canon rules.

Initially, judges had broad discretion to weigh evidence, evaluate witness credibility, and make decisions based on their understanding, however, this **flexibility caused concerns** about fairness and consistency, leading to increasingly rigid procedures.

Rules became stricter over time, the exact number of witnesses required to prove different types of facts, it changes also how evidence was to be presented and assessed.

Judges were **no longer allowed** to interrogate witnesses directly or decide based on their personal judgment, instead they adhered to **procedural guidelines** with counting evidence rather than evaluating its quality and relying on pre-determined rules for the credibility of witnesses and documents.

The required number of witnesses could depend on the social status of the individuals involved, witness credibility was assessed rigidly, often disregarding the personal characteristics or past behavior of the witness.

The rigid system became cumbersome and ***overly detailed***, with extensive rules about the types of evidence required and it led to a mechanical process that prioritized procedural compliance over substantive fairness.

This is the procedure that governed, basically, **until the 18th century**.

By the **19th century**, there was a backlash against these rigid systems, driven by principles of fairness and judicial autonomy. Reforms aimed to restore flexibility in three key areas:

- **Orality**: witnesses were required to **testify in person before the judge**, instead of relying solely on written statements.
- **Immediacy**: judges needed to **observe witnesses directly**, allowing for better evaluation of credibility.
- **Free Evaluation of Evidence**: judges regained the authority to weigh evidence and decide who to believe, **based on their judgment**.

Differences between continental European legal procedures and the Anglo-American system:

Judges in **continental Europe** have the authority to **freely evaluate evidence** rather than being constrained by rigid rules about the admissibility and weight of evidence. Critics argue that this freedom introduces subjectivity and potential biases: judges may form early opinions during pretrial conferences and inadvertently stick to them. *Long delays* between evidence collection and decision-making might impair memory of witness demeanor, hesitations, or nervousness, leading to decisions based solely on written records.

Cases often begin with a structured conference involving the judge and both parties; the judge actively questions both sides: he asks the plaintiff to outline claims and evidence and asks the defendant to respond and indicate counterarguments or evidence.

Evidence is gathered in **stages** over months or even years because witnesses and documents are introduced gradually, and the judge records all evidence in a case file and parties reconvene periodically to address new evidence or counterarguments. This method allows careful and methodical examination of claims and evidence and minimizes courtroom theatrics and focuses on substance over performance.

This delay raises questions about their ability to recall critical details, such as witness demeanor, cross-examination by lawyers is minimal and regulated, focusing more on clarifying facts than challenging witnesses' credibility.

Continental systems emphasize written records and judge-reviewed dossiers over live testimony. Unlike the Anglo-American system, **appeals** aren't limited to **legal errors** but can involve

reevaluating the entire case.

Anglo-American systems emphasize **live trials**, with cross-examination playing a key role in testing witness credibility, judges and juries make decisions promptly after hearing all evidence.

Proponents of the European system argue that the structured and methodical approach avoids the theatrics of Anglo-American trials because early procedural clarity prevents surprises and ensures both sides know the full scope of evidence.

Critics, particularly American and English observers, find the **lack of immediacy and spontaneity problematic**, they argue that rigid reliance on dossiers may result in overly formalized and detached decision-making.

Historical development and features of legal procedures in medieval and Renaissance Italy:

Judges were entrusted with **applying the law fairly**, which raised concerns about impartiality, to maintain fairness, judges sometimes consulted law professors (via a process called ***concilium***) for advice on legal interpretations. Judges sought opinions from legal scholars, presenting the facts of a case and receiving an authoritative legal interpretation and this approach allowed judges to appear neutral and unbiased, relying on the expertise of law professors rather than personal judgment, they were held liable for their decisions under laws governing *judicial malpractice* and if a judge made a negligent or incorrect ruling, they could be sued and required to compensate the aggrieved party.

By the **11th century**, many Italian cities began governing themselves, **diminishing the authority of bishops** and feudal lords. These **self-governed cities** emphasized civic participation, often requiring nobles to renounce their titles to participate in governance.

Cities frequently faced conflicts between powerful factions (e.g.: the **Capulets** and **Montagues**) and for that reason **factional loyalties threatened judicial impartiality**, as judges might favor one faction over another. To address factional bias, cities introduced the **podestà** (an impartial judge or official), key features of the *podestà* system:

- The *podestà* was an **outsider to the city**, ensuring neutrality;
- They served for **only one year**, with no ties to local factions;
- At the end of their term, t**hey could be sued for judicial malpractice** if their decisions were found to be negligent or biased.

Before assuming office, the podestà posted a bond as a guarantee of their judgments' fairness. If sued successfully after their term, the podestà could face the same penalties they had imposed on others during their tenure.

To avoid allegations of bias, judges adhered to **strict rules of evidence**, such as requiring a specific number of witnesses. This reduced the perception of partiality by ensuring decisions followed clear procedural standards. The *podestà*, often trained in Roman law at prestigious universities like Bologna, applied this knowledge in their judgments and this practice contributed to the widespread adoption of Roman law across Italian city-states, alongside local statutes. These legal innovations **aimed to stabilize city-states** by minimizing factional influence and ensuring fairness in the judicial process and the system's reliance on external judges and strict procedural adherence reduced corruption and bolstered public trust.

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Medieval Jurists Approach and 12th Century Legal Context

Medieval jurists defined legal concepts like negligence or possession, primarily through **numerous case examples** rather th**an creating general rules**. These cases illustrated how the concepts applied in **specific contexts**, without formal explanations of how a case was linked to the broader concept. In the **12th century**, the rediscovery of Justinian's Corpus Juris marked a pivotal shift, especially in Bologna. These **jurists** were **not authorities** in the Roman sense, where legal texts were rarely cited. Instead, they had to constantly refer to **written texts** to justify their opinions. This shift made written texts and legal documents essential, as **jurists** now h**ad to ensure** that their **interpretations** of the law did **not contradict these texts**. Writing became critical, and texts were carefully studied and commented on, transforming legal education and practice. The **production of books** in this period was labor-intensive, as they used goat or calf skin to create the necessary pages. **Students** would **collectively purchase books**, **sharing** the **costs**, which made access to legal texts more feasible. In class, students would **write down what the professor said**, creating glosses or notes in the margins of the books. These glosses were essential for learning and interpreting the law, and students could rely on these notes throughout their careers. The medieval jurists used complex abbreviations in their writing, many of which are still used today, like the abbreviation for "**and**" (**et**) and for "paragraph." Medieval jurists like **Bogara** were critical of general rules, arguing that law should not be reduced to a set of abstract rules. Instead, it should be based on the interpretation of individual cases and how the law applied in real situations.The medieval legal method was different from a rule-based system, a concept that would not emerge until the 19th century. These jurists were more **focused** on **interpreting existing texts** and **resolving conflicts between them**, rather than creating universal rules applicable to all cases.

The text begins with a discussion about legal rules and their application, focusing on the limitations of formulating rules purely from examples. One example provided is a rule stating that "**what belongs to no one belongs to the possessor**." This rule is illustrated by the **cases of catching birds or lions**, where, according to the rule, the person who catches them would own them because they belonged to no one before. However, **Bogara's skepticism arises**—how does this rule apply to other situations, like **possession** of **temples** or **free people**? The rule doesn't help resolve such ambiguities, as it fails to account for the differences in context. Bogara suggests that simply formulating a rule does not necessarily make it useful, as it doesn’t provide guidance on how to handle exceptions or nuances in real cases.

The text then delves into the importance of **equity** (the underlying rationale) when applying rules. While rules may appear to be abstract, the underlying principle, or causa, is crucial for determining whether the rule should apply. In this view, **rules are not merely collections** of **cases** but are based on common equity. For instance, the same rationale for why a bird belongs to the one who catches it can also apply to other scenarios, like the ownership of lions.The lecture also reflects on the historical context in which medieval jurists worked. They **did not rely heavily** on **formulating rigid rules** but instead focused on resolving contradictions between legal texts and reconciling various interpretations. They would often try to harmonize texts to create consistent legal principles, rather than rigidly applying rules across all cases.

Property Law Case

Later, the text shifts to the **discussion of a property law** issue related to neighborhood interference, or noxal injury in Roman law. The case of **Mr. Gucci**, who was suing for interference with his property by noise and fumes near the **Trevi Fountain**, illustrates this. The question arises about the extent of noise or pollution that can be considered acceptable in a neighborhood. Roman law and various legal opinions on this matter, like

those of **Aristo**, are examined. **Aristo** asserts that certain **emissions**, like smoke from a cheese shop, should not be allowed to interfere with neighboring properties. These texts and interpretations guide the jurist in determining whether a given action (such as discharging smoke or noise) is permissible based on existing legal principles. The discussion revolves around various legal texts from the Digest dealing with property law and interference between neighbors, specifically regarding smoke and water. **Two juristic opinions are presented**:

First Text: A jurist argues that **smoke cannot be discharged** from a cheese shop if it bothers people in the **building above**. Similarly, water should not be discharged onto lower property if i**t causes a nuisance**.

Second Text: Another jurist allows for a moderate amount of smoke, as it's necessary for basic activities like cooking or keeping warm. This presents a contrast to the first text, where smoke is seen as a disturbance.

The key issue is how to reconcile these differing views. One solution proposed is based on whether the smoke or water is naturally occurring or intentionally discharged. For example, smoke naturally rises, so if it bothers someone upstairs, no legal action is needed unless the smoke is excessive or intentional. However, **water needs to be poured**, so if it h**arms someone below, liability can apply**. The text transitions into a glossing practice, where later jurists, like **Accursus**, clarify or modify earlier opinions. For example, he **distinguishes** between the **normal smoke from a cheese shop** (necessary for making cheese) and excessive **smoke that could cause harm**. Furthermore, the discussion brings in **Bracton**, a medieval jurist, who adds that normal amounts of smoke or water (e.g., from household use) are lawful unless there's intent to harm. This reinforces the idea that the intention behind the action matters in determining liability. Ultimately, the rule being formulated is that a moderate amount of smoke is acceptable if it's for ordinary, non- offensive purposes. However, if the smoke is excessive or done with the intention to harm, legal action can be taken. Similarly, water can be lawfully discharged unless it is done excessively or with malicious intent.

Relationship between Medieval Authors and Jurists

Legal authorities like **Accursius** and **Bartholomew** are highly influential, but judges still need to make their own decisions based on Roman law. While judges might respect these authorities, their role is to find the right legal answer, even if influenced by these figures. Over time, European law was shaped by university professors' interpretations of these authorities, particularly in medieval times, where professors would be consulted on complex cases. In **Germany**, the practice extended into **the 19th century**, with judges seeking expert opinions from professors on cases, leading to a legal system centered around academic authority.

Canon Law

Gratian, a key figure, compiled texts to reconcile discordant canons, which were authoritative statements guiding Christian life, behavior, and church doctrine. This method of reconciling texts from diverse sources, such as the Bible, church fathers, and penitentials, formed the foundation of canon law. Gratian's work influenced the creation of a system that linked religious teachings with legal principles, a system that evolved through legal scholars and continued through the study of canon law. Canon law's purpose, however, is to unify Christian teachings and resolve apparent contradictions within religious doctrine.

There was a particular importance of certain texts in canon law, particularly the "**Credals**," which were compiled by **Pope Gregory IX**. These texts became the foundation of Catholic law for centuries, even after the code of canon law was enacted in 1910. The "Credals" were authoritative legal books that were instrumental in church courts, and they were often used to resolve disputes, including complex cases that eventually reached the Pope.

The story then delves into the development of canon law, mentioning figures like **Johannes Andreas**, who was instrumental in writing the ordinary laws of the Credals. Andreas' work in canon law was significant, and there are romanticized stories about his life, including one where his daughter reportedly helped with his lectures, a tale that adds to the lore surrounding his contributions. Canon law became a formalized academic discipline, with students pursuing degrees in both civil law and canon law. Earning both degrees, called "**doctor oprius**" was a prestigious accomplishment. The study of these laws involved understanding both Roman law and canon law procedures, with the "Credals" serving as a primary source for legal decisions. It is also important to highlight the distinction between: the **external forum** is concerned with **public matters**

handled by church courts, such as lawsuits and criminal cases, while the **internal forum** deals with personal matters like **confession**, where sins are absolved through the priest. The internal forum works on the assumption of voluntary cooperation from the individual, whereas the external forum is more concerned with proving legal elements and enforcing penalties for offenses.

Lezione History 4 ottobre 2024

Private Law

Medieval jurists (defined as Glossators) wrote "glosses" of the roman law (i.e. notes in the margin of the Corpus iuris civilis). Hence, differently from **roman jurists**, who were able to give an opinion about roman law, **Glossators** (or if late medieval civilians Commentators, i.e. authors of commentaries) were **jurists** who, by virtue of their specializes training, knew the **Roman texts** and could cite them to supports their opinion. Law was, thus, based on the exposition of authoritative texts. **Medieval jurists** did not operate within a rigidly structured legal system as we might imagine today. Instead, they believed that if a legal text was properly interpreted, it could address every possible obligation or dispute: therefore, their purpose was to **resolve every case that might arise by reference** to an authoritative text and to explain each of its texts in terms of every other.

Property

For instance, **this principle** can be observed in **cases** involving significant extensions of property or other complex legal scenarios. The **Digest** provides **three texts** (pag. 75-76) that cover such issues, stating, with regard to interferences among neighbors, that "a man is only permitted to carry out operations on his own premises to this extent, that he discharges noting onto those of another". Therefore, the owner of a property can bring an action against his neighbors if latter discharges water or other objects (not in a moderate amount) onto the property of the former without the right to act in this way (e.g. servitude). If, moreover, such action is carried out with "intention to offend", also an action for iniuria is admitted. This does not apply to smoke, which, according to **Accursius** "is diverted naturally". By the **19th century**, the concept of property had evolved significantly. During this period, legal thinkers developed a more formalized understanding of property rights. However, by the **20th century**, jurists began to challenge the efficacy of earlier theories. Those who argued that property was an absolute right claimed that an individual could use their property as they wished, without regard for external consequences. This absolutist view faced **practical challenges**, **particularly** with the **law of nuisance**. In cases of nuisance—such as disturbances caused by smoke, noise, or vibrations—people often continued their activities despite infringing on their neighbors' rights. During this period (19th century), legal scholars often relied on a **dogmatic approach**, characterized by **conceptual jurisprudence**. This method began with abstract legal principles, such as ownership, and attempted to derive practical rules from these theoretical foundations. However, this approach often overlooked real-world implications, such as the conflicts arising from nuisances.

Doctrine of Necessity

If you were looking at the German Civil Code, you would find an article that goes with this premise, and it says that I have the right to make use of another person If I am in great danger Of losing something that's still more valuable than my life, could be another piece of value of that property. I am entitled to use someone else's property without your consen, this was meant as **doctrine of necessity** in the German Civil Code. The **doctrine of necessity** addresses situations where urgent circumstances justify actions that would normally be prohibited by law. Imagine that I' m drowning, and you' re in me, near me, in a rowboat. You have a boat. I' m drowning. So I reach out and grab onto your boat. They enacted a prohibition of necessity, about necessity. This never got into the French Civil Code for another reason. The Roman law hasn't been ever received in France. The doctrine of necessity that we're here is invented by the canon lawyers, while the civil lawyers adopted it. However in **France**, there is a case often cited about a girl living in a cave in a rocky forest in the south of France. She had two little brothers, and she would steal from them and bring back whatever she had taken. She got caught, and a criminal case was brought against her for theft. The judge, however, couldn't bring himself to punish her fully.Ultimately, he decided to declare her actions as "duress", even though it wasn't really a case of duress. **Duress**, in legal terms, usually means a situation where someone is forced into doing

something under threat. In civil law, the closest concept might be "**necessity**," which could be used to void a contract if it was made under unfair conditions. However, that doesn't apply in criminal cases, like this one. To illustrate necessity more clearly, consider a case from around **1910 in the U.S.** involving a ship on Lake Erie during a major storm. The ship needed to dock, but there was only one pier available, and the owner of the pier refused to let them tie up. In a desperate situation, the ship tied up to the pier anyway, and the owner cut the ship loose. The owner argued that they had no right to use his property, but the court found that the situation was an emergency.Under the French Civil Code, the ship's actions would likely not be justified, since necessity is generally not recognized in civil law for situations like this. However, there is a related concept in criminal law called "**omissione di soccorso**," which means that failing to help someone in need can be considered a crime. So, in this case, the owner could be held liable for not helping the ship during an emergency. While this doesn't directly relate to civil law, there is an article in the French Civil Code that allows a person to enter another's property in certain situations, like retrieving animals that have escaped. This is a kind of emergency action, similar to the idea of necessity.

Property Law According to Canon Law

The connection between canon law and civil law here is that the **canon lawyers helped establish the doctrine of necessity**, drawing on Roman civil law provisions. They then cited the support of canon law to give it legal weight, which influenced the development of these concepts. The **Acts of the Apostles (4:32**) offers a significant description of the early Christian community's understanding of property: "Now the full number of those who believed were of one heart and soul, and no one said that any of the things that belonged to him was his own. They had everything in common." This passage suggests an ideal where property was held communally, with no one claiming exclusive ownership.

In the **13th century**, a group of Christians, known as the **Spiritual Franciscans**, claimed that this communal property arrangement should be the norm for all Christians. However, this view was officially condemned by the Church. The Church taught that while communal use of property might be ideal in certain circumstances, private ownership was permissible and, in many cases, necessary. In this context, **St. Ambrose**, the bishop of Milan in the 4th century, was deeply troubled by the growing wealth among Christians, especially as Christianity became more established and powerful in the Roman Empire. In his sermons, he repeatedly warned the wealthy to be cautious in how they used their money, stressing the moral responsibility to care for the poor and to use wealth in ways that aligned with Christian values. St. Ambrose's teachings on wealth are reflected in the **Decretum Gratiani**, a foundational text of canon law. In one section, D. 47, c. 8, he emphasizes the idea that property is not inherently evil but should be used for the common good. He famously stated that no one should call their wealth "their own" when it is in the service of the common good. While this does not imply that private ownership of property is wrong, it does highlight the importance of generosity and social responsibility and so, in necessity all things are common. This suggests that in times of urgent need, such as during famine or extreme poverty, individuals could share property and resources for the common good. However, the ideal of communal property was seen more as a spiritual aspiration rather than a binding legal norm. Johannes Andreae, in his Glossa ordinaria on X 5.18.3, discusses the issue of property in cases of necessity. He suggests that if a person steals food, clothing, or money due to necessity, such as hunger or nakedness, they should perform penance for three weeks, which might involve living on bread and water. However, if the stolen goods are returned, the penance could be reduced or waived. This reflects the principle that, in cases of necessity, property becomes "common," meaning it should be shared with those in need. Private property is not denied, but in times of urgent need, individuals are morally required to use their resources to fulfill others' needs. The idea of "common" property in necessity does not imply a permanent renunciation of ownership, but a temporary suspension of property rights, justified by the urgent need to address life- sustaining needs.

Delictual obligations

The concept of **delictual obligations**, or torts in Roman law, refers to the obligations that arise from harmful actions that affect another person, either intentionally or negligently. Roman law established various frameworks for dealing with these situations, such as the **Lex Aquilia**, which is central in defining liability for certain wrongful acts.

- One example from the Digest **(9.2.7.7)** involves an individual who intentionally throws someone off a bridge. In this case, Celsus states that the person is liable whether the victim is immediately killed by the blow or drowned in the river.
- Another example comes from **Proculus (Digest 9.2.7.8)**, who says that if a doctor treats a slave in an unskilled manner, the victim may bring an action either under the Lex Aquilia or for breach of contract, as the doctor was hired and failed to meet the terms of the contract.
- In **Digest 9.2.28.pr**., the text discusses the liability for setting traps, such as pits meant to catch wild animals. If such traps are set in public spaces and someone falls in, the person who set the trap is liable under the Lex Aquilia. However, there's no liability if the pits are set in areas where such traps are customary.
- **Digest 44.7.1.4** illustrates another situation where a person takes a loan intended for a specific purpose—like a dinner—but instead uses the money for a different purpose and the money is lost in a shipwreck. The individual would be liable under the Lex Aquilia for this negligence (culpa). Celsus provides further examples of negligence, explaining that negligence can occur in various ways: during the act itself, before the act, or after the act.

Accursius, in his Glossa ordinaria to **Digest 11.2.8.pr**., elaborates on the concept of **negligence**, or culpa. He explains that negligence can occur in different stages: it can be part of the action (e.g., if a person throws someone off a bridge or administers incorrect treatment), it can precede the act (e.g., if a trap is set that leads to harm), or it can follow the act (e.g., failing to provide adequate post-operative care). This framework helps Roman jurists classify acts of negligence in a structured way, though it may seem abstract or overly technical to modern legal thinking.

- **Decretum Gratiani, D. 50 c. 50** (**Council of Worms, c. 29**) discusses the case of a person felling a tree who inadvertently causes harm by the tree falling on someone who was passing by. The key distinction is whether the harm was caused by intention or negligence. If the harm was caused by negligence or intention (e.g., if the tree was felled with awareness that someone was in the area), the person is liable for homicide (i.e., a grave offense). However, if the harm was truly accidental, with no negligence or intent to harm, the person is not liable for homicide. This relates to the concept of delictual obligations, as it establishes that liability can depend on the nature of the action (intentional, negligent, or accidental).

The legal and moral distinction between intention and negligence is central in determining the moral and legal culpability for homicide. If someone kills in self-defense, the act is generally considered excusable as a necessary act to preserve one's own life. In these cases, there is no sin if the person was acting out of necessity, as long as they did not act with joy or spite in killing the aggressor. The emotional response to the act (e.g., feeling sorrow vs. feeling joy or spite) plays a crucial role in assessing whether the action was morally justifiable. Conversely, if someone intentionally kills another person, this is a clear sin, as it involves premeditated malice or willful action, even if the external circumstances might seem justifiable (such as in a judge's ruling leading to a death sentence).

- **Decretum Gratiani, D. 50 c. 51 (Council of Triburg, c. 36)** discusses the case of two brothers cutting down trees. If one brother warns the other, but the other brother is still accidentally killed by a falling tree, the surviving brother is not guilty of homicide. This further emphasizes the idea that in certain circumstances, even when harm occurs, individuals may not be held liable due to lack of fault or negligence. This aligns with the concept of delictual obligations as medieval jurists would differentiate between negligence and accidental harm.

When considering accidents (such as a tree falling on someone), the question arises whether negligence played a role. If someone is performing an act (like felling a tree) with due diligence and the accident occurs unexpectedly, they are typically not guilty of homicide in a moral or legal sense. However, if they were negligent—acting carelessly or recklessly—then they could be considered culpable for the death.The distinction between intentional acts, negligence, and accident traces back to Roman law, specifically the Lex Aquilia, which provided frameworks for determining liability based on intent, negligence, and the nature of the act. This distinction is influential in both civil and canon law. However, if someone is engaged in a lawful

activity, such as cutting down a tree on their own property, but causes accidental harm to another (such as a person walking by and being struck by the tree), the question becomes whether they were negligent in their actions or if it was truly an unforeseeable accident. Under canon law, if there was negligence, the person may still be held morally responsible, even if their actions were lawful in intent.

- **Decretum Gratiani, D. 50 c. 37 (Pope Urban I)** deals with the case of a cleric who accidentally kills a boy by throwing a stone. The canon law here highlights that if the cleric was engaged in lawful work (such as expelling pigs from a field), and the harm was caused negligently, then they must do penance. However, if the act was done lawfully and with diligence, the cleric would not be guilty. The delictual obligation here is again tied to the concept of negligence—if there was carelessness or recklessness, there would be liability. But if the action was lawful and no negligence was involved, the individual may not be liable.

- **Decretales Gregorii IX 5.12.25**, this passage speaks of a priest performing lawful work (repairing a church) who accidentally causes harm. The priest is not held liable if they acted with due diligence and could not have foreseen the accident. The concept of lawful work is key here. The canonists agreed that if a person was engaged in unlawful work and caused harm, they would be liable even if there was no negligence. However, if the work was lawful and conducted with due care, the person would not be liable for unintended harm. This reflects the broader medieval legal doctrine that delictual obligations arise primarily from negligence or intentional harm. If someone is performing lawful work, they are not liable unless negligence is present. If the work is unlawful, liability for the harm may still exist, even without negligence.

In medieval legal thought, **delictual obligations** were primarily concerned with whether an individual acted **negligently, intentionally, or accidentall**y, and whether the act in question was lawful or unlawful. Key concepts included:

- **Negligence**, if harm resulted from carelessness or failure to take appropriate precautions, the person was often liable for damages or punishment, especially if the harm was foreseeable.
- **Intentional Harm**, if someone intentionally caused harm (e.g., throwing a stone at someone), they were liable for the consequences. If the harm was not intentional but was still foreseeable, the person might still be held accountable.
- **Unlawful Actions**, if someone was engaging in an unlawful act, even if there was no negligence or intention to harm, they were often held liable for the consequences (e.g., a priest hunting during the closed season). The concept was that unlawful acts, regardless of care, should still have consequences because they were inherently wrong.
- Lawful Work if an individual was performing lawful work (e.g., repairing a church or cutting down a tree) and harm occurred despite due diligence, they were generally not held liable. However, failure to take appropriate precautions could still result in liability.

These principles were not only key to the development of canonical and civil law but also influenced common law, where similar doctrines of negligence and transferred intent were eventually incorporated into legal systems. The idea that individuals should be responsible for the consequences of their actions, especially when negligence is involved, remains a cornerstone of both medieval and modern tort law.

Delictual Obligations: Homicide

Gospel According to John 3:15: This biblical passage asserts that "**whoever hates his brother is a murderer**" and highlights the moral severity of hatred, equating it to homicide in terms of **spiritual consequences**. The passage underscores that harboring malice or hatred toward others leads to spiritual death, drawing a parallel between spiritual homicide (murder through hatred) and physical homicide.

Raymond of Penafort, Summa de Poenitentia, Book II, Title 1 - On Homicide, discusses homicide in both spiritual and corporal terms, grounding his analysis in both legal and moral dimensions. Raymond acknowledges that when a judge condemns someone to death, the minister (e.g., executioner) who carries out the sentence is not guilty of homicide if the death sentence was **just and carried out lawfully**. However,

if the sentence was carried out maliciously or without due regard to the legal order, th**e judge or minister would be guilty of mortal sin**. Raymond distinguishes between **homicides** committed **out of necessity** and those committed **without necessity**:

- If the **necessity was avoidable** (e.g, the person could have escaped without killing), the person would be guilty of homicide and must perform penance.
- If the necessity **was unavoidable** (e.g, the person killed someone in self-defense to escape an imminent threat), they would not be guilty of sin unless there was doubt about their intent or duplicity. Even in such cases, they must reflect on the act and perform interior penance as a precaution.It is also necessary to distinguish between lawful and unlawful activities. If someone accidentally kills another while engaging in a lawful activity (e.g., cutting down a tree), the death is not imputed to the person, provided they exercised due care (e.g., calling out a warning). However, if the act was unlawful (e.g., throwing a stone in a crowded area), the person would be liable for the death.Additionally, it is emphasized that voluntary homicide—killing done with malicious intent—is always a mortal sin. He also notes that homicide committed out of spite or for pleasure in shedding blood (even if "justified" legally) is still sinful. Raymond explains that homicide can also be "spiritual," meaning actions that harm another's soul rather than their body. For example, hatred, slander, bad advice, and withholding sustenance are all forms of spiritual homicide. These actions may not cause physical death but are considered mortal sins in a theological sense.

By contrast, corporal homicide, which is identified physical killing, which can occur in different ways: (a) by word, a person may commit homicide by giving harmful advice or by causing harm through words, such as inciting violence or preventing someone from acting (e.g., by malicious advice); (b) by deed, i.e. a physical killing that may happen through justice (e.g., execution of a condemned criminal), necessity (e.g., self-defense), chance (e.g., accidental death), or will (e.g., intentional murder).In a broader sense, the distinction between intention and negligence becomes a crucial test in both moral and legal courts: in the context of confession, the priest can ask the sinner how they felt about the act. Did they feel joy or sorrow? This is crucial for determining whether the person has committed a sin. If the person felt joy, it suggests a malevolent or sinful heart, even if the action was legally justified. On the other hand, in civil or criminal courts, these internal feelings (joy, sorrow, etc.) are not typically considered. The focus is on the objective nature of the act— was it lawful or unlawful? Was the person negligent or careful? In the case of an accidental death, the focus is on whether the act was due to carelessness or was entirely unavoidable

- The example of two brothers felling trees, one of whom is accidentally killed by the falling tree, reflects an application of Roman legal principles (such as those found in the Institutes of Roman law) within the Christian moral context. If the death was unintentional and the person had acted with due diligence, they would not be held morally accountable for the death. If someone is engaged in an unlawful act, even without intent to harm, they can still be held morally or legally responsible for resulting harm. This is highlighted in the example of hunting, where someone intentionally aims at a target but accidentally hits an innocent bystander due to a ricochet. The key distinction here is that the person was engaged in an unlawful activity (shooting at a target) which created the risk, even though the harm was unintended: if the act was unlawful (e.g., hunting without permission), even if it was done carefully, the person could be held morally accountable for the unintended harm. This shows how canon law incorporates a moral evaluation of not just the outcome of an act but the nature of the act itself and the intention behind it.

The example of shooting at an enemy and unintentionally hitting someone else, or throwing a stone at a child to drive them out of one's yard and hitting the wrong child, illustrates a scenario where the person is not intending to harm the victim, but is still liable for the consequences. This is a key point in discussions of legal and moral liability, both in civil and ecclesiastical law. In this context, the analogy of the priest repairing the church and accidentally causing harm because of negligence—while engaged in lawful work— highlights the importance of intention and diligence in determining liability. If the priest was careful and diligent, he would not be liable for any accidental harm caused. However, if he was engaged in unlawful work, he would be considered liable, regardless of his diligence. The discussion also touches on the idea of "unlawful work," which often involves actions that are not inherently unjust, but are prohibited for other reasons—such as the prohibition of working on Sundays or engaging in certain activities outside of their proper time (like hunting

during the closed season). In such cases, even if the person is diligent, they may still be held liable because they were engaging in unlawful actions.

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The Real Contract and the Principle of Consent

A real contract is based on **this principle**: we are entering into a binding contract. It is the will of the parties, the promise, and the consent of both parties. The source of contractual obligations is the will of the parties, and it is a consensual principle. This is the foundation of the law, the legal text, and the master principle on which all c**ontractual laws should depend**. The contracts are enforceable because the parties willed it, they gave their consent. If you were a **19th-century legal scholar**, you would talk about consent and the principle of private timing. You would then explain that sometimes consent is invalid, for example, due to a mistake, duress, or fraud. These are imperfections in consent. Eventually, you might address the issue of what happens if circumstances radically change. For example, I agree to build a house for a certain price, but then discover there is a huge rock beneath the site, which costs me ten times what I expected to excavate. Most theorists of the time said we should not offer relief. The debate was whether relief should be given. However, fairness was not relevant. Whether a contract is fair is a mystical question involving abstract notions of value.In the context of barter, it's less problematic to change your mind, since the exchange isn't as legally binding as a monetary sale. But in a sale, once we agree on the price and goods, I can't just back out. This shows the role of contracts in the market: they limit the risk of not getting the deal you want and ensure both parties commit to the agreed terms. Only through civil law did consent become an obligation. Ultimately, contracts are enforceable because of consent, but the question remains: does consent alone impose a duty to perform? Roman law didn't fully resolve this issue, but over time, consent became the cornerstone of contract law.

Contracts and Their Binding Nature in Roman Law

Roman they might not even understand what you're talking about when you were referring about contracts. Gaius, for instance, did not even use the word "contract" until 150 AD. He spoke instead of two kinds of obligations: contract and tort. He derived this distinction from Aristotle. Each contract has its own rules. But for many contracts, the rule was that they were binding upon consent. There's no need for an advance payment, no need for a handshake, no writing required, no stipulatio. As soon as we agree, the contract is binding. The same principle applies to leases, whether renting a house or leasing services. In a partnership or mandate, consent alone binds the parties. There are also other contracts that are binding only when an object is transferred to the other party. For example, mutuo (a loan of fungible goods, such as money or grain) and comodato (a loan of specific items, like my horse). If I loan you something fungible, such as grain, and I'm not charging you, you return the same amount. That's a mutuo. A comodato is a free loan of an object, like my horse, where I don't charge you money. If I did, it would be a lease.

Formal and Informal Contracts

A **deposit** is another form of contract. In this case, I give you my horse, but you're doing me a favor by taking care of it. You return it to me without charging me. If I pay you, it's considered a contract for services. A **pledge** involves giving someone an item as collateral. For example, I give you my horse because I loaned you money, but if you don't repay me, I keep the horse. Then there are formal contracts like the **stipulatio**, where anything can be made binding. I can say, "Do you agree to this promise?" and you can agree. The stipulatio is a verbal contract and doesn't require witnesses or written documentation, though wise parties might choose to have it in writing. In the Middle Ages, formal contracts often took place in front of a notary. We still have this practice in Italy today.Barter was an anonymous contract. For example, if I give you my horse and you give me a donkey, there's no contract in Roman law unless we exchange these items and complete the trade.

In the beginning, barter had no legal force, but over time, the law evolved to allow for claims if the agreed exchange was not completed. This principle eventually evolved into the idea that the moment someone partially performs the agreement, it's considered a contract.

The Law of Nations and Contracts

Wars arose, followed by captivity and slavery, which are common to all nations but are contrary to the law of nature. According to this law, all men are born free. Furthermore, the law of nations introduced many contracts, such as buying, selling, leasing, hiring, partnerships, deposits, loans, and others. We have the law of nature and the law of peoples. The law of nature seems to be a concept peculiar to human beings, grounded in reason. In any case, these are the rules that nations have established. In Roman law, ius civile could even have a technical meaning. Imagine you're suing in a Roman court. Regardless of your origin, Roman law would be applied to you. If it's a contract dispute, they would apply Roman law concerning contracts or torts. However, they specified that certain aspects of Roman law, such as contracts and torts, belonged to the law of peoples. What they meant by this is that if you came to a Roman court, they would apply Roman law to you. You could claim its benefits, and you could sue someone—even if they weren't Roman

—and they would be bound by Roman sales law.

Marriage and Inheritance in Roman Law

But there were other areas where they wouldn't apply Roman law to foreigners, like marriage and inheritance. So, if you were married or had inherited something and sought legal recourse, you couldn't come to a Roman court. They wouldn't apply Roman marriage or inheritance law to you. This concept could be challenging when considering the application of marriage laws from different nations, such as Bosnian or other peoples' laws, especially in comparison to European Union laws. It's much like the notion that all nations should follow a universal law.

Civil Law and Natural Obligations

The law of nations imposes obligations, which are naturally invented. It wasn't necessary for civil law to introduce these obligations—such as contracts—since they were already established in the law of nations. Civil law simply ratified these natural obligations. Civil law doesn't create the obligations; it merely affirms them, making them enforceable in court. In civil law, consent is crucial. So, there's a theory that contracts are binding by consent. However, civil law only makes these agreements actionable in court. Until civil law validates an agreement, no lawsuit can be filed. This idea marks an important step, as it acknowledges the natural obligations that govern agreements between individuals.

Mistake and the Absence of Consent

Mistake is an example of when consent is absent. A passage in Roman law addresses this issue—if a mistake invalidates consent, there's no contract. This idea is central to how courts approached relief in sales law all the way through to codification. But how much do these texts really tell us about the kinds of mistakes that would warrant relief? The texts introduce the general principle that mistake negates consent in a sale. However, they then break it down into specific examples, offering no clear explanation of why certain mistakes invalidate a contract.

Substance Versus Essence in Mistakes

For example, if there's a disagreement about what's being sold—whether the sale price is understood differently by the buyer and seller—there's no valid contract. Similarly, if there's confusion over which object is being sold, such as a buyer thinking they're purchasing one horse when the seller is offering another, the sale is void. These types of mistakes render a contract non- binding because consent was not truly present. Yet the law also raises questions about cases where there's no mistake regarding the object but an error in substance, such as when vinegar is sold as wine or copper as gold. Roman law suggests that if there's consent regarding the object, the sale may still be valid, even if there's an error in the substance of the item. This distinction between "substance" and "essence" is fundamental in Roman legal reasoning. The Romans didn't necessarily understand Greek philosophy regarding essence. Roman law was more concerned with practical cases and tried to resolve them through specific examples, rather than creating deep philosophical principles about substance and essence. In this way, Roman law dealt with sales mistakes in a case-by-case manner. If the buyer thought they were purchasing gold but it turned out to be copper, the contract could be invalidated. But if it was a simple mistake about the quality of gold, the sale might still stand. Such distinctions reveal the complexity of Roman contract law and its gradual evolution.

Preservation and Use of Wine in Roman Times

Once you sealed the amphora, it could preserve the wine for up to 40 years. But as soon as you opened it, the wine would begin to sour. So, you'd buy an amphora of wine, open it, invite your patrons, friends, and influential people over for a dinner, and enjoy the wine. The next day, it might be a little sour, and you'd invite just your family. The kind thing to do, at that point, was to leave it in the field for the slaves to drink. If it became worse, the kind thing to do was to give it to prisoners who were being led to execution, so they could get drunk, making their last moments a little easier. This happens in the New Testament when Jesus, being led to his crucifixion, is offered what was translated as vinegar. However, in modern Bible translations, it's often referred to as sour wine. Giving vinegar would sound cruel, but sour wine was a more common practice—it was simply a way to ease suffering.

Divergent Approaches to Substance in Civil Codes: German & French

The Germans will resist the notion of substance as long as they can, but eventually, the German Civil Code will acknowledge that a contract is valid unless the mistake is of fundamental importance. The mistake must be based on an essential characteristic that's crucial for the commercial purposes of the contract. This concept can be seen in Italian law, where there's a similar notion of charakteristik—the idea that contracts are based on an essential characteristic.In the 19th century, the French did not adopt the doctrine of change of circumstances, which says that if things change drastically from what was originally agreed and the contract may need to be adjusted. This doctrine didn't come into French law until 2016. For instance, in 1968, Paris was paralyzed by riots. General De Gaulle had to flee to Germany for safety, and tanks were on the streets. A theater had a contract to perform, but even though no one could come to the show, the contract would still be enforced. The French attitude was that changes in circumstances didn't matter. In Germany, in the 19th century, people debated whether changes in circumstances should ever affect the validity of a contract. The general view was "no," meaning that if I agree to prepare a play, you agree to pay me, and we don't account for things like tanks or riots. But German theorist Dinscheid argued that if the circumstances change drastically, it would be a mistake to ignore the new reality. Eventually, this idea was introduced into German law, particularly after the upheavals of World War I. For example, contracts for copper wire delivery became untenable when the price skyrocketed during the war, and the peace settlement caused it to plummet.The German courts ruled that it was a violation of good faith to insist on contract performance when the circumstances had changed drastically.

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CONTRACT OBLIGATION AND NATURAL LAW.

In natural law, some contracts can come into existence spontaneously, provided all the necessary data are present. However, in the past, contracts were not valid until they were recognized by law. As for the Romans, it seems that they did not have much interest in following natural law principles related to contracts, which is why they did not develop them further.

CONTRACTS AND CONSENT.

Contracts are based on the consent of the parties. However, there are mistakes that can vitiate such consent. For example:

- One party might believe that the contract is a sale, when in fact it is a lease.
- There may be errors about the price.
- One party might think he is selling a specific object, while the other party is buying something else.

The goal of Roman law was not to develop a theory of consent or to define the principles underlying consent, but to address and resolve concrete cases. Accordingly, legal texts identified six specific errors that could vitiate consent and for which remedies were provided.

THE DOCTRINE OF CHANGING CIRCUMSTANCES.

The doctrine of changing circumstances, also found in 20th-century texts, is based on a simple principle: promises should be kept only if the conditions remain unchanged. A classic example is the following, reproduces p. 87 Iohannes Teutonicus, Glossa ordinaria al Decretum Gratiani C. 22 q. 2 c. 14: "If I leave my sword with you, I promise to return it." However, if something happens (e.g., I go mad), I am no longer obliged to return it. Cicero and Augustine, for example, held that under such circumstances the promise was no longer binding.

REMEDIES IN ROMAN LAW.

Roman law provided specific remedies to deal with situations of contractual injustice. For example:

1. **Fraud related to sale:** If a seller lies about the price or quality of the goods sold, the contract can be challenged. A concrete example is when a seller convinces a buyer to buy a horse by deception, saying that it will be expropriated or die soon. This creates the motivation for the purchase, based on false information.
2. ****Error on the edition of the law:**** If one party misleads the other into believing that the version of the law used is obsolete in order to take advantage of it, the contract can be challenged. This type of fraud often results in an invalid sale.
3. ****Price error:**** When the price of a contract is altered by intentional fraud, the contract is considered void or modifiable. For example, selling a three-year-old horse by passing it off as a five-year-old in order to increase the price constitutes fraud.

PAG 84:"*9. Ulpianus on Sabinus, Book 28: àIt is obvious that in a purchase and sale there must be consent. If there is disagreement about the sale itself or the price or anything else, the sale is invalid. So if I was planning to buy the Cornelian farm and you were planning to sell the Sempronian, the sale is void because we disagreed on the thing sold. The same is true if I intended to sell Stichus and you thought I was selling you Pamphilus, there being no slave per se.e Since there is disagreement on the particular versus the particular object (in corpore) it is clear that there is no sale.f Of course, if we disagree on the name but agree on the particular object there is no question that the sale is valid. A mistake on the name makes no difference when we agree on the particular object. The question then arises whether there is a sale if there is no mistake about the object itself, but the mistake is in the substance (in substantia). For example, suppose vinegar is sold as wine or copper is sold as silver. Marcellus writes in the sixth book of his Digest that there is a salej because there is consensusk on the particular object even though there is error on the matter (in materia). I agree.l In the case of wine because the ousiam is much the same, that is, if the wine has soured. If the wine did not sour, but was vinegar from the beginning, like beer vinegar, then it seems that one thing was sold as another. But in other cases, I think there is no sale because the error was in the matter (in materia).*

10. Paul on Sabinus, Book 5: It would be different if the thing was gold but of a lower quality than the buyer thought. Then the sale would be valid.

11. Ulpianus on Sabinus, Book 28: What would we say if the buyer was blind or if the mistake on the matter (in materia) was made by a buyer not skilled in distinguishing materials? Would we say that they consented as to the particular object (in corpore)? And how can a man who cannot see consent? If I think I am buying a virgin when it is actually a woman, the sale is valid, because there is no mistake about her sex. But if I sell you a woman and you think you are buying a male slave, the sale is void because there is a mistake in the sex."

FRAUD PAG 86 : *Collectio Senensis D. 28 (anonymous, 12th century)*

Fraud affects both a bona fide contract and a contract of strict law. When it affects a contract of strict law, whether the fraud gives the contract its cause, or whether the fraud, committed intentionally, affects the contract in some other way, the contract is valid, and an action 8.39.5.1 arises on it, but an exception for fraud (exceptio doli) C. 8.39.5.1 When fraud gives a contract of good faith its cause, the contract is invalid ipso iure, and no action arises on it. However, if the property has been delivered, the title passes, and no action can be brought against one who acquires or otherwise acquires the property from the one who committed the fraud.

But an action for fraud (de dolo) is given against the person who committed the fraud, and if he owns the property, it can be claimed by condictio indebiti. D.4.3.7;2 C. 4.3.37;3 C.

4.44.5;4 C. 4.44.10.5 When the contract is prejudiced by a fraud that does not give the contract its cause but otherwise prejudices it, then the fraud is either committed intentionally (ex proposito) or results from the thing itself (ex re ipsa). If the fraud was committed inte no ntionally, it is eliminated by an action on the contract, regardless of the smallness of the sum of money. D. 4.3.9;6 D. 19.6.6;7

D. 19.1.13.4.8 If fraud results from the thing itself, a distinction must be made whether the equity of the contract tolerates it or not. If the equity of the contract tolerates it, there is no action, because by nature the parties are allowed to deceive each other. If, on the other hand, the deception is such that the fairness of the contract cannot tolerate it, as, for example, if one buys for more than twice the fair price or sells for less than half the fair price, what was done inequitably must be reformed. One has an action on the contract, and it is in the power of the buyer, either to give the fair price or to recover what he paid by returning the object he bought.

THE CONCEPT OF "DOLUS"

Roman law introduced the concept of **Dolus**, a remedy for contracts made at an unfair price or under false information. Although there is not always evidence of intentional fraud, Dolus allows the contract to be challenged to restore balance between the parties. This principle raises many questions:

- Was the contract made with true consent?
- What mistakes can vitiate the consent?
- How do we determine whether conditions have changed to the point of invalidating a contract?

THE DOCTRINE OF CONSENT AND MISTAKE

In Roman law, the application of the doctrine of consent was closely linked to the doctrine of mistake. A specific mistake could invalidate consent, but the very idea of consent could be ambiguous: one could be said to have consented in one sense but not in another. This approach left open many fundamental questions, such as: what does consent really mean? What mistakes can vitiate a contract? How do we define a contractual condition involving both parties? For Roman law, law was a textual matter, with no room for philosophical speculation.

The Just Price in Contract: A central issue in Roman law was the concept of just price. Although today we regard contractual balance as an essential element, for the Romans the idea of fairness in contract was not a primary concern. It was believed that there was no such thing as an "absolute" fair price, since value was decided by the parties. Good faith, however, required that transactions be undertaken honestly and without fraud.

Digest 45.1.36.: "*If one who agrees to obligate himself to another does so by deception (per machinationem) he is indeed bound according to the subtility of the law, but he may have a defense of fraud (exceptio doli) because this defense belongs to one who is obligated by fraud. The same is true if there is no fraud in the stipulating party, but the matter is itself fraudulent (ipsa res in se dolus habet), because one who makes a claim on such a stipulatio commits fraud merely by making the claim.*

Digest 4.4.16.4 *emphasizes that "the contracting parties are naturally entitled to take advantage of each other." This reflects the classical view that contracts did not necessarily have to be fair; the important thing was that the terms set forth were met."*

Good Faith and Contractual Binding: A contract based on good faith obligated the parties to comply not only with what was explicitly said, but also with all implied obligations. For example, if a seller did not explicitly guarantee a good against certain events, he could still be held liable. This principle applied to both sales and leases, which were strictly regulated in the Roman code. In the 19th century, the concept of contract was more structured, but in the ancient Roman context there was no problem with accepting seemingly

“unfair” contracts. For example, a contract was considered unfair only if it included lies that led one party to pay more. However, a high price was not in itself considered unfair unless accompanied by fraud.

THE FAIR PRICE DOCTRINE

The fair price doctrine aimed to strike a balance between the contracting parties. Although the classical law allowed parties to take advantage of each other, there were exceptions. For example, if a transaction took place at less than half the actual value, the law allowed remedies.

The Glossa Ordinaria of Accursius (C.4.44.2)(p. 88) , attributed to the emperors Diocletian and Maximian, states, “If you or your father have sold property for less than its real value, it is right that the price should be returned to the purchaser and the land recovered by the authority of the court, or the difference in the price should be recovered.” This principle applied to sales, leases, and barters, and could be invoked by either the seller or the buyer.

Generalization of Remedy = Placentinus , Summa codicis 4.44: Roman law offered a generalized remedy for unfair pricing, known as the remedy for overpricing. The rule was clear: if the price deviated by more than 50% from fair value, the disadvantaged party could choose between:

- Rescinding the contract;
- Recover the difference between the agreed price and the fair price.

This remedy applied not only to land sales, but also to leases, barters, and exchanges of goods. For example, an exchange of a horse for a mule of significantly different value could be disputed.

A significant example can be found in medieval discussions of fair price: if a good was sold for too high a price compared to its actual value, the law stipulated that the difference should be made up. This approach was rooted in both Roman law and canon law, which emphasized justice in transactions.

THE APPROACH OF MEDIEVAL JURISTS

Medieval French jurists, for example, considered the protection of the seller to be paramount. This view was later incorporated into the **French Civil Code**, which maintained this approach, highlighting how French law sought to balance the needs of the seller and the buyer.

When it came to determining whether a price was “unfair,” medieval courts followed a formal procedure: evidence on the value of the property (e.g., the price of a horse) was presented and compared that value with the sale price. In some cases, experts were used to establish a reference price based on the local market. This process reflected the importance of ensuring procedural justice in transactions.

The challenge of fair pricing: Despite these measures, medieval jurists failed to develop a comprehensive theory of fair pricing. There was a strong debate between proponents of a Christian approach, which emphasized morality and fairness, and those who focused on economic pragmatism. Some believed that the fair price should reflect production costs and a reasonable profit, while others saw it as the natural outcome of market dynamics.This lack of an unambiguous definition led to varying interpretations. For example, the right price was often associated with the **market price**, considered the balance point between supply and demand. This concept began to prevail as market economies evolved in the early modern period.

The right price and the market price: The idea of the market price as the “right price” gradually took root in European economies. Local markets, with their stability and predictability, provided a benchmark for determining the value of goods. For example, the value of a farm was estimated on the basis of similar land nearby or the economic return it could generate. This methodology, still used in property appraisals today, reflects the legacy of medieval practices.

T**he challenges of market price**: Despite the apparent rationality of market price, questions remained about the fairness of transactions. If someone bought a good at a low price in one town and resold it at a much higher price elsewhere, this behavior was considered acceptable as long as it reflected market dynamics.

However, medieval and modern jurists questioned how to distinguish between a lawful profit and an excessive one. This ambiguity led to the emergence of economic theories that sought to justify market pricing as a natural equilibrium. According to some scholars, such as John Newman, the right price had to be the result of market forces, rather than a regulatory imposition.

A question still open: The debate over the just price has never been fully resolved. Although modern markets have established the market price as the prevailing standard, ethical and legal questions remain about what makes a price truly "fair." This issue continues to be relevant, especially in global contexts where economic inequalities and limited access to essential goods pose challenges to the market system. However, the move to market pricing has not entirely eliminated concerns about fairness in transactions. For example, civil law continues to provide remedies for fraud or particularly unbalanced contract terms. Similarly, consumer protection regulations seek to ensure a balance between contractual freedom and social justice.

Price protection and regulatory intervention: Despite the formal abandonment of the concept of a fair price, attempts have been made to ensure some degree of fairness through regulatory interventions. For example, the **French Civil Code** provides remedies only in cases of manifest fraud or particularly unbalanced terms, refusing to recognize an "unfair" price as sufficient grounds to cancel a contract. In Germany, on the other hand, manifest disproportion between contractual benefits may justify legal intervention.

In Italy, the **Codice Civile** recognizes the principle of party autonomy, leaving the parties free to determine the price. However, specific consumer protections have been introduced, highlighting the need to balance contractual freedom with the protection of weaker parties.

THE HISTORICAL ROOTS OF THE USURY DOCTRINE

The regulation of usury has deep roots in canon law, influenced by the **Fathers of the Church**. Figures such as St. Augustine, St. Jerome and St. Ambrose condemned usury as a practice contrary to justice and charity. Lending money with the expectation of excessive profit was considered morally reprehensible because it exploited the needs of one's neighbor.

For example, St. Augustine defined usury as a grave sin, while St. Jerome emphasized that any gain obtained beyond the amount initially lent could be considered usurious. These principles were codified in canon law and have influenced European legislation for centuries.

Pg. 91: "*That to profit beyond the sum given is to demand usury is proven by the authority of Augustine, who writes on Psalm [37:26], at the verse 'He always gives liberally and lends.... 'ac. Whoever demands more than he gives, accepts usury (Augustine on Psalm 37).*

If you take usury from a man, that is, if you lend your money expecting to receive back something more than what you gave, not only money but also grain or wine or olives or anything else, if you expect to receive more than what you gave, you are a usurer, and you are not worthy of praise."

The application of canon law: In canon law, ecclesiastical courts were tasked with judging contracts suspected of usury. However, there was also an internal dimension, related to individual conscience and confession. For example, if a person borrowed money with interest without doubts about the legitimacy of the contract, he or she could be accused of usury and forced to return the illicit gain in order to obtain forgiveness.

A case in point concerns the purchase of goods with deferred payment. If a seller agreed to receive a larger payment in the future than the current value of the goods, the legitimacy of the contract depended on the existence of uncertainty about the future value. Otherwise, the contract could be declared usurious.

THE HISTORICAL CONTEXT AND THE ROLE OF PAPAL DECREES

The decrees of **Gregory IX** represent a fundamental body of law in canon law. These decrees were essentially papal letters sent to resolve specific legal issues, which were later compiled into an official proclamation and integrated into canon law. Among these decrees, there is one that addresses an issue related to trade and the regulation of contracts of sale, particularly those with deferred payment.

PAG 93: "*6. (Alexander VI to the archbishop of Genoa): You say that in your city it often happens that some people buy pepper or cinnamon or other merchandise which is then worth no more than five pounds and promise payment of six pounds at the end of a fixed term to those from whom they receive the goods. Such a contract is lawful and cannot be censured, according to its form,c as usurious.d However, the seller commits sin unless there is doubt whether the goods will be worth more or less at the time of payment. Therefore let your citizens think well about their salvation if they refrain from such contracts, for no human intention is hidden from almighty God."*

A concrete example of this regulation concerns the trade in spices such as pepper and cinnamon. Imagine a scenario in which the current price of a commodity is five pounds, but payment is delayed for one year, with the buyer agreeing to pay six pounds at the end of the stipulated period. This contract, on the surface, would appear to be a loan disguised as a sale, with an implied interest of 20 percent. The question that arises is: **is this type of contract lawful or does it represent a form of usury?**

The position of canon law: Gregory IX's decree states that such a contract can be considered lawful, but with reservations. The Pope clarifies that if there is **real doubt** about the future value of the goods at the time the contract is made, then the agreement is acceptable. However, if there is no doubt that the goods will be worth exactly six pounds a year from now, the contract takes on the characteristics of usury. The distinction is thus based on whether or not there is a real risk in the transaction.

The moral dimension of the contract: In canon law, there are two dimensions to consider: an **external** one, related to the judgment of the ecclesiastical courts, and an **internal** one, involving individual conscience and confession. For example, if a seller enters into a contract in which he receives six pounds for goods currently worth five, but with no doubt about the stability of the future price, he might not be charged with usury in court. However, at the level of conscience, he might be considered guilty of sin and obliged to repent.

In fact, the pope invites traders to reflect on their **moral salvation**, encouraging them to refrain from contracts that do not respect the principles of justice and charity. This approach emphasizes the role of canon law as a regulator not only of outward actions, but also of personal intentions.

The problem of uncertainty and economic risk: A crucial point raised by the decree is the concept of **risk**. Suppose that the future price of the goods might vary: it might be worth six, but also four pounds. In this case, the seller accepts a risk in deferring payment, and the buyer agrees to pay six pounds as compensation for that uncertainty. This type of contract is considered lawful because both parties share the risk of the transaction.In contrast, if the future price is predictable with certainty, the contract becomes problematic. The Church, however, cannot know with certainty what is in the minds of the parties at the time the contract is made. Therefore, the ultimate assessment depends on the individual conscience.

THE REGULATION OF USURY AND TRANSACTIONS IN CANON LAW.

Canon law aims not only to regulate external legal relations, but also to guide the individual conscience. This legal system entrusts a central role to the **moral responsibility** of those who operate in the economic world, such as bankers or merchants. In the Middle Ages, for example, those who committed usury were urged to confess their sin and, in some cases, to **return the wrongfully obtained money**. This approach, which may seem harsh today, reflected an ethical view of law aimed at maintaining justice and charity as core values.

Sins against charity and against justice: Two types of sins are distinguished in canon law:

1. **Sins against charity**, which occur when a surplus of goods is dealt without sharing it with those in need.
2. **Sins against justice**, such as usury, which involve direct exploitation of one's neighbor.

PAG 94: "*19. (Gregory IX to Brother R.) Those who lend a certain sum of money to merchants who travel or go to fairs and receive something more than capital to bear the risk are to be censured as usurers. One who gives ten shillings in order to have back, at another time, a corresponding measure of gain, wine or oil that*

is worth more at that time, is not for that reason to be regarded as a usurer, provided there is a real doubt as to whether it will be worth more or less at the time of the service. A person must also be excused because of this doubt if he sells bread, gain, wine, oil or other goods and receives for them more than they are worth at the end of a certain period, provided, however, that at the time of the contract the goods were not to be sold."

A practical example: if an individual lent five pounds and demanded six pounds without any real risk or doubt about the value of the transaction, this was considered a usurious act, as it violated the principle of justice. In order to be forgiven, the moneylender had to return the unjustly earned difference.

According to canon law, the risk must be real and shared. For example, if I invest in a business venture together with you, I can claim a proportionate share of the profits. However, I cannot guarantee a fixed return regardless of the success or failure of the enterprise. This kind of clause would violate the principle of shared risk, turning the investment into a usurious loan.

Canon jurists have addressed the problem of usury by establishing **six exceptions** where it is permissible to take money at interest. Of these, the last three deserve special attention.

1. **Usury as compensation for damages**: If someone does not return an amount due on time, the creditor can claim compensation that includes interest proportional to the delay. For example, if a debtor fails to pay five pounds within the agreed upon year, the creditor could legitimately demand six pounds as compensation.
2. **Lease Agreements:** It is lawful to rent a property and make a profit proportional to its value. Suppose a property is worth $500,000: renting it out for 10 percent annually, earning $50,000, does not violate the canonical principle, since the income comes from the use of the property and not from a monetary loan.
3. **Company and shared risk**: The doctrine admits that partners can share risks and profits. For example, if a partner invests 20% of the capital in a company, he is entitled to 20% of the profits. This model differs from usury in that it implies active, shared participation in business risk.

DISTINCTION BETWEEN LUCRUM AND COMMODATUM

Canonical jurists make a key distinction between two types of contracts:

- **Lucrum**: This is a loan of fungible goods, such as money or products, which must be returned in the same amount.
- **Commodatum**: This is a contract in which a specific good, such as a cow or lamb, is loaned and must be returned in the same or equivalent form. Lucrum may not include a profit for the lender, while commodatum may include a rent for the use of the good.

This distinction reflects the intent of canon law to limit economic exploitation, allowing only gains that are proportionate and linked to the real risk or actual use of the asset.

THE CONCEPT OF COMMODATUM

In canon law, the **commodatum** is a contract that provides for the transfer of a specific good, such as a cow or lamb, with the obligation to return the same good or an equivalent at the end of the stipulated period. For example, if I give a cow for use, at the end of the year the recipient must return that same cow or an equivalent to me. If, on the other hand, it is decided to charge a fee for the use of the asset, that payment will be considered rent.

This distinction becomes important in defining the **economic legitimacy** of transactions. The commodatum must not turn into a disguised lease, which could constitute an illicit gain. This is where canon law draws a sharp line: the contract must comply with the rules and not result in **usury.**

Letting as a legitimate alternative: Leasing is considered an acceptable contract. If I lease a property or asset, I can get compensation proportional to the use of the asset, such as a 10% annual rent for a property

worth $500,000. This type of transaction does not break the rules of canon law because the compensation comes from the actual use of the asset, not from interest charged on a loan.

THE LINE BETWEEN ETHICS AND BUSINESS PRACTICE

The regulation of usury in canon law demonstrates a complex balance between **economic ethics and legitimate business practices.** The main goal is to avoid exploitation and ensure fairness in transactions. However, the system recognizes that some forms of gain, such as those from leases or partnerships, may be considered lawful if based on real risk sharing.

This approach reflects an economic view based on **justice and moral responsibility**, but it leaves room for different interpretations, often influenced by the economic and social context of the time. Until we reach the 16th century, this regulation serves as a standard for private law, setting the stage for broader thinking about the limits of profit and the justice of transactions.

LEZ 4/11

THE FORMATION OF THE IUS COMMUNE

Part III: Public Law

1. The power of the emperor

Baldus de Ubaldis, Consilia 4.436 f. 103r2

It is very true that the emperor is lord of the world with respect to every kind of jurisdiction and supreme power. D. 14.2.9; C. 7.37.3; C. 1.14.12; X 1.33.6.

Baldus de Ubalde, Consilia 1. 418 f. 129 v.

The empire is the entire domain from where the sun is seen to rise and to the west and all that on either side, that is, what is north and south, as in Nov. 69.1.

Nov. 69.1.

Given these considerations we deem necessary to promulgate a law. And we command all in the judges in the provinces ruled by us to which our power extends our entire domain from where the sun is seen to rise and to the west and all on either side that if any is guilty as to money or to crime … he shall be subject to this law ….

Can we infer from the text that he rules everything from the east to the west, to the north, to the south, throughout the entire world? If all this does, would you do that?

There were people on the side of the emperor, but he was fighting the pope, and the Guelphs were on the side of the pope. What is weird is that the Guelphs, the people who were on the side of the pope, did not object. You would think this must be done for **political reasons**. This must be done because there' s a huge battle over the powers of the emperor.
No, the people who opposed the emperor are on the church' s side, said, well, *you don' t have the power to appoint bishops*. Only we have that power. We have the right to decide our cases in the catalog of courts, not your courts.
When he was fighting the barons, what the barons would always appeal to is, **rule of the law**. We hold our peace with you, but those are always uncertain conditions. You cannot remove us without cause. And they let the emperor claim he has jurisdiction over the whole world.
But if it wasn't for political reasons, why it was so?

We are accusing the Roman Empire of fiction, but what about the Italian Civil Code?

We say that the Italian Civil Code was enacted in 1942, but we can't say that all the laws in it were promulgated by the assembly since there were a lot of laws enacted earlier in 1870. Furthermore, it was a copy of the French Civil Code enacted by our legislator. We can argue that, even though we say that it comes from the people, not all people understood that and neither did all the elected representatives. Also, the French Civil Code was de facto enacted by Napoleon.

How emperor could possibly have gotten that power?

Baldus de Ubalde, Commentaria to D. 1.1.9
Furthermore, the Roman people in which lay the force and power of every people abdicated it to the empire. Therefore it does not remain in the members who transferred their lot to the head.

The **Lex Regia** is a law: it was not really made by the people, but it was how the Caesars explained their power, how the emperors explained their power. The power originally lay in the **Senate of the people of Rome**.

How is it conceivable that all the people on earth, people on undiscovered lands, people who have never heard of the Romans, the Roman people was exercising their force and power in giving the law to the emperor.

Nobody can use the points that I' m making until we get the humanists and until we get to the latest scholastic. Why? Could it be that the lawyers have a need? The lawyers in the Middle Ages were experts on text. Every statement they make had to be grounded in the text. The texts have **authority**. The authority must come from somewhere.

The authority must come from somewhere. Maybe it's at that point that we start telling stories. There must be an ultimate authority to make these texts authoritative. What would an ultimate authority be like? Well, you rule the whole world and you have complete power to make law. That's what the emperor has and that's why the texts are authoritative. You begin with the assumption that your texts are authoritative throughout the entire world, and you work your way back to the idea

You begin with the assumption we're a democracy. We' re ruled by the Italian Civil Code. You work on your way back. And pretty soon you're finding yourself deciding how the people make a constitution. The constitution allows the people to adopt the code. Therefore, it's the will of the people. Is it any more or less fictitious? I don't know. But lawyers need authoritative texts. And they have to come from somewhere.

What difference does it make in practice? About none. And maybe that' s why you got by with it so easily.

Did the emperor ever exercise the power of adding laws to the already existent Roman laws?

Some historians counted eight different times when one of the Holy Roman emperors claimed he could add to the Roman law. But the only things that get into the **compilation of Roman law**, that is taught to **Bologna** and used by the courts, are:

1. **Roman tax**;
2. **Libra Theodora**.

That began with a meeting in Conrad: that was the **basis of feudal law** and it got incorporated into the program at Bologna. It was taught as though it was part of the imperial code.

Well, is that an instance where the emperor (Emperor Conrad I) legislated?

They argued about that. Some of them said yes, and that argue that the Libra Theodora, the feudal law, should be in principle binding everywhere, including Germany. Other people said no since he was just saying what law should be in **Milan**, because he was in Milan in the second millennium period.

But that's the only time when the emperor said *let this be law*, and some people say it is, but even the people that say it isn't, say it applied to Milan, and it's been adopted on their places as a matter of custom, so we'll follow it.

And this was, this was a **barrier**, an obstacle, to the **development of any rational political theory** for 300 years until finally, the humanists debunked it, and the late Scholastic developed a new political theory on the basis of Aristotle. That's the point where you can date political theory as we think of it.

2. The power of other political authorities to make laws

Bartolus de Saxoferrato, Commentaria to D. 1.1.9 no. 4
And in this case the authority of a superior is not to be expected as appears in the example of a custom which is established by the tacit consent of the people and is the equivalent of a statute which does not require the consent of a superior.

Custom has the force of law. The question is why? And the answer is, according to Bartolus, because the people have the ability to make law.

Ubaldis, Commentaria D. 1.1.9
Furthermore, the people can introduce a law tacitly and without the consent and knowledge of a superior since they can introduce a custom of which the superior is unaware. Therefore, it can introduce a law expressly, which is, to make a statute.
[Earlier, Baldus said:]
Note, therefore, that peoples are able to make laws for themselves.... It remains to be seen whether the authority of a superior is required for such a statute. And it would seem that it is not, for peoples exist by the ius gentium. Therefore, government of the people is from ius gentium. D. 1.1.5. But government cannot be without laws and statutes. Therefore, by the very fact that a people has being, as a consequence, it has, in its being, government, just as every animal is governed by it own proper spirit and soul. And if it governs well, the superior cannot hinder it because prohibitory laws are not made for those who are living well but for the erring, for if they are doing naturally what the laws are made for, they themselves are the law, and the healthy do not need external medicine. Therefore, if the statutes are good for that place in view of the public exigencies and conservation, they do not need another's direction because they are confirmed by their own natural justice. Furthermore, to the extent that anything has an essential form, it has an active power (virtute activa). But the people, of itself, has a form. ***Therefore it also has the exercise [of the power] of conserving itself in its being and in its proper form.*** *For it is natural and permitted that each thing endeavors to preserve its being.* D. 1.1.3.

Even though **Lex Regia** gives the power to the emperor, they still have **emperor residual power**. They have this power from the **Ius Gentium**. = it's supposed to be a law based on human reason and from it come contracts and, of course, all kinds of other things. From the Ius Gentium, the people have the power to make law. Now there, that's an **innovation**.

Doesn't that lie behind the later Aristotelian idea that every person has the right to make its own law?

Aristotelian notion: every living thing has the power of **conserving itself**. The animals, the plants, the people, and so forth. The body politics and the republican have the power to conserve themselves. Therefore, they have the power to make laws.

The people gave all their power to the emperor. Wherever they had gotten that power from originally, the emperor was getting it. Some Aristotelian notion about the power to make law, to act the law, it doesn't matter since they gave it to the emperor.

3. On limits of the power of the emperor

Supposing the emperor has all the power, are there any limits on that power? Well, in the political controversies of the time, when the emperor was fighting with the **church**, yes, there' s a limit. He has **temporal power**, and the church has **spiritual powers**. When he's fighting with the **barons**, yes, there's a limit and, therefore, they can' t be removed without a cause.

When we forget feudalism, when we forget the law of the church, can the emperor do anything he wants? What would happen if he did something oppressive and unjust?

Baldus de Ubalde, Consilia 1.333
*The Roman emperor has no one above him except **God**, from whom he can expect punishment if the acts unjustly. We jurists must say that the emperor is lord of the world even if he rules badly because **a superior cannot be corrected by an inferior**.*

We' re all under God. We jurists must say the emperor is lord of the world even if he rules badly. A superior cannot be corrected by an inferior. **No one has the legal power to correct the emperor**.

Digest 1.3.
As we resist violence and injury. For, indeed, it happens under this law what whatever anyone does for the protection of his body is considered to have been done legally….

It is okay to **repel force by force**. That is a little tiny scene out of which the **right of resistance** eventually emerges. It is right for a person to resist force by force.

However, the Digest is thinking of private **law**. You attack me, I can resist you. If I kill you in the process, well, you attack me. It' s perfectly okay for me. You can kill somebody by necessity.

Now how do we get from that to the right to oppose the emperor? The answer is that he acts unjustly, he may be acting by violence. In fact, he probably is. He's taking away what belongs to you by violence. It could be your life, or it could be your property. Now if he does that, he' s acting unjustly. But the Digest says you can oppose force by force, unjust force by force. Therefore, if the emperor opposes you, certainly you must have the right to fight back.

How do we reconcile two statements?

1. **Statement one**: no one can grab an inferior to right the superior.
2. **Statement two**: everybody has the right to defend himself against unjust violence. Therefore, you can defend yourself against the emperor.

Now we've got a **scholastic question**: **de jure, you can't oppose the emperor, de facto you can**. And what that means is no matter what he does, I can' t oppose him. I can't say I'm exercising legitimate power in his step. He is the only one with legitimate power. He cannot be deposed. What I can do is lock him up. I can get a **rebellion**. And so, de facto, I' m exercising power. Even though de jure, he can't remove the emperor. But we can stop him.

Because you read the one statement one and you think this is **absenteeism**. You read the other statement, and you say this is the **right of resistance**. It sounds like anything unjust the emperor does, I do not have to obey. In fact, I have to stop him.

The latest scholastics on the basis of Aristotle will come to the same conclusion that you have the **right to oppose the government**, but they'll go all the way. You have the right to overthrow the government or overthrow the king if he's really dead and set up a new government.

You can characterize these different theories about what their project is, what the jurists think they' re doing in the text.

- **Roman period**: give me the case and I'll give you the Roman law.
- **Middle Ages** -> experts on texts: you give me text and I'll give you a solution but don't give me anything that isn't in the authoritative text.
- **Humanism** -> different way of looking at text: you are going to understand the text and look at its **historical context**.
- **Late Scholastic:** we're going to find what did matter to philosophy.

LEZ 7/11

PRIVATE LAW

The work of Accursius, , from the 13th century (1184-1263), where he writes *The Great Gloss* (MAGNA GLOSSA, containing 96.000 gloss of Justinian's Corpus Iuris Civilis) .

It is said to contain over 100,000 comments, though much has been lost in the context of the *Corpus Iuris Civilis*.

The following period is referred to as the ***Age of the Commentators.***

One of the key figures in this process, likely Gerardus, contributed significantly. This era effectively ends around 1400. However, some continued writing until roughly 1500, and all those who engaged in legal scholarship during this time were referred to as commentators.

For some reason, the "Great Age" came to an end. Perhaps this is tied to the same reasons why the Romans' last significant legal work, possibly misinterpreted here as ***Period***, ended around 250 A.D. People believed they could no longer produce writings of equal caliber. This marked a transition in how legal texts were approached.

CHARACTERISTICS:

What characterizes this period is **fidelity to the text**.

→ The Middle Ages are often called the *Age of Authority* or the *Age of Faith*, emphasizing the role of established texts as the ultimate guide. Whether they were jurists or theologians, their task was to make sense of who they were through these authoritative writings.

They sought to extract knowledge from the texts, especially in private law. It is tempting, when looking at their efforts, to think of them as primitive precursors to modern legal systems.

Today, we have codified law—particularly in the Civil Law tradition—with systematic doctrines that outline clear definitions, such as what constitutes property, the types of property, instances of contracts, or torts.

By contrast, these medieval scholars were not aiming for comprehensive systems of rules. They didn't even think it was possible.

→ When discussing **rules**, **they believed these were approximations derived from the law itself,** which resided in the texts. They weren't formulating doctrines systematically; they were simply interpreting what the texts meant. In the process, they arrived at principles we now recognize as doctrines like the doctrine of necessity.

→ **They tell you what's in the text.**

However, some terms in this transcript, like "the doctrine of Uber," "the Watsonage," and "Sione," appear to be transcription errors or misinterpretations. → The scholars of that time focused on **reconciling texts** rather than formulating abstract doctrines.

For example, they might ask: "Is there a doctrine of just Christ?" They would point to a specific text, such as *Code 44-42*, to justify their interpretation. To them, this was the right way to engage with the law, not as a primitive stage of development but as the best approach for their era.

PROPERTY

Their discussions often revolved around practical problems, such as property disputes.

For instance, they wouldn't define property in abstract terms, but they would address specific issues that might today resemble modern legal concerns, such as public nuisances or conflicts between neighbors. They also touched on what we now call necessity, though they didn't see themselves as developing doctrines.

- **INTERFERENCES AMONG NEIGHBORS**

A key example involves cases of **"interferences among neighbors."** Consider two cases: one where someone creates smoke purely to annoy their neighbor—this would not be allowed. Another case involves smoke created as a byproduct of cooking or manufacturing cheese. The scholars would reason about these scenarios, noting that abnormal activities, such as excessive smoke or noise, might justify legal action. (- **Digest 8.6.8.6. & Digest 47.10.44.)**

This approach to reconciling texts—analogous to connecting dots to form a picture—is how they interpreted the law. Even today, some principles from their work, such as the regulation of nuisances, remain embedded in modern legal systems.

- **NECESSITY**

Take the doctrine of necessity. This principle remains a perfectly valid part of modern law in many jurisdictions, including Germany.

If I find myself in desperate straits during an emergency—for example, if I need to moor my ship at your pier during a storm—you cannot cut me loose. This doctrine was developed by medieval jurists and did not originate in Roman law. Roman law doesn't contradict this principle, but it also doesn't explicitly envision it. Instead, it was derived from a collection of texts, which the jurists pieced together.

- One key text comes from ***Saint Ambrose,*** who questioned, "How can you, rich people, call this property your own? How can you claim ownership of anything? Don't you know that all things are held in common?". From a legal perspective, this raises a challenge: if all things are in common, does that mean private property is unlawful? The answer, according to medieval jurists, was no. They reconciled Ambrose's perspective with Biblical teachings and patristic writings, such as the commandment "Do not steal."

- **Decretum Gratiani D. 47, c. 8 (St. Ambrose)**

To resolve this tension, the jurists developed two key principles:

1. If you possess more than enough to meet your own needs, you are morally and legally obligated to share the excess with those in need.
2. If you lack the means to survive through no fault of your own, you are entitled to take what is necessary to survive, and it is not considered theft. For example, taking someone's bread or coat in extreme circumstances would not constitute stealing.

This creates a tension with other legal principles, such as penance for taking property in desperation, which was viewed as a lesser sin or excusable act. These jurists grappled with how to reconcile such doctrines with broader definitions of property. They didn't aim to redefine property as a concept but to address these issues pragmatically.

DELICTUAL OBLIGATIONS

Next, we turn to tort law. Roman law, particularly the *Lex Aquilia*, established that if someone caused harm to another person or their property, either intentionally or negligently, they were required to pay compensation. Medieval jurists expanded this principle to include personal injury: **harming another person, whether intentionally or negligently, necessitated compensation.**

For instance:

- A shoemaker striking his apprentice resulted in liability for the shoemaker, and the apprentice could recover damages.
- However, in the case of injuries sustained during a wrestling match, participants could not recover damages since it was part of the agreed-upon activity, akin to a game or sport.

This interpretation reflects an evolution of personal liability and injury compensation.

Interestingly, when we examine canon law, we find a parallel moral principle: **if you harm someone, you are morally obligated to make amends**.

This extends beyond the confines of Roman private law into the realm of Christian ethics, creating a universal moral obligation. For example, if I harm someone, whether intentionally or negligently, I am morally required to compensate them. This moral dimension of liability transcends Roman legal principles and becomes embedded in universal ethics.

Another innovation by medieval jurists was the inclusion **of liability for unlawful activity**, even without direct negligence. Consider these scenarios:

1. If I throw a stone at a pig in my field and accidentally hit something else, I am not liable.
2. If I throw a stone at a child in my field (an unlawful act) and accidentally hit another child, I am liable, even though I was not negligent. Liability here arises because the act itself was unlawful.

This extension of liability highlights the medieval jurists' evolving understanding of moral and legal responsibility, which continues to influence modern legal systems.

Even if I'm not negligent, consider this scenario: imagine I'm hunting and shoot a deer. On what I might call a "three-princess day," I accidentally kill a man. Am I liable? No. Now, suppose I shoot at my enemies, again on a "three-princess day," and accidentally kill someone else. What then?

→ Medieval jurists might say, "Well, I happened to shoot at my enemy and kill them by accident," but in that case, I'd still be liable. Interestingly, this doctrine has disappeared over time. It no longer applies in modern legal systems like those of Germany.

The rationale behind this doctrine originally made sense to the jurists because certain texts supported it. For example, there was a rule stating that if you cut down a tree and it falls on someone, as long as you were engaged in lawful activity and were not negligent, you wouldn't be liable.

→ From these texts, they developed the idea of **liability tied to lawfulness**. However, this doctrine began to crumble in the 16th century when it couldn't resolve complex hypothetical scenarios.

For instance:

- What happens if it's illegal for me to ride a horse, and while riding, I trample someone? Am I liable?
- Or suppose I'm working on a Sunday, in violation of a prohibition against Sunday labor, and I drop a stone that kills a coworker. Would I be liable?

These situations led to the realization that engaging in unlawful activity doesn't always create liability, and the doctrine was abandoned. While elements of it persist in some civil law traditions, it largely vanished.

CONTRACT LAW

CONTRACTUAL OBLIGATIONS, when are contracts binding?

Next, we turned to contract law. Did the Romans understand that all contracts require consent? Yes, they did. However, Roman law was focused on specific types of contracts rather than a general theory of contract law. Their system addressed particular contracts like loans, deposits, and gifts but didn't articulate consent as a universal principle.

Later jurists began to reconcile texts to address this issue.

One source claimed, "All contracts come from the law of reason." Another stated, "All contracts require consent." (**Accursius, *Glossa ordinaria* to 1.3.14 pr. to necessitate.)**

→ Together, these ideas led to the conclusion that all contracts, **under the law of nature, require consent to be valid**. However, only some contracts were actionable under civil law. The medieval jurists preserved this Roman approach, acknowledging that certain contracts were enforceable by consent while others were not.

Their primary task was to align the texts rather than develop a systematic theory of contract law. For them, the Roman texts held the answers, and their role was to clarify rather than innovate. They didn't aim to establish a universal doctrine of contracts, and their explanations were limited to specific instances.

MISTAKE

Glossa ordinaria to Digest 18.1 - 9. Ulpian on Sabinus, Book 28:

One notable Roman text they referenced stated: "In a sale, there must be consent, or the contract is invalid." **They then explored various scenarios to apply this rule:**

- What happens if we don't agree on the terms of a sale? For example, you think I'm leasing the field, while I believe I'm selling it.
- Or perhaps I think I'm selling a cow, but you think you're leasing it.
- Discrepancies in price, object, or substance could also lead to confusion.

These examples illustrate how Roman and medieval jurists approached contracts pragmatically, focusing on **resolving specific disputes rather than formulating abstract legal principles.**

If I think I'm selling gold and you think you're buying gold, but there's a misunderstanding about the substance of the transaction, there's no sale. Why? The jurists simply used the Greek word for "substance" without explaining what it means.

The medieval jurists added layers of examples—**errors about price, object, or purpose**—but they didn't elaborate on why these misunderstandings invalidated consent. They felt their task was done as far as the Roman texts could guide them.

FRAUD

The idea of fraud, however, brought forth a new layer of complexity. Fraud could take two forms:

1. **Fraud in the cause (or motive):** A lie induces someone to enter into a contract they otherwise wouldn't. For instance, if you tell me that my horse will be seized tomorrow or that my law book will soon be outdated, I might sell the horse or the book because of your lie. This form of fraud invalidates the contract entirely because it undermines the very basis of consent.
2. **Fraud in the price:** A lie affects only the price, such as misrepresenting the condition or age of a horse. This kind of fraud doesn't invalidate the contract but entitles the injured party to damages reflecting the price discrepancy.

The jurists made up the term *fraud in the causa* because the Romans didn't explicitly distinguish these cases. To the medieval jurists, this term clarified why Roman texts sometimes invalidated contracts and other times prescribed remedies like damages. They reasoned that when fraud influences the motive, the contract collapses. When it merely alters the price, damages are the appropriate remedy

The just price

Additionally, the jurists addressed unjust prices. Sometimes, prices were unfair not due to lies but simply as a result of circumstances. For these situations, they provided remedies for unjust pricing, unrelated to fraud. They developed a framework distinguishing:

1. Fraud related to cause (motive) versus fraud related to price.
2. Lies versus circumstances.

This framework allowed them to reconcile Roman texts and explain outcomes logically, even when texts didn't use the term *fraud* explicitly.

Changed Circumstances and Promises

The doctrine of changed circumstances, which persists in modern law, also has medieval origins. It addresses scenarios where unforeseen changes make fulfilling a contract impossible or drastically unfair. For example, a classic case goes back to Cicero, as adapted by St. Augustine. Cicero posits that if you entrust me with a sword and later ask for it back to harm the republic, I'm not obligated to return it. Augustine and later jurists like Gratian agreed: **promises are implicitly conditional upon the continuation of relevant circumstances.**

→ Why is this significant? It established the principle that contracts are not absolute. They're bound by an implicit understanding that circumstances won't fundamentally change. This principle, born in medieval jurisprudence and refined by canonists, eventually made its way into civil law systems and, later, modern contract law.

The medieval jurists' contributions were driven by their commitment to reconciling texts, rather than creating entirely new doctrines. Their interpretations laid the groundwork for principles like **fraud, unjust enrichment, and changed circumstances, which remain integral to modern legal systems**.

Liability in Hunting and Unlawful Activities

Even though I'm not negligent, I asked you to imagine: what would happen if I were hunting. I shot a deer. It was a free shooting day. I killed a man. I'm not liable. ≠ I shoot at my enemies. It was a free shooting day. And what happens then?
Mechanists would say, "Well, I happened to shoot at my enemy and kill it in this advice paper." I'm still going to be liable. Interestingly enough, that doctrine has vanished.
That's not what they say in the laws of Germany and so forth today. And we saw it made sense to the chemists because some texts said if you cut down a tree and it hits somebody, as long as you're engaged in unlawful activity and you're not negligent, you don't pay. → Some of the texts said that.
They invented this doctrine of lawfulness. And we're not going to see what it does: It died about the 16th century when people took hypotheticals that the doctrine couldn't resolve.

Unlawful Activity and Liability in Hypothetical Scenarios

What happens if it's illegal for me to ride a horse? And I'm riding a horse and I ride somebody down. Would I be liable? No.
I'm working on a Sunday in a place where you're not liable to work on Sundays. I slip with a stone and it falls on a fellow worker. He dies, and am I liable? I shouldn't be. Therefore, it must be true that even if I'm engaged in unlawful activity, I'm not liable. The doctrine ends there.
Sometimes it's picked up by the civil law. Sometimes it ends. Here it ends. That's what we get to report.

Roman Law and Contracts

Then we looked at contract. And we saw the following.
→ You may ask: did the Romans know that all contracts need consent? The answer is yes.
But their law was the law of particular contracts. → They don't try to handle consent to prove anything. If you ask them, the evils know that contracts are binding by consent.
Now you get to our curious problem. They say so. They eventually, by proposing one text here, the U.S. Jetson says, all contracts come from the U.S. Jetson, the law of reason. All contracts require consent.

Consent in Contracts

They conclude that by the U.S. Jetson, contracts require consent, and contracts were enforceable by the U.S. Jetson, the law of nature.
But only sometimes does the civil law give action. So they preserve the Roman law. Only some contracts are actionable by consent. Some are not. There were contracts brave, for loans, deposits, gifts, but in

principle, the U.S. Jetson says, by consent, they're actionable, only sometimes civil law gives an action. And once we have that, they just leave it alone.

Examples of Contractual Disputes

There was one Roman text, by opening it, which said, oh, by the way, in a sale, there has to be consent, or there's no contract. And then they gave a bunch of examples. What would happen if we don't agree on a sale, and you think I'm leasing on a contract? I think I'm selling for the price. I think it's this high, I think it's lower. For the object, I think I'm selling, you're leasing this field, you're leasing this field. I think I'm selling this cow, you're leasing this cow.

Fraud in Contracts

If you defraud me, if you tell me a lie, it could be that you lie gives me the motive for buying something I wouldn't have bought, or selling something I wouldn't have sold. It's a lie that gives me my motive. It induces me to do it. That's fraud in the causa.

- **Fraud in the causa**: Motive; tear the contract down.
- **Fraud in price**: Adjust the price; damages awarded.

Changed Circumstances

With changed circumstances, we have a doctrine that survived. It varies with the 19th century, where people had seemed to contradict the idea that I'm bound by what my father said. That's a real theory to talk about. I'm bound by what my father said. So how can I be bound just because I didn't think of something and now I don't want to get out of my contract? But it goes back to the Middle Ages.

The Middle Ages and Historical Thought

The Middle Ages was the period between Romans, the classical age, the Greeks and Romans, and the modern world. The Middle Ages was, well, people would find that they were different then. Now, one of the insights that really animates history, and what I'm thinking of too, is this. It's the idea that people long ago thought differently than we do now. People long ago thought differently. People think differently at different times and places. Some people trace it back to the humanists and the Renaissance. And the humanists said that people in the Middle Ages sure thought funny. They weren't. It was a barbarous age. It was an age when learning was forgotten. Yeah. So they understood that people in the Middle Ages thought differently than the Greeks and the Romans. What they made of that, though, was the Greeks and the Romans thought the right way. They were virtuous, clear-headed, articulate people, and they spoke great language. They're like we are, the humans. And then the queen, who had all these people, was a barbarous language. They're a very strange, unhistorical method.

The Renaissance Perspective on Virtue

But to the extent they thought that the medieval people were different, it's because they just weren't as virtuous and intelligent. To the extent they thought the Greeks and Romans were different in the Middle Ages, it was because they were clear-headed. They were virtuous. And they thought they could make them virtuous. By a new system of education. We were talking about that, a new system of education. It was an education for classes. It was an education to write decent words, language. You learn to write well, speak well, oratory. We could make a complete human being. But their model was the Romans. We want to make you the kind of person Cicero would have been like. And Cicero was virtuous, and we want to be humanly virtuous in the same way. So they were virtuous.

The Medieval and Gothic Periods

So it's not as though they think people at times and places think totally different. Sometimes they think the right way. That's the Greeks and Romans. And not since the Renaissance. And sometimes they think the wrong way. And that's this very dark period that separates the two. In the Middle Ages, when people are

Gothic. And they called the style of architecture Gothic. And that is a compliment. Goths were barbarians. So they made Gothic architecture. They wrote a Gothic script. We'll get to the Jimenez in a minute. But you see the idea. They're not inventing the idea that different societies are different historically. They're inventing the idea of the Dark Ages and the Middle Ages. The separation of people. The time when the sun was shown. And the time when the sun now shines again. Separated by an age, a period of time.

If you want to look at the origins of the idea. That people thought differently. That they belonged in different societies. I would find it in, like many people. I would find it in the late 1830s, 19th century. It's a modern idea. People that are here. No, they are now.

The Rationalists and the Mathematical Approach to Law

On today, I'm going to rephrase it. A hundred people gathered. And we voted against a philosophical theory called the Rations. The Rations came at the tail end of the period we're going to study. We're going to read the works. The Rations thought law should be like mathematics. Start with axioms, postulates, and definitions - like definitions of contract and property. And we are capable of deducing the conclusions with the same accuracy as there is in mathematics. Give us their axioms, and we will introduce the conclusions. And the conclusions are true forever and always in all societies. Just as true as if a triangle has three angles, and they've got 'A' up to 180 degrees. And that's true everywhere. And that may seem strange to you. But that was what most educated people in Germany believed in the 18th century.

Criticism of Rationalism

Anyway, there were some people who said that can't be right. I mean, that can't be right. The same principles. The law in front of all societies. And people don't know those principles. It's like they don't know the Pythagorean theorem. They just don't know. They don't know anything. So they developed the idea that law is different in different societies. And that people think differently in different societies. And the people who developed this. One was a guy named Vico. A German teacher, Vico. And he died around 1750. Another person who developed this idea was a young man, Dr. Herger. He died around 1800. So we're dealing now with 18th century people. And they are, go back to them, and you find the idea that if you can live in a society, you can have a sense of justice, you can see laws certain way. And the only way you're going to do that is if you can live in a society that has a certain set of, we would say values. And every society has its own set. And so if you live in that society, the way you're going to think about right, law, justice, law, everything, is in terms of the values of that society. But where does those values come from? Well, Vico and Herger had a history of the world. They don't come out of nowhere. And the history of the world is kind of an ascension from the very, very beginnings of ancient Egypt to the law you gave in the 18th century. You work your way up step by step through a series of societies. And it almost represents the growth of a child throughout a thousand years. At each age, the child sees things a certain way. The molester sees things a certain way. And so forth.

The Three Ages of Vico's Theory

Remember, Vico said there were really three ages. One was the ancient, or the oriental justice in this time, Egypt. And that was when all they thought of in law was the will of the gods. And it was known through divine ceremonies of priests. That was the first age of the earth. And then the second age of the earth was what he called the aristocratic age. And it was ruled out by priests. It was ruled by heroes. They thought of themselves as a magical ability. And then he says they thought of everyone else as, 'animus', unquote. So this is a very long age. Because it stretches from Homer, where you have Achilles and Agamemnon and heroes like that, all the way through the Romans, and all the way up to the early modern period. When you get to the early modern period, which we call it now, you have a fully developed human being. He realizes and makes his decisions on reason. And he understands that all people are equal.

The Evolution of Societal Perspectives

In any of the prior ages, such as the hero ages, it would have been natural to think, as Homer did, that everyone who wasn't noble was less than human. And if you lived in ancient Egypt, it would be obvious that the pharaohs, in their position of power, were the ones responsible for establishing justice, according to divine

law, as the Egyptians believed. I'm not going to stop to critique that idea—let's just continue. This idea gradually became a key belief in Egypt.

Herodotus and the Eternal Order of Development

Moving forward, we get to Herodotus, who had a similar perspective, but framed it differently. He saw societies as believing in an eternal order of development, and that eternal development became a central value for those societies.

Greek Society and the Age of Adolescence

Moving further ahead, humanity enters adolescence, as seen with the Greeks. The Greeks cherished the physical body, beauty, and the concept of freedom. They were an aggressive, yet remarkable, society.

The Roman Empire and the Age of Maturity

After the Greeks, the Romans represent the age of maturity. They were focused on empire-building, justice, and governance. Eventually, though, this process seems to stop. It's almost as if after that, people needed to rediscover what it meant to truly be an adult in society.

The key point here is that, within each of these historical periods, people had to view the world through the lens of their own culture. If you were Greek, you would think like a Greek. If you were Roman, you thought like a Roman.

Hegel's Philosophy and the World Spirit

Hegel later expanded on this concept. He argued that all of history is the realization of a force called the "world spirit." This world spirit drives the development of civilizations, making each one contribute to a higher understanding of itself. The human mind, through history, gradually understands itself and becomes more aligned with this world spirit.

Hegel, taking much of his ideas from Herodotus, divided history into periods: an Oriental phase, a Greek phase, a Roman phase, and then, a Germanic phase, which he believed marked the birth of freedom. In this framework, societies grow, develop, and transform, with each stage building on the previous one. For example, the Romans accepted slavery as part of their worldview, just as the Greeks believed in the superiority of their aristocratic class. To them, these practices weren't morally wrong—they were simply the way things were, according to the world spirit of their time.

Weltanschauung, Geist, and the Influence of German Philosophy

The concept of the "world spirit" also tied into German philosophy with two key terms: Weltanschauung (worldview) and Geist (spirit). These ideas have deeply influenced how we think about history. They suggest that if you want to understand history, you must recognize that people in the past didn't think the way we think today. People thought differently depending on their historical context. Philosophers like Vico, Herder, and Hegel emphasized this, arguing that each society's "Geist" or spirit shaped its values and laws.

The Challenge of Historical Transitions

One difficulty with this approach is that if you really believe people in different periods thought completely differently, how do you explain the transitions between them? How did the medieval mindset transform into the Renaissance mindset? It's difficult to explain how such a drastic shift occurred unless you think that a new vision or insight was suddenly revealed, changing the course of history. But how do you reconcile this with the fact that the Renaissance built on medieval knowledge? The Renaissance thinkers might have criticized the Middle Ages, but they still used the medieval ideas as a foundation for their own work.

The Marxist View of History and Material Conditions

This brings us to the Marxist view of history, which focuses on material conditions. According to this theory, society is shaped by the material situation, where one class dominates another. The ruling class develops a

set of values that justify their power and control. In the case of the Middle Ages, the ruling class—largely the feudal lords—had a certain vision of why their system of exploitation was justified. Whether or not this is a valid perspective depends on how one defines exploitation and what values one sees as important in analyzing history.

Feudalism and Exploitation

If you examine the medieval peasant working for a rural landlord, who is a knight, goes off to fight in five battles and crusades, and appoints a steward to administer justice in the village. And you say, "I think that's true. That's exploitation." That might be the starting point of the conversation. You might ask, "Why?" And you could respond, "Well, because the peasant is producing all the food, and the knight is taking it away from him." That sounds like a principle of Roman law. It seems to align with a principle of injustice and exploitation. The dietician might say, "This, by nature, is equitable. If one man's loss is another man's gain, it is unjust." Of course, this then raises the question of whether it truly is unjust and exploitative.

Is It Unjust? The Property Question

So, we return to the original question: Is it unjust? Is it about property? At this point, it is almost impossible to imagine that Trump isn't talking to the medieval. If he had talked to the medieval and said, "I say property relations are unjust," I can imagine the medieval person responding, "Well, what's your authority?" They would point to their authorities, saying, "Here are our authorities. They assert that property is not ours, but we understand it under some circumstances. It's not right to own, but we understand it under some circumstances. We should be able to take possession of it." Marx would reply, "You think that because it justifies your institutions." And the medieval might ask Marx, "What do you think? What do you think?" Because you don't have any texts, you've just made it up. At that point, the conversation could end.

Dualism, Capitalism, and the Medieval Struggle

Sometimes, the law is applied against the Lord's steward, and they are foreigners. But most of the time, it's applied against each other. There was much in the Middle Ages that you wouldn't expect if you were simply looking for a philosophy of exploitation. A lot of the time in the Middle Ages, was it the rise of dualism? Yes, we saw that. Was it the rise of capitalism? Yes, we saw that. Beneficial convergence, commercial empires, and so on. Can we even say there was a struggle between the capitalist class and the nobles? Yes, we saw that. In the medieval semi-states, they pushed out the nobles, and they took control of the towns and cities, building themselves up. Sure, there was a struggle about that.

Is There a Connection to Dialectical Materialism?

Having said all this, are we anywhere close to dialectical materialism? I don't know. Nobody ever believed anything that I could prove. So, I don't want to debunk everyone else's views. But I do want to say something about mine, which is this: I agree with everyone. I agree with cultural historians that the only way to study a society is to try to see the world through their eyes. Try to remove yourself from it. See the world as they saw it.

Looking at Individuals in the Medieval Period

But when we examine the way the world looked to them, however, we don't find ourselves looking at any knights from the Middle Ages. We find ourselves looking at individuals. Some of them are trying to rationalize their relationship with older feudal systems.

Negotiation Instruments and Philosophical Reflection

Some are inventing things like instruments of negotiation to move money. Some are interpreting their own texts or others' texts by reconciling them with each other. And that's what we see, and that's all we see. If we were to ask them, in some deeper theory, what they were doing, I suppose the first thing you'd need to ask is, "What text are you referring to?" You won't have a philosophical discussion with the person you're talking to. That doesn't mean they don't have philosophical discussions about the law. That's what happens after you've been doing this. And some people will start trying to inject philosophy into others' minds, asking questions

like, "What is the justification for that?" We know the justification. And that answers the questions people ask when they try to do that.

The Shift from Law to Art in Italy

The Italians stopped practicing law. They just started drawing beautiful pictures. My wife is an art historian, so I'm referring to her father, who was a parent, and she talks about all the great artists they produced. I think these great artists also contributed to the rise of humanism. And what's new is the significant impact. We're talking about a smaller impact here, which is the discovery of philology. It's how you read the text. And a new objective: Let's figure out what the deeper meaning is. That's a new way of reading texts. We're discussing that. The humanist idea changed how people in the upper class conducted their lives. The AI wasn't a religious change. It was a change in what you're supposed to be like if you're upper class, you know, a noble in the Middle Ages.

Life of the Upper Class in the Middle Ages

You would go to the universities, and they were religious. You could go to the university, become a medical doctor, a jurist, or a theologian. These were the people who worked for the house, the diocese, the bishops, and the judges. They could heal people. They could be priests. They could become popes. Many of them, of course, were canon lawyers and theologians. They were in the church, and that's how it started. But that was for the learned people. To be a learned person, you know, if you were raised in that environment, by the age of 14, you'd go off to study and pursue that path.

Social Status and Education in Medieval Society

You might be nobody, a canon, or something else. But if you were a board member, you know, parents, and people like that, we had a completely different kind of culture in the Middle Ages. We didn't do it because it didn't seem to have much to do with law. It started around the same period, around 1150. And there was this whole cult of what it meant to be a knight, what it meant to be a court lady. It was brought to perfection by Eleanor of Aquitaine. She was the wife and head of the section when it started to become law. They didn't get along, so she had to go to court. So did France. I mean, they call it courtly culture now.

Courtly Culture and the Role of Women

It's how you behave when you're in the courts. And the way of behavior, you know, it was the men fighting in the tournaments and the women talking about it. There were lists of stories, stories of valor and stories of love. The extended influence of law was no longer based on a court of law in which people would pretend to be lawyers and argue cases. So, somebody would honestly put a case in front of the court, saying, "It's this lady. I'm throwing my heart at her feet. I'm going to miss and miss and miss if she continues to refuse me. I want a verdict that says she should accept me." The other guy would do the same for his lady.

The Courtly Love Narrative

Can you really be in love if your husband didn't love you, or maybe loved you, and everyone waited to see what the queen would say because she didn't love her husband immediately? If you were talking to a woman and wanted to dismiss her through the book and deliver a lot of speeches, as near as I can tell, you were supposed to think that it's not a small argument but rather a big argument. The guy says to the woman, "You don't love me." "I love you very much because I'm excited whenever I see you." And the woman says, "By this, you show you don't know the very definition of love, which consists of imagining suffering caused by love." Then the guy is supposed to respond, "You can't handle this. I'm really angry." And they listen very carefully and poetically, staying true to the romantic narrative. The guy says, "I don't know what romance is, but here's what I'll say." There's very little culture here. The founder of humanism in the past was a rising patriarch, writing in the 14th century. He was an exponent of an entirely new type of culture based on knowledge, grief, and lack.

When he wrote, he was once invited by the King of Naples to visit the court. He says, fortunately, they put up with him. They were so well-mannered. They didn't behave according to culture. I mean, the outsiders at the university. Well, it's two centuries later. If you go to the court, you're considered Christian as well, except for people like Thomas More, who knew Greek and Latin literature very well. And the whole idea of what it means to be a gentleman is a shame. You're supposed to know Greek and Latin literature. When you kill people, you know, there's a broad story. You want to write a letter to a woman in a secret place and you don't do it

the way you did in court. You write her a sign, and it must have at least three classical allusions, two of which I'm sure I get, one of which I'm sure I miss. You're lying to yourself if you don't acknowledge that Greek mythology influenced your life. Everyone has a "canal."

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Humanists had to be educated, they had to know Latin and Greek One of the effects that this had was on **language**; they invented philosophy, philology meaning that we will teach you how to read a text. Another thing it meant was that when you look at the law, the law should not be a tangle, law should be an **art** and what they meant by art was a word they took from **Cicero**, an art would be a unified treatment of something based on simple principles. **Cicero** was describing how he thought **an orator** should be trained, an orator is the one who should argue before the courts. He should have knowledge of the law. But he said, "I think that instead of what we have with jurists, where they argue endlessly about when this action arises, when the value of your house exceeds the boundary, what we really need is if I am allowed to do what I am proposing". Then you would have a complete art of common law, magnificent and copious, but neither inaccessible nor mysterious. If you could reduce it to a few simple distinctions, you could have a complete art of common law.

Why should the law be such a complicated thing that only jurists can understand? it should be transformed into an art that everyone can do.

Now, that is the idea that it is currently preferable to avoid writing rather than having animals as readers, and the latter do not understand what you have wisely elaborated for them – the animals poorly explain it to others, who do not speak with a Roman, but with a barber.

Society is often characterized by a language and by the lack of certain urban and civil customs, showing yesterday a rusticity and animal ferocity.

"The Encines and the Armies" was a clever little book because it dealt with coats of arms and written on coats of arms, as he called them in Italian ("stemmi"), the coats of arms that the knights had. So, he decided to see if he could apply Roman law to understand what the correct use of coats of arms was. And he argued that not only nobles have the right to use coats of arms, but also other people have the right to use signs in certain cases.

For being a humanist, you should speak good Latin and with good Latin does not only mean having the correct grammar but means using the words in the right original sense of the word out loud in Latin or clarifying that you want to define them in a new way and means that you have to express yourself in the same way as Cicero in beautiful Latin; it was used as a model for centuries and centuries since humanists, just as other people to whom they refer.

Wim De Cock, a great historian, and now, he's writing about a boy, Can Yell who is a humanist. Here we are later, he discusses the 1500s, when humanists were really entering their golden age, he's telling you what the problem is with the way some of the texts we read have been traditionally interpreted, and you too.

He goes on to talk about the **Glossators** who concluded that they could analyze fraud and dolus in terms of cause, reason. So,

o if you lie to me and give me my reason, my cause, my reason for contracting, you tell me that I will be deprived of the horse, so I buy yours, the contract falls. Your contract remains valid, but I receive the price difference, the amount I would have paid if I had known the correct age.

- If you haven't even lied to me, the thing that there is to say. It is dolus ex regissa. At i deceit seen from the same thing in itself. And **Pingale** addresses this very carefully, trying to understand, wait, where are you coming from? There is no room in Roman law, in the original sources that ever used the word dolus to describe a situation in which you were not even told.

→ **Dolus** always means that you did something subversive to take advantage of me. You would take advantage of me by telling me a lie. So, "dolus ex regissa" just doesn't make sense. This topic is still in Roman texts, they developed this distinction without the word cause appearing in any of their texts:

- Fraud in cause;
- Fraud that is not in cause;

→ **Justice is right:** the people who wrote the classic text on taking advantage of the other side on the price could not foresee small deviations and it was not even just that the Romans, who spoke of this remedy or that, canceling the sale, waiving damages, could have had in mind the word cause. What better proof could you have than that there are eight texts and none of them uses that word? Okay, well, most plenty of historians if you try to recover the original meaning of the sources:

how is it possible to apply the sources to any situation that the people who wrote the text never considered? They simply did not think of it and if we cannot apply the text to any situation except those they considered, what happens to the state of law?

Now, there is a struggle over how to interpret codes.

1. Originalist view = some people say we should be originalists, to stick to the language of the code.
2. Creative view = some people say we need to apply it creatively to new situations.

→ **Originalism** = we talked about originalism in Portugal. It was through Zoom, and there was a Portuguese professor who wanted to gather his friends and talk about originalism. When I hear about originalism in America, for me it means the discussion on how to interpret the American Constitution. But to interpret the French Civil Code we can use an example of a provision of the French Civil Code, which you don't have in the Italian code, so I can't give you the details. But it was taken from Domat. He was using it to describe objective responsibility in Roman law for wild animals, fairies.

That is not what he means by originalism. He means **literalism**.

Is this how the Italians continue to do it, and most of Europe, in courts?

They follow Barlas; they cite him as authority, Accursio is cited as authority. Everything we've learned so far continues, but it is the most extreme. They wrote very, very long books and it would be interesting to know the result of this is that it was quite effective in understanding . The problem was that it was almost unusable by the courts.

- It creates a problem we have never completely resolved. It created a division on how to make the law. But the courts, at least those that follow the more Italian way, continue stubbornly to behave like scholastics.
- Now, the second difference is that the humanists want the law to be an art. Copious, but easy to understand, magnificent, simple – a kind of thing that is easily learned. It is not necessary to go to law school to do it. And that is what people should learn, to be judges, to argue before the courts and so forth. And this is quite a big project. In a sense, it is one of those we never really give up on, we never give up the idea of the humanistic method.

Why can't we have the law as a set of simple and clear principles?

And the original idea of the French civil code would be that an average citizen could read the French civil code and understand what to do. Copious, simple, and so forth. We will see how this idea develops.

→ The thing is, at the time of the humanists, let's say in the 1500s, when these people thought about making an art of civil law. They did not realize that there's a clash between what Cicero says and what the Roman jurists did. And look at it just in his character, in his dialogue. And his character says: 'We need a copious and simple art to replace what the jurists do.' They were concerned with actions and you couldn't say this,

because as far as they were concerned, the great model for us is antiquity (the Greeks, the Romans, the Latin, their culture, their ideals, their law).

And notice when Bala attacks Carlos, those are the guys who wrote the Roman text; they are in the digest if you look at those Roman texts do you read them, do you see a system? Now you have to go to law school, or in their time you had to be a jurist after years of training to understand what you were talking about. Now we've given ourselves an interesting project: that is, we take those direct texts because they are ancient texts written by ancient authors, we can take all the texts in the compendium and put them together so we have a system that is beautiful and copious,

→ **the problem** of trying to demonstrate this is that you must remember that you cannot, but you must understand why it is an experiment that fails; it ends with them the experiment of trying to take all the Roman texts and turn them into a simple system; it does not fit. And when you look at them, you can see that there were only two people who really tried; you can see that there were only two people who really tried to do it.

1) Canadiens decided that he must find simple principles, but how would you find simple principles that explain, for example, why some contracts bind on consent and some contracts do not bind on consent? I mean, I can describe how he tries to do it, but it is confusing, and I think it is confusing because an act of voluntary commutative justice, a simulacrum, and this since they are exchange contracts; so they should be binding on consent. Then he must explain why some contracts are binding only on delivery and some are not binding at all. Then he

elaborates his principles: 'Well, delivery counts as if it were an exchange, that's why a contract that is not an exchange is binding on delivery, like a deposit or a free loan I could continue like this, but the more you go on, the more complicated it becomes; that principle ceases to be simple. He has to twist it, and when he's done twisting it, he ends up writing eight volumes in humanist Latin, one of my most painful experiences in life is creating a system that is simple, abundant, and easy to master. So, that's how he did it.

2) Then Ellis did it differently. He said, let's see the part of Cicero where he says we need to make distinctions: or A or not-A. After A, this or that. We cannot go through everything and start with distinctions, private law, public law, make a branched tree and end up with all the texts, but every time making a simple distinction between the texts? When he tries to do this with Roman law he produces another eight volumes full of distinctions. It's amazing how complex they are, because you have to divide and divide and divide every time you find texts to explain. Is it a system that is abundant and simple? Principles that would explain all Roman law, and in any case, it does not do so.

3) Danellis thinks you can do that by tracing distinctions. This is this, this is that, this is subdividing this, subdividing this and produce an incredible series of bifurcating trees, bifurcating paths through the woods that lead nowhere. And that's the end of the project. What we will see, however, is that the project will be revived, it will come alive. People still dream that it could be done, that law could be reduced to a system of simple principles, abundant, magnificent, easy to master, but they will do so avoiding trying to create a system that explains the Roman text. They will not do so by trying to create a system that explains the Roman text. If you try to do it with the Roman text, it doesn't work.

Influences on the Formation of Western Law

Two significant influences on the formation of Western law and culture have been

1) Roman law and
2) Greek philosophy.

→ **Aristotle** = In antiquity, Aristotle was one of the most important philosophers and in the Middle Ages, he was the reference philosopher. Dante referred to him as "the master of all who know." Aquino called him "the philosopher."

→ **Tommaso D'Aquino (Thomas Aquinas)** = He made his appearance in the Middle Ages, and one of his work from which all others draw inspiration was connected with Christian theology, but he constructs his ethics and his assertions about law based on Aristotle. We'll see, because we will need to read a bit of Aristotle and a bit of Aquinas to keep up.

In the Middle Ages If you wanted to study theology, you would have encountered the Bible, you would have read it, and you would have read the Fathers; you would have studied Aquinas and you would have read Aristotle. And this continued, despite humanism, despite everything else, it continued for a very, very long time. Samuel Pufendorf, who called himself the son of Grotius, reached into the 17th century, stating that all the universities of Christendom are founded on the teachings of Aristotle, as if the human mind could not go beyond, and this is still ongoing.

→ When **John Locke** wrote, he said: "I hope I at least clarified the stable, eliminated all those things I had to study at university, which were all Aristotle." So, it takes a long time before Aristotle loses his influence. In the meantime, so much has been built on the foundation of that philosophy that people continue to use the ideas even if they no longer know where they come from. Well, here's the thing. It's the thing.

The next group project = the project of the medieval jurists is to understand how to make every text consistent with the others; the project of the late scholastics is to let Roman law and Aristotle combine. So, moving forward with the project, they begin to write books where instead of having comments on passages of Roman law, the books deal with the issue; let's talk about the rest. So, you're taking them all in a logical order. This is the first time Roman law receives a coherent doctrinal system. The Romans didn't have one. They didn't have one in medieval Italian law; a modern textbook is trying to present your law as a coherent doctrinal system; well, these are the first people to do it, but with them the idea is that it should be a philosophical system.

Problem with understanding Medieval Jurists

The difficult part of what we have already done is that it is impossible to understand what medieval jurists were doing unless you look at the Roman text and imagine the Roman system in a natural law. They ultimately elaborate a legal system. SO, to explain them all we need to analyze them by principles, and what makes this much easier for them than for the canonists is that we will be selective about which Roman text we will explain; if we can explain them philosophically from Aristotle's philosophy, we assert that this is a natural law that means it has a philosophical explanation; it is good everywhere and always because it is based on human nature, which is the same everywhere and always, so that is the principle of natural law.

Natural Law Schools

So, we have seen that there have been 3 law schools:

1) **Jurists** trying to use principles to understand what romans actually stated in texts
2) **Grotius'** school
3) **Brodius'** school (the one we will look better at)

First School of Natural Law (jurists)

The late scholastics actually begin in Paris. There is a man named **Pierre Crocker** who undergoes an intellectual conversion.

He believed in something called **nominalism**, initiated by William of Ockham in the Middle Ages, where rules tended to disintegrate into particular cases. Now, suddenly, he realized that Aquinas was right about the nature of rules.

He had two students, they founded the **School of Salamanca**, which represents a turning point in the history of law.

They studied in Paris. They went to Salamanca. Both became professors there, and they were two of the main professors in Italy. They are known as:

- **Vitoria**: had 32 students who became law professors. He never wrote. None of his works were published in his lifetime. The last time he was called, all the books they wrote are called "On Justice and Law"
- **Soto**: Soto wrote the first book in which he sought to structure Roman law, Aristotelian ethics, moral theology, and bring them all together under one umbrella.

→ Then, that work was completed by a guy named **Louis Molina** and by **Leonard Lessius**, who wrote around 1616-1620. And their books are philosophy books; at the same time, they are law books. They are incredibly detailed and argued. These guys knew the law and philosophy. Molina is Spanish, in fact, the whole school is based in Spain, around the University of Salamanca, and it is sometimes called the School of Salamanca. Lessius instead is Flemish (fiammingo), so schools coming from northern Europe, living in Edward, a very busy trading town, have much to say about how they think the rules can be modernized to work with a trading society. All are engaged in this project, they all believe in each other and they constantly cite each other.

Their method is: how can we reconcile Aristotle and Thomas Aquinas, or intellectual heroes, with the Roman law in the most detailed way possible? And they develop a system, a system. Now, they call it natural law, meaning that it is justified by philosophical principles that ultimately rest on human nature.

Hugo Grotius School of Natural Law

He was a genius as a young man. Translated into Latin, and he filled in the gaps in the translation. They thought his Latin was better than that of the ancient Romans. He was called the "Dutch Miracle". He wrote his famous legal book, which really changed legal history, the "De Jure Belli ac Pacis" in 1620. He was still a young man. It seemed impossible that such a young person could write the book, and he wrote it in a year and a half and then continued on other things. He sought to write about theology. And his goal is to try to make peace in a world that is very, very troubled. He spent part of his life writing theology, trying to reconcile the principles and interpretations of Catholics and Protestants regarding the Fathers and the Bible, **BUT** what he is mainly famous for is his legal book. Again, it is part of his desire to bring peace to the world he lives through the purges, as soon as these wars begin, and he lives two years after the Thirty Years' War begins in Europe.

Vitoria and Grotius = they disregard all the correct principles; they are considered the founders of international law. Vitoria founded the School of Salamanca. He wrote about the principles of international law.

→ Regarding international law, what are the just causes of war? They agree on one thing: religion is not a just cause for war, the only just cause for war is an injustice committed against us; BUT to explain the injustice, he must explain what injustice is and take his principles from private law, and here his project is this: to realize Cicero's dream because we cannot make law a simple compendium. It should be easy enough to understand so that you do not need a legal education, and it should give you the fundamental principles of law. This is it. Now, he has a huge advantage over the humanists who are trying to build the arts because he can ignore all the Roman sects, and he does this even if not entirely. He is using them, but he is not quoting them often.

Why does Grotius have this advantage?

The reason he can do this is that he takes this idea of natural law one step further. The late scholastics wanted to explain Roman law with Aristotelian philosophy, whenever something did not fit, they would say:"That is not natural law." Every time something didn't fit, they would say, "That's not natural law." **BUT** Grotius instead would write a book purely on natural law. This will deal with natural law. And that law consists of simple principles.

Why omit all those complicated things, which he thinks are mostly positive law? And if we only look at natural law, it may consist of some simple principles. Now, that is a difference from the late scholastics.

Distinguishing characteristics of Grotius

1) He will not try to explain Roman law in detail. He would not cite it in detail. When he quotes authorities, they are all from classical literature, classical rhetoric, things like that, Cicero. Things that appeal to humanists.

2) Another difference is this. He will not write a book full of heavy philosophy. The late scholastics, you cannot read it without having read Aristotle. That's where we will need to read a lot of Aristotle and Aquinas just to understand what the late scholastics are doing. As for Grotius, all right. You don't need to read those things.

He describes Aristotle as the best of philosophers. P **The resul**t of this, omitting all the technique of Roman law, omitting all the technical philosophy, the result of all this, gentlemen can understand it. You need to go to university to study philosophy to understand Aristotle and Aquinas.

What does Grotius' Project deal with?

But if you want to summarize the project, it is this: create laws, present the law as a system of principles; natural law as a system of principles so simple that a gentleman can understand it, and he writes very elegant Latin that humanists would love and could generally read if they had received classical education and learned to read a humanistic style of Latin. The Latin of Cicero, his references are all to classical sources; scholastics, which is really strange.

But where should he draw his principles from? This point has been repeated many times. It has been done in the last, I guess, 70 years. It was first done by **Robert Feinster**, who was at one time the leading expert in the world on Hugo Grotius. And he highlighted something that no one had ever observed, but when you put the two books side by side, it is obvious. He had Lessius next to him. Lessius was one of the last and greatest of the late scholastics. When he wrote his book in a year, he looked back and forth between Lessius and then wrote.

The Latin is hard to beat unless you grew up with Cicero. But on the other hand, the principles are simple (sometimes you have difficulty understanding what they mean because they are not technical --> Gustavus Adolphus carried it in a satchel so that when he was about to lay siege to a city, I suppose he could pull it out and say, am I authorized to do this? Yes, sack the city. And the Swedish troops behaved better than most other troops. It has not changed legal education because when you find yourself in court, you cannot argue with Proteus.

The Lassius and late scholastics do not change legal education. When you go to court, you do not discuss what Aristotle has said about this and that. You may perhaps discuss what Barbalus, Paulus, and so on have to say. There are medieval jurists like Barbalus and Paulus, and they are the most influential.

The humanists had their view, the courts do not pay attention to them, they keep following Barbalus, citing Barbalus. This is called the "Mos Italicus". And so, there is a very technical school called "**Usus Modernus Conductarum"**, and this comes in the 17th century, in the 18th century

and all they do is align the Roman texts and try to provide you with some rules or guidelines on how a court would apply them.

Grotius apported the very change in legal education

Now, in France, there is a change in legal education. Grotius writes in the 17th century.

→ Judges adopt Roman law only until we find it sensible to do so. Now, given that they are trained in Roman law at university, they find it often sensible, but there is no concept that it is applied because the emperor says so, or at least not in France. France is an independent kingdom. So, they are adopting Roman law only when they consider it appropriate.

Great Change in the Language used in France related to legal texts

Now, a great change arrives with writers called **Jean de Vaud** and **Robert Poitier**, these are writers of the *Ancient Régime*, from the 17th and 18th centuries. And what they do is write in French.

Except for the fact that both writers love Grotius, they try, in a sense, to imitate him using simple principles, well organized texts, but then insert all the Roman law. It is as if you had started with Grotius and then you reinserted the Roman law saying that it is the **law of trenches**, presented in a systematic way. And many of the conclusions that they draw from the Roman text are here, because they fundamentally believe that there is a natural law, and Hugo Grotius was right.

The principles do not seem to change much. In a sense, the principles, the general principles, were inserted by the late scholastics when Aristotle was still a philologist.

BUT what changes is that now it is presented simply, beautifully, with excellent stylists, and is rewritten in French instead of Latin. Robert Potier says that the reason he writes in French instead of Latin is connected to 2 facts:

1) One is that the students do not know how to read Latin = this is the first time I know that someone thought about the students in the last 400 or 500 years, but they do not know how to read Latin. The humanist in the Middle Ages must have known Latin. They had to study Latin to attend law school, but it was a crime since it was a primitive Latin. When we arrive at de Robert Potier, scholars do not speak Latin well enough to be able to read the sources of Roman law, so jurists started to teach what words meant in French and insert the sources in Latin into footnotes. So, scholars had no longer studying Roman law from the Digest, they started studying a textbook, like a modern textbook on the French Civil Code.

2) The language is beautiful, but it is not the Latin involved by the humanists. It is clear French, and this, says Dumas, is the second reason he writes in French. He writes in French. It is a language just as good as Latin.

In any case, the final joke, two-thirds of the French Civil Code, and practically every text that deals with the law of obligations, is drawn from the Robert Poitier. Napoleon gave the authors of the code three months to draft a code. He knew how to get results. So, what would you do if you had three months to write a book? You would—so they copied everything from de Mont Potier. Here it is, there is the code.

Third School on Natural Law (Brodius/Rationalist)

This third school wants to make the law as if it were mathematics. It starts with propositions, definitions, and proves through mathematical logicwhat is a contract, what is a civil wrong, and so on. The great personalities are **Leibniz** in Germany, and **Wolf** in Germany. There is a time when this takes over action. Rationalism is discredited, still it is the professor who claims, it is the law and not in the courts. And when rationalism is discredited, in France it happens that instead of codifying, they say, no, we will not codify it. Savigny, Friedrich Carl von Savigny says that is not the right way to make law, which instead it is to look at the Roman texts, which are:

- Conceptual;
- Deductive
- But it is supposedly all based on Roman texts.

Evolution of legal interpretation

Important is to highlight the difference between two styles of jurisprudence: the ***Mos Gallicus*** (French style) and the ***Mos Italicus*** (Italian style).

The jurors (interpreters of the law) are highly trained and respected for their understanding of ancient texts. The question raised is: If jurors already know the law and its meaning, why don't they simply judge cases as they see fit, based on their expertise?

Actually, the challenge arises when jurors attempt to reconcile ancient texts with modern cases, especially when authors of the original legal texts could not have anticipated contemporary issues => when legal jurors try to combine principles from two conflicting texts, problems emerge.

The key issue is that authors of those texts likely never intended them to work together. SO, how can jurors interpret and reconcile texts that were not designed to address new or complex situations?

We can identify the survival of two legal traditions:

1. ***Mos Gallicus*** **(French Style):**

This was a humanist approach that focused on analyzing ancient texts critically and philologically, with a strong emphasis on the original meaning of the text. However, this method did not endure in courts because it was less practical for resolving real cases.

2. ***Mos Italicus*** **(Italian Style):**

This approach emphasized applying Roman law to real-world situations, making it more practical for courts. It prioritized the utility of legal texts over strict adherence to their original meaning.

Key figures of this tradition, such as ***Bartholus*** and ***Accursius***, wrote influential legal commentaries in the 16th and 17th centuries. These were widely used in courts because they provided actionable guidance for judges.

Next steps in legal development:

We talk about a transition toward learning how to codify and formalize legal principles ("a federal word of law"). Before moving forward, is important to focus on some elements that influenced the previous mentioned approaches to legal interpretation.

Influence of **Aristotle** and **Aquinas** on the medieval jurists' approach:

- The reference to Aristotle and Aquinas highlights that these thinkers had a long-standing intellectual influence on medieval scholars. They worked within a philosophical tradition that emphasized reason, ethics, and the nature of justice. Medieval jurists wanted to reconcile this philosophical framework with the legal traditions they inherited from Roman law => **goal**: to explain Roman law through philosophical principles, grounding the law in reason and ethics.
- This approach emphasized understanding and interpreting Roman law through the lens of moral philosophy.
- Medieval jurists believed that by applying Aristotle and Aquinas' teachings to Roman law, they could provide a more rational, ethical, and coherent system for understanding legal issues.

In contrast, **humanists** were focused on simplifying and clarifying legal systems. Their goal was to make the law understandable, even to those without advanced legal training. This contrasts with the approach of the medieval jurists, who were more focused on reconciling ancient texts with new contexts.

- Humanists sought to create a clear and comprehensive statement of the law based on easy-to-understand principles, but they struggled to construct such a system.
- However, this ideal didn't die. It lived on in the works of later scholars like **Hugo Grotius**, a key figure in the development of modern legal theory which took the humanists' idea of simplifying law and combined it with natural law theory, which posits that laws should be based on universal, inherent principles of morality. This created what's referred to as the **Northern Natural Law**

System. His ideas were influential, with disciples like *Christian Wolff* and *Samuel Pufendorf* continuing the work into the 18th and 19th centuries.

The legacy of Roman Law in French legal systems

Roman law, while influential in both medieval and Renaissance legal thought, was treated differently in France compared to Italy. In France, Roman law wasn't seen as automatically binding, as it was in Italy. Instead, it was respected for its practical utility and moral value but was applied with a more flexible approach.

The treatises on Roman law written in France, starting from figures like ***Jean Domat*** and ***Jean-Baptiste Colbert***, didn't simply follow Roman law but adapted it to the French legal system. The idea was to create a more practical and systematic version of Roman law that could be used in real-world cases.

This process eventually led to the development of the **French Civil Code in the 18th century**, influenced by the synthesis of Roman law and new legal principles developed by thinkers like *Hugo Grotius*. In this way, Roman law was not just preserved but adapted and modernized.

Important is also to talk about the **evolution of legal education**: previously, students had studied Roman texts directly. However, as legal scholars like *Brody* and others simplified Roman law into treatises that were easier to understand, legal education became more systematic, organized into clear chapters, and geared towards training practicing lawyers rather than just understanding ancient texts. This passage continues the discussion on the development of legal theory and education, showing how philosophical thought, Roman law, and the simplifications proposed by humanists and later jurists evolved and intertwined. Let me break it down for clarity:

The role played by Hugo Grotius

Hugo Grotius (1583-1645) is praised for his ability to write in simple and elegant Latin. Jurists attempt to imitate his organizational style: creating clear and systematic texts dealing with core legal topics (law, property, contracts, torts).

- Goal of these jurists: to transform law and legal education into something more accessible and systematic.
- This approach blends Roman law, philosophical principles, and humanist methods to create a legal system that is both rational and easy to understand.

In order to achieve this result, several elements are combined:

- **Roman Law**: the foundation of European law is reexamined and simplified.
- **Aristotle and medieval classics**: medieval philosophers, influenced by Aristotle and Thomas Aquinas, develop philosophical systems that underpin legal principles.
- **Humanism**: humanists advocate for a form of law based on simple, comprehensible principles.
- **Grotius**: he introduces a method of philosophizing about legal principles, simplifying law and making it more accessible.

Over time, the connection to Aristotelian principles is lost. While the **late Scholastics** (medieval philosophers) were deeply rooted in Aristotelian thought and frequently cited Aristotle and Aquinas, later approaches (influenced by Grotius) tended to reduce these ideas to matters of "common sense" rather than rigorous philosophical inquiry.

The break introduced by Descartes and his approach

By **1625**, the same year Grotius publishes his major works, Aristotelian philosophy is in decline. This decline is marked by the emergence of thinkers like ***René Descartes*** (1596–1650).

He introduces ***rationalism*** with a radically new approach: doubting everything and rebuilding knowledge from fundamental, certain principles using logic and mathematics. Rationalists, inspired by Descartes, aim to apply a mathematical method to law as well, seeking universal, invariable principles that can be rigorously demonstrated, akin to mathematical. This new approach becomes especially influential in **Germany**, where rationalism dominates the legal and philosophical landscape.

From this perspective, law is no longer an organic system based on Roman texts or Aristotelian principles but is redefined through rationalist principles that aim for certainty and universality.

While this rationalist approach seems disconnected from the original Roman legal texts, jurists of the time continue to believe that the new methods are compatible with the legal tradition.

The 19th Century: The Conceptual School in Germany

This rationalist philosophy inspired **19th-century German jurists**, who developed an incredibly systematic and logical framework for the law, known as the **conceptual school** (or *Begriffsjurisprudenz*). It is also referred to as the **Pandekten-Schule** (Pandectists), as it sought to reinterpret the Roman law (the *Pandects*) and extract guiding principles from it.

The Pandectists made an extraordinary intellectual achievement, creating a detailed and structured system of legal thought. This school of thought had a significant influence on legal systems around the world, especially in **Central and Eastern Europe**, but **France** remained largely immune to it. Instead, France adhered to its **Civil Code of 1804** (the Napoleonic Code), which became the foundation of French legal thinking.

The Napoleonic Code and Its Origins

The **French Civil Code** of 1804, as mentioned in the passage, borrowed heavily from earlier legal traditions:

- Around **two-thirds of its text** was taken almost verbatim from earlier Roman law.
- Much of the section on the **law of obligations** (contracts, property, etc.) was either copied directly or paraphrased from earlier Roman and medieval sources.

In this course of study, you'd encounter **18th-century legal texts**—predating the Napoleonic Code— that were the basis for many of its provisions. These earlier texts were influenced by **Grotius's natural law principles**, as well as the ideas of **Aristotle**.

The Shift in the 19th Century

By the 19th century, a significant shift had occurred. The rationalist and conceptualist schools began to reinterpret these earlier legal principles. They applied a more **individualistic view of the law**:

1. **Property** was understood as the absolute will of the owner.
2. **Contracts** were understood as purely the will of the parties involved.

These ideas were absent in earlier legal traditions like the French *loi du Bourguet*. However, the 19th- century German conceptualists claimed to find support for this individualism within the wording of the **Civil Code** and other earlier legal texts, even though this wasn't their original intent.

Focus on Natural Law **Natural law**, had been a cornerstone of earlier legal philosophies:

- The **late scholastics** (medieval thinkers influenced by Aristotle and Aquinas) believed in a version of **natural law** grounded in human nature, as articulated by Aristotle.
- **Grotius**, on the other hand, also believed in natural law but approached it differently. He avoided delving into the detailed philosophy behind it (as the scholastics did). Instead, he wrote for a broader, more practical audience, appealing to **gentlemen**, who were expected to grasp general principles rather than engage in technical legal or philosophical debates.

Key Differences in Approaches

1. **Late Scholastics**: Rooted in Aristotelian philosophy, they emphasized technical law and detailed philosophical arguments.
2. **Grotius**: Took a more accessible and pragmatic approach to natural law, avoiding complex philosophy.
3. **19th-Century Rationalists**: Focused on creating a systematic and mathematically precise legal framework, influenced by Enlightenment rationalism (e.g., **Descartes**) and moving away from Aristotle and Aquinas.

Grotius's Approach to Natural Law

Grotius's version of natural law is in contrast with that of the **late scholastics** and later **rationalists**. Grotius had a more **practical and accessible approach**, compared to the scholastics' detailed technical philosophy. His version of natural law focused less on complex theories about human nature and more on making law understandable to a broader audience.

Grotius avoided technical law and philosophy to ensure his work could reach "gentlemen," who wouldn't have the time or training to study complicated legal theories. This made his work **accessible and popular**—it became a kind of **bestseller**, which served his goal of spreading legal knowledge widely. His method simplified the law into a system that people without years of study could understand.

Northern vs. Scholastic Natural Law

The **late scholastics** and **Grotius** are sometimes placed in different schools of natural law:

1. The **late scholastics** represent a highly **philosophical, Aristotelian approach** to natural law, deeply rooted in technical legal and philosophical ideas.
2. **Grotius** is associated with the **Northern natural law school**, as his ideas moved into **Northern Europe** (he was Dutch, and later thinkers like Buchenwald were German). Unlike the scholastics, Grotius's natural law didn't focus on heavy philosophical theories about human nature. Instead, it emphasized common-sense principles that were easier to grasp.

Rationalists and the Shift in Natural Law

Rationalists—who emerged later—interpreted natural law in a very different way. They sought **mathematical precision** in law, focusing on invariable principles and rigorous logical deductions. For rationalists:

- Natural law became a system of **fixed definitions and rules** (e.g., definitions for contracts, property, etc.).
- These rules were seen as universal and undeniable, like mathematical truths.

Over time, people began to associate **natural law** with the rationalists' approach, forgetting earlier interpretations (like those of the scholastics or Grotius). Rationalism became the dominant view of natural law during this period.

The 19th Century and the Rejection of Natural Law

By the **19th century**, the idea of natural law was largely rejected. Lawyers and legal scholars turned away from it, saying that:

- **Law was not universal** but rather based on specific **historical sources** (e.g., Roman law or civil codes).
- Law was rooted in the **current legal system** (such as the **Civil Code**) rather than timeless philosophical principles.

The Importance of Aristotle and Aquinas

To understand how this transition occurred, the passage emphasizes the need to study **Aristotle** and

Aquinas, whose ideas formed the foundation of scholastic natural law. Their philosophy provided:

1. A systematic way to restate the law.
2. Justifications for the rules of Roman law.

The **late scholastics** used these foundations to give Roman law its **first systematic structure** and philosophical justification. Grotius adopted this structure but simplified it significantly. While the late scholastics engaged deeply with Aristotle and Aquinas, Grotius worked at a more **common-sense level**, assuming readers would accept certain principles as self-evident.

The Legacy of Natural Law

By the time of Grotius, Aristotelian philosophy was no longer as central, and ideas that once required detailed philosophical arguments had become **common sense**. However, by the **19th century**, even this common-sense understanding of natural law was no longer obvious.

The passage suggests that in studying legal history, it's important to trace these ideas back to their roots:

- **Medieval jurists** (heavily influenced by Aristotle and Aquinas).
- How their ideas were adapted by **Grotius**, who used the same foundations but made them more accessible.
- How natural law eventually transformed under the rationalists and was later abandoned in favor of historical legal codes.

Understanding the Medieval jurists

The **Medieval jurists** were focused on reconciling multiple sources of law—typically old Roman legal texts and other authorities. To understand their work:

1. You'd need to read the **original Roman legal sources** they referenced.
2. You'd also need to understand how they **reconciled these sources**—how they made them fit together logically and systematically.
3. Once you've done this, you've essentially captured everything they had to say about a particular legal issue. Their process was about:

- Analyzing the historical context of each source (e.g., its origins in Roman society).
- Reconciling conflicting or overlapping ideas into a single, coherent legal system.

This method is systematic but labor-intensive, requiring a huge amount of reading and familiarity with Roman law and philosophy.

The problem with understanding the medieval jurists today

Studying the Medieval jurists is **challenging for modern readers** because:

1. **The texts are dense** and often written for an audience that already had extensive legal and philosophical training.
2. They rely on a **philosophical worldview** (primarily Aristotelian) that feels alien to modern thinkers.

3. Without a deep understanding of the **Classical Tradition** (Aristotle, Aquinas, etc.), these texts can seem unintelligible.

To bridge this gap, some options can be :

- Lay out the underlying philosophical ideas (especially Aristotelian and Thomistic philosophy) that the Medieval jurists relied on.
- Help modern readers make sense of the texts by explaining their context and assumptions, rather than simply expecting people to dive into them without preparation.

The importance of philosophy and human nature

The **philosophical ideas** behind the Medieval jurists' work are rooted in Aristotle's and Aquinas's views on human nature:

1. **Aristotle**: A human being is a "rational animal," meaning our defining feature is our ability to reason.
2. **Aquinas**: A human being is a "rational, social animal," emphasizing both reasoning and our inherently social nature.

These views are central to the concept of ''*natural law*'', which is about understanding the laws that are derived from human nature itself. Important is to highlight The speaker highlights the essence of natural law as being tied to ***human nature***:

1. Natural law is fundamentally about understanding what it means to be *human*.
2. This involves asking philosophical questions like: *What is a human being?*
3. According to Aristotle and Aquinas, the answer lies in understanding humans as **rational and social creatures**.

Transitioning to Grotius

Unlike the Medieval jurists, Grotius didn't expect his readers to have a deep understanding of Aristotle or philosophy. His work is less technical and more accessible.In earlier editions of his works, Grotius referenced Aristotle and the scholastics more explicitly, but he later removed these references because they confused Protestant readers (who were his primary audience).

However, even without those references, Grotius was still relying on ideas from Aristotle and the late scholastics. His framework for natural law is still tied to the **same philosophical tradition**, even if it's simplified for a broader audience.

Rationality and Natural Law

1. **Misunderstanding Rationality:**
    - The term "rational" is often misunderstood. People tend to equate rationality with deductive logic or provable conclusions, like in mathematics.
    - However, for Aristotle and Aquinas, rationality doesn't mean "proving everything logically"; it means something broader.
2. **What Does Rationality Mean?**
    - Rationality, in the ethical context, involves recognizing certain ends (goals) as inherently good.
    - For example:

- It's better to know than to be ignorant.
- It’s better to have friends than to be lonely.
- It’s better to live in society than in isolation.
- This understanding distinguishes humans from animals. Animals pursue goals (like finding food) instinctively, without understanding the reasons behind them. Humans, by contrast, can understand *why* something is good.

3. **Two Types of Reason:**
    - *Practical Reason* (or prudence) helps humans determine the best way to achieve their goals. For example:
        - How can I make a friend?
        - What’s the best way to gain knowledge?

- Practical reason is context-dependent, accounting for the complexities of real life. Its conclusions aren’t absolute or certain because circumstances vary greatly.
- *Theoretical reason*, on the other hand, is about logic and certainty. It’s used in fields like mathematics, where conclusions are universal and unchanging (e.g., the Pythagorean theorem). It starts with basic truths and uses deductive reasoning to reach firm conclusions.

1. **Ethics and Practical Reason:**
    - Ethics relies on practical reason, not theoretical reason.
    - Aristotle’s ethics begin with basic truths about human nature: some things are inherently worthwhile, like friendship, education, or leisure.
    - Practical reason helps decide:
        - How to pursue these goals.
        - To what extent they should be pursued.
        - How to balance multiple goals.

The ultimate goal: Happiness (or Well-Being)

I. **The End of Human Life:**
    - For Aristotle, the ultimate goal (or "end") of human life is ***happiness*** (Greek: *eudaimonia*). However, this term is often mistranslated.
    - In modern English, "happiness" often refers to fleeting emotions or the opposite of sadness.
    - A better translation might be *well-being* or *flourishing*—living a complete and virtuous life.

II. **Happiness as Doing the Right Things:**
    - True happiness involves:
    - Feeling the right emotions for the right reasons (e.g., feeling sadness at a funeral is appropriate).
    - Acting in the right way to achieve good ends.

- It's about living a life aligned with reason and virtue, not just feeling good.

III. **The Role of the State:**

- Aristotle also considers the role of the state. The goal of a state is to promote the well-being of its citizens.
- A good state fosters an environment where everyone can achieve happiness (in the sense of flourishing).

The Concept of "Flourishing" and Living Well

- **What Does "Flourishing" Mean?**
  - The term "flourishing" comes from Aristotle's idea of *eudaimonia.*
  - For Aristotle, flourishing means living a complete, virtuous, and meaningful life. It's about achieving the ends (or goals) that are inherently good for a human being. This includes things like:
    - Cultivating knowledge
    - Building friendships
    - Living in a just society
  - These are not fleeting pleasures but deeper, enduring achievements that reflect a life well-lived.
- **How Do We Know What Flourishing Is?**
  - Humans, through their rational nature, can recognize that some things are inherently good (e.g., friendship, education, virtue). These recognitions form the "first principles" of ethics.
- **Example of Flourishing in Context**:
  - Living well VS situations like "standing there, about to be shocked" (i.e., being in danger). Even in extreme circumstances, living well involves aiming for goals that align with human nature and purpose.

The Role of "First Principles"

- **What Are First Principles?**
  - First principles are foundational truths or assumptions that cannot be proven but are self-evident. In ethics, these include:
    - Friendship is good.
    - Knowledge is valuable.
    - Virtue is worth pursuing.
  - These truths serve as starting points for reasoning about how to live well. For example, if you recognize that education is worthwhile, you can then reason about how to pursue it.
- **Why Can't First Principles Be Proven?**
  - If you tried to prove a first principle, you would need to rely on something even more fundamental. Eventually, this process must stop at truths that are self-evident and do not depend on anything else.

- For example:
    - You can't prove that "knowledge is valuable" without assuming that being informed is better than being ignorant—which already accepts the value of knowledge.

- **Aristotle's Example of the Law of Non-Contradiction**:

- In theoretical reasoning (e.g., logic or math), first principles also exist. One is the **law of non-contradiction**: a statement cannot be both true and false at the same time in the same way.
- You can't prove this law because any attempt to do so would rely on the very law you're trying to prove. It's a self-evident principle that must be accepted to engage in any rational thought.

How Aristotle Defends First Principles

- **Dialectical Defense**:
    - If someone denies a first principle, Aristotle suggests engaging them in a dialogue. For example:
        - If someone rejects the law of non-contradiction, ask them to make a statement.
        - The very act of making a statement assumes the law of non-contradiction because, without it, their statement could be both true and false at the same time.
    - Similarly, if someone denies that "knowledge is valuable," ask them why they are engaging in conversation or argument. Their actions (e.g., reasoning, explaining) contradict their claim.
- **Practical Reasoning and Action**:
    - In ethics, people might deny that anything is worthwhile unless proven. But as soon as they act (e.g., choose to eat, speak, or pursue anything), they demonstrate that they implicitly believe some things are worthwhile.
    - For example, if someone says, "Nothing is worthwhile," but they continue living, eating, and making choices, they're showing that they believe survival or pleasure is worthwhile. Their actions betray their denial.

First Principles in Practice

- **Unconscious Operation of First Principles**:
    - People don't need to consciously state first principles to act on them. For instance:
        - A child doesn't need to say, "I believe the law of non-contradiction" to avoid contradicting themselves in speech.
        - Similarly, people don't need to declare, "I believe knowledge is valuable" before seeking to learn something. These principles guide behavior even if they are not explicitly acknowledged.
- **John Locke's Criticism**:
    - **Locke** objected to the idea that first principles are innate or consciously held by everyone. However, Aristotle's point isn't that people explicitly know these principles but that they unconsciously operate on them through their actions and reasoning.

Connecting to Human Flourishing

- **Living Well Through Reason**:
    - The teacher connects first principles to the broader question of how to live well. To flourish, people must:
        1. Recognize what is good (e.g., friendship, knowledge).
        2. Use practical reason to pursue those goods in a balanced way.
        3. Align their actions with their ultimate purpose: achieving *eudaimonia*.
- **Aristotle's View of Society**:
    - For Aristotle, the purpose of society and government is to help individuals flourish. This means creating conditions where people can:
        1. Pursue knowledge
        2. Build meaningful relationships
        3. Practice virtue
- A society that fails to help its members flourish is not fulfilling its ultimate purpose.

Flourishing and Happiness

- **Happiness as "Well-Being" or "Flourishing"**:
    - The term “happiness” in Aristotelian ethics is often misunderstood as mere emotional pleasure. A better translation might be "well-being" or "living well."
    - For example:
        - If you attend a funeral, you might feel sadness, but you could still be flourishing because you are acting appropriately (honoring your loved one) and in alignment with virtue.
- **The Hierarchy of Goods**:
    - Aristotle believes some goals are more important than others. For example:
        - Knowledge might be a higher good than material wealth because it contributes more directly to flourishing.
        - Practical reasoning helps prioritize and balance these goals.

The Nature of First Principles

First principles are foundational truths that cannot themselves be proven. Aristotle and Aquinas argue that these principles—such as the law of non-contradiction or the intrinsic worth of friendship or knowledge—are recognized intuitively. These truths are not mere subjective preferences but are part of human rationality.

For example:

- The law of non-contradiction: "A statement cannot be both true and false at the same time in the same way."
- The value of friendship: People recognize, without needing proof, that having meaningful relationships is good.

These principles are "self-evident" and guide practical reasoning, but they are not always consciously articulated. We act on them implicitly, even if we cannot formally state or justify them.

Practical Reason and Natural Law

Practical reason operates by applying these first principles to specific situations. For example:

- If knowledge is good, then one ought to pursue learning opportunities.
- If friendship is good, then one ought to nurture relationships.

Natural law, as understood by Aquinas, emerges from human reason discerning what is good and right in concrete situations. Unlike purely rationalist systems, which try to deduce universal laws from abstract reasoning, natural law acknowledges that circumstances matter.

The Case of the Sword

The "case of the sword" is a classic example of applying natural law to real-world situations. Cicero, Augustine, and Aquinas all address this scenario to illustrate the flexibility of natural law:

- If someone entrusts you with a sword and later asks for it back under normal circumstances, natural law would dictate that you return it.
- However, if the person becomes insane or intends to use the sword to harm others, natural law would dictate that you withhold it.

This example shows that natural law is not a rigid, one-size-fits-all rule. Instead, it adapts to the specifics of a situation while still being grounded in overarching principles like justice and the common good.

Key takeaway: Natural law changes in its application, not in its essence. The principle "return what you owe" remains constant, but how you fulfill that obligation depends on the context.

Societal Differences and Knowledge of Natural Law

Aquinas acknowledges that different societies may interpret or even remain ignorant of certain moral conclusions derived from natural law. For example:

- A society might fail to recognize that theft is wrong due to cultural customs or historical circumstances.
- In such cases, people might genuinely believe their actions (e.g., raiding other tribes) are permissible. This ignorance does not mean natural law is invalid—it means their capacity to discern it has been hindered by their particular context.

Example: Aquinas cites the Germanic tribes, who at one point considered raiding and theft acceptable. While natural law holds that theft is wrong, the tribes' customs and lack of understanding led them to believe otherwise.

Implication: This highlights the educative role of law and society. Over time, through reflection and exposure to broader truths, such societies can come to recognize the universal principles of natural law.

Critique of Rationalism

The teacher critiques rationalist approaches that seek to systematize ethics into absolute, universal rules. Rationalists might say, "The rule is to return the sword, *unless* the person is insane or dangerous," codifying all possible exceptions into a rigid framework.

For Aquinas and Aristotle, this misses the point. Moral reasoning is not about pre-formulated rules but about discerning what is right based on the specifics of a situation. Natural law is dynamic and situational, rooted in first principles and practical reason rather than abstract logic.

Universal Truths vs. Contextual Applications

Aquinas asserts that:

- Some truths, like the law of non-contradiction or the goodness of friendship, are universal and unchanging.
- However, how these truths are applied (e.g., how justice or friendship is expressed) varies by circumstance.

For example:

- The principle "do good and avoid evil" is universal.
- What "doing good" means depends on the context—e.g., whether to return the sword.

Dialectical Justification of First Principles

Then it is mentions a dialectical defense of first principles. This means:

- First principles are not proven in a traditional sense but are defended by showing their indispensability.
- For example, if someone denies the law of non-contradiction, they undermine their own argument, as their denial presupposes the very principle they reject.

Similarly, if someone denies the value of knowledge or friendship, they cannot live consistently with that denial. Their actions (e.g., seeking education or forming relationships) contradict their claims.

Natural Law and Its Applicability What is Natural Law?

Natural law is a universal system of moral principles, believed to be intrinsic to human nature and discoverable through reason. It transcends cultures and societies, providing a foundation for determining right and wrong. The precept "Thou shalt not steal" is an example of a natural law principle.

- **Key Characteristics:**
  - **Universal**: Natural law applies to all humans regardless of time or place.
  - **Rational**: It is rooted in human reason, not just in customs or laws imposed by society.
  - **Objective**: It is not contingent on personal opinions or cultural norms.

The Problem of Awareness

The argument raised in the passage questions the practical existence of natural law when people fail to recognize or apply it. It suggests that **a precept of natural law effectively "ceases to exist" for a society if no one acknowledges or follows it.**

- **Illustration with the Vikings**:
  - The Vikings were a society that did not recognize theft (raiding and pillaging) as inherently wrong. This lack of recognition meant that the natural law principle "Thou shalt not steal" had no real influence on their lives.
  - The speaker concedes that the Vikings might have been better people and lived in a better society had they stopped stealing. Their community might have experienced more unity, trust, and flourishing. However, since they didn't recognize the immorality of theft, this aspect of natural law was irrelevant to them.

Why Does Natural Law "Cease to Exist"?

The argument is not that natural law itself vanishes, but rather that its influence depends on human understanding and application. A moral principle like "don't steal" exists universally, but for it to shape behavior, people must:

1. Be aware of it.
2. Agree that it is right.
3. Incorporate it into their practices and institutions.

Thus, **natural law exists in an abstract sense but requires recognition and enforcement to have practical relevance**.

Society and the Common Good

The Social Nature of Humans

The teacher transitions to discuss society and the **common good**. Aristotle's philosophy asserts that humans are inherently social animals. This means that:

- To live a good life (achieve happiness, well-being, or flourishing), humans must live within a society.
- Living in isolation deprives individuals of the relationships, cooperation, and shared resources necessary for human development.

The Role of Society

- Society exists to help its members achieve the **good life**. The ultimate goal of society is to ensure that everyone can flourish and live well.
- This leads to the concept of the **common good**—the shared goal of promoting the well-being of every individual.

What is the Common Good?

The **common good** is not something separate from the good of individuals. Rather, it is the sum of individual flourishing:

1. Each person's good contributes to the overall good of society.
2. Society, in turn, creates the conditions that allow individuals to achieve their good.

The Reciprocal Relationship

- Society depends on individuals acting virtuously to maintain its stability and promote the common good.
- Conversely, individuals depend on society to provide the opportunities, resources, and order they need to flourish.

Misunderstandings of the Common Good

It is highlighted a common misconception:

- Some people think the common good refers to a **collective good** that overrides or opposes individual interests.
- In reality, the common good is deeply tied to the well-being of individuals. It is achieved when each person is able to flourish within society.

Justice: A Framework for the Common Good

Justice as a Virtue

Justice is one of the cardinal virtues in the philosophical traditions of Aristotle and Aquinas. It is the habit of giving others their due and maintaining right relationships.

Three Types of Justice

The passage identifies **three types of justice** that contribute to the common good:

1. **General Justice**:
    - This is the highest form of justice.
    - It refers to actions taken to promote the common good of society as a whole.
    - Aristotle calls it the "supreme virtue" because it encompasses all other virtues.
2. **Distributive Justice**:
    - This deals with the fair allocation of resources, opportunities, and burdens in society.
    - For example, distributing wealth or privileges based on merit, need, or equality.
3. **Commutative Justice**:
    - This governs individual transactions and ensures fairness in exchanges, contracts, and agreements.
    - For example, paying a fair price for goods or honoring the terms of a contract.

General Justice as the Foundation

The speaker emphasizes that **general justice is the foundation of all virtues** because it aligns individual actions with the common good. Every virtuous act—whether it involves courage, temperance, or prudence—ultimately contributes to general justice by promoting the well-being of both the individual and society.

Virtue and the Individual's Role in the Common Good

What is Virtue?

- Virtue is an acquired ability or habit that enables a person to act rightly.
- Examples include:
    - **Courage**: Acting rightly despite fear or difficulty.
    - **Temperance**: Resisting harmful pleasures to act in accordance with reason.
    - **Prudence**: Using practical reason to determine the right course of action.

The Interdependence of Virtues and Justice

All virtues serve the ultimate goal of contributing to the **common good**:

1. **Individual Perspective**: By cultivating virtues, a person improves their own life and achieves personal flourishing.
2. **Societal Perspective**: The virtuous actions of individuals contribute to a harmonious and flourishing society.

The Carpenter Example

The example of the carpenter illustrates how individual actions contribute to the common good on multiple levels:

- The carpenter works hard to build houses and earns wages to support their family (commutative and distributive justice).
- By building houses, the carpenter creates shelter, directly benefiting others in society.
- On a higher level, the carpenter's work contributes to a society where everyone can flourish, even if they don't interact directly with the beneficiaries of their labor. This realization ties their work to **general justice**.

Society as a Whole: The Metaphor of the Body

The teacher uses the metaphor of society as a body to explain the relationship between individuals and the common good:

- Each person is a "part" of the societal "whole."
- If one part (person) is unwell—e.g., lacking temperance or justice—it affects the well-being of the entire body (society).
- General justice seeks to ensure that all parts are in good condition so that the whole can thrive.

Implications of the Metaphor

- Individual flourishing is inseparable from societal flourishing.
- General justice unites the virtues by ensuring that all individual actions ultimately benefit the common good.

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NATURAL LAW: LATE SCHOLASTICS AND IUSNATURALISTS

The program of the **late scholastics** was to synthesize Roman and Canon law with the **moral philosophy of Aquinas and Aristotle**. These authors had been rediscovered in the late **12th** and early **13th** and became a staple of the medieval curriculum. However, there are some people who think that this enterprise, **introducing Aristotle into law**, was a **mistake**. For example, medieval jurists such as **Bartolus** and Baldus, were familiar with both Aristotle and Aquinas: they sometimes read an Aristotelian meaning into their Roman texts, yet their use of philosophy was occasional.

The late scholastics used the principles of Aristotelian and Thomistic philosophy to explain Roman and

Canon law as interpreted by the medieval jurists. Nevertheless, they acknowledged that only some legal norms could be explained by their philosophical principles. Those that could, they said, belonged to the **natural law**. They were as universal as the philosophical principles themselves. Those that could not belonged to the positive law.

Consequently, the late scholastics had greater freedom in dealing with their legal texts than the medieval jurists. So, they're engaged in **different projects**.

In the **17th century**, Aristotelian philosophy no longer commanded the same respect. The founders of **modern critical philosophy** were in revolt against it. The iusnaturalists did not try to support their conclusions by drawing explicitly on Aristotelian principles even though many of these conclusions had been borrowed directly or indirectly from the late scholastics.

PART I: FOUNDATIONS

3. PRACTICAL REASON

What is natural law? The scholastics derive its meaning from Aristotle's natural reasoning. Aristotle tells us there are two kinds of truth:

1. **Theoretical truth** -> that's the kind that you use in mathematics
2. **Practical reason** -> that's the kind you use to decide what to do

Every statement must be either true or false: it is either A or it is not A, there is no in-between. If you do not start with the **law of non-contradiction**, you can't prove anything from anything, because every demonstration is supposed to show itself that it is true or equally that is false if the demonstration is impossible.

Practical reasoning aims to achieve an end, but you have to begin by knowing some **ends are worthwhile**. Those are the **first principles** of practical reason. And these principles take the form of **acts**, things that are good to do, like knowledge is better than ignorance, friendship is better than being solitary, living in society is better than trying to do it all alone.
Practical reason tells you '*how do you pursue them? How do you reconcile them?*'

3. EUDAMONIA

Eudaemonia is a hard word to translate. It means **living well** and **doing well**. It is commonly translated as "**happiness**," which is misleading. In English, "happiness" commonly refers an agreeable state of mind which is the opposite of sadness. Yet a person could be living well when he attends the funeral of a friend. It is sometimes described by the phrase "human flourishing," which is also misleading. A person may live well when he gives his life fighting for the independence of his country. To sum up, **eudemonia is feeling the right thing to feel: if you deny those feelings, you deny your humanity**.

3. NATURAL LAW

An Aristotelian individual uses practical reason to decide which actions will promote them, which actions will defeat the purposes he has set to achieve eudamonia. ''How will I seek knowledge? How will I make friends?'', stuff like that. When he does that, he is following the natural law. The natural law is defined as a practical reason.

As you use your practical reason, you make a rule for yourself, like 'I went to medical school for four years'. We're now following the natural law and that's why in this tradition natural law differs from one person to another. The natural law varies from person to person. And this is a big change, a big difference from the rationalists we will examine later on, where it doesn't vary from person to person any more than mathematical conclusions could.

THE IDEA OF COMMON GOOD

And when we get to society, people live in society; they see it's good for them to live in society, because only in society are you able to **accomplish** those things that are **worthwhile**, that make life worthwhile. To do this, you need the help of others, and more of the things we didn't see to be worthwhile is to help other people to accomplish what's worthwhile to them.

So you get a strange sort of notion, strange from a modern perspective, of how the purpose of society relates to the purpose of individuals. By this idea, the purpose of society is the **common good**.

The common good is the idea that each individual flourishes, eudemonia is that each lives a good life, wellbeing that's what Aristotle says.

The **best form of government** is that in which each person, no matter who he is, **can live the best life**, can be happy the way Aristotle says, eudemonia. That's the purpose of the whole which is made of part and yet each part, in order to live a good life a wellbeing, must contribute to the wellbeing of others because if you can't live a good life, part of what you can see to be worthwhile is to help others to live a good life.

So, the purpose of the whole is to help each and each one of himself or herself has to help the whole; every single action that contributes to your own wellbeing, to the welfare of the whole society because the welfare of whole society is a common good, is the common of each individual part.

At this point we can identify two potential problems with what we have examined up till now.

4. Supposedly the natural law is based on reason, and yet you begin by just knowing certain things you can't prove.

5. The relation of society to the individual.

It was noted by a very famous American historian that, other than liberty, the most common phrase used in American for the generation was the common good. And that started to go flat in American historical circles. *How can you reconcile liberty with the common good?* **Liberty** means the individual get what he wants, the common good means what, and even if he gets it wrong; he says the common good is not in the liberty of individuals, it's a distinct thing which subordinates the individual.

The modern tendency is to think either the common good is the good of individuals which are excited to aggregate private interest to get to it, or the common good is something like the good of the state, the good of the public, and therefore is the opponent of private interest. You have to subordinate your interest: anytime you're working for yourself, you must be working for yourself, not for the common good.

4. Justice

a. General Justice (according to Aristotle)

General justice is an orientation towards the common good. General justice is when you want a society in which everybody flourishes; living in a society is the common good, you're wanted, you're desired, your commitment to the common good is general justice, the good order of the society.

b. Particular Justice (according to Aristotle)

Now what we get to particular justice, we've got two types of justice:

1. **Distributive justice**
2. **Commutative justice**.

And the commutative justice is a concept that the late scholastics are going to use to remake private law, but again it all depends on three concepts, three ideas that we laid in.

Aristotle, Nichomachean Ethics V (pag 128)
*'Of particular justice and that which is just in the corresponding sense, (**A**) one kind is that which is manifested in **distributions of honor** or **money** or the other things that fall to be divided among those who have a share in the constitution (for in these it is possible for one man to have a share either unequal or equal to that of another,) and (**B**) one is that which plays a **rectifying part** in transactions between man and man. Of this there are two divisions; of **transactions** (1) some are **voluntary** and (2) others **involuntary** – voluntary such transactions as sale, purchase, loan for consumption, pledging, loan for use, depositing, **lease**, while of the involuntary (a) some are **clandestine**, such as theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness, and (b) others are **violent**, such as assault, imprisonment, murder, robbery with violence, mutilation, abuse, insult.'*

A. **Distributive justice** -> occurs during distribution of money or honor or whatever else you buy up. The idea of distributive justice is that everybody ought to have what they need to live a good life.

B. **Commutative Justice/Rectificatory Justice** -> occurs during transactions:

   1) **Voluntary** -> they're made by consent

   2) **Involuntary**

      a. Clandestine

      b. Violent

But how are we going to guarantee distributive justice?

Aristotle gives us this **example**: suppose we were buying the flutes and there's a small number of them: how do we divide them up? The answer is to give up the best flute players, giving them to the people whose lives they want to contribute the most.

Now, as we'll see in tradition, that's not going to work. **Grotius** will tell us that distributive justice can work in a **small society** like a **family**, but you can't do it in a large society.

What you do instead is you end up trying to give each person a **fair share** of purchasing power, and then you let them buy what they want. We have to conceive distributive justice as a fair share, which is a kind of **equality** each person should get according to their needs.

But the principle on which you're dividing things up is going to vary according to what kind of regime you have. There are three **legitimate forms of governance**.

1. **Aristocracy** -> he does not mean a hereditary monarch, but he means there's the leadership of one person, an executive.
2. **Oligarchy** -> an hereditary aristocracy, a government by the rich who are well-born in their own interests: he means a government by the **elite**, of the wise and the good, let the wise be the best people who rule.
3. **Democracy** -> government by the people.

Now, Aristotle never tells us what the principle of division should be in an oligarchy, in a monarchy, but he says that in an aristocracy, they will want to divide things up according to **merit**, which means the **wisest** and the best who have the command of more resources. Those people, because they are wise and good, will understand the **common good**. They'll understand what flourishing is, what a good life is, better than the ordinary person.

In democracy there's the **principle of equality**, which doesn't mean that thing should be divided according to needs, but equality means one person counts one.

The ideal of commutative justice (fair share) in an aristocracy is you get more, while in a democracy is you get the same share, and that will help everybody. And Aristotle says, what is it that should determine whether you have an aristocracy or a democracy? It depends on the kind of people we're dealing with.

CONTRACTUS AND DELICTUS

It's interesting we think of contract tort, contractuous, delictuous does it go back to roman law? It does, but it's Gaius in about 150 AD that affirms that there are two kinds of obligations: contract and tort. Before that, the Romans never used those words and afterwards, they still talk about all the rules for sale and so forth.

Contract law is **voluntary commutative justice** and **delictus** is **involuntary commutative justice**.

Where did Gaius get this distinction from?

At least some six modern scholars says that he got it from Aristotle, because you can find him paraphrasing Aristotle and there's nowhere else, he could have gotten that distinction. But once he borrows the distinction, instead of explaining where we are now in terms of Aristotle's ethics he's just going to write back to the Roman head words.

PART II: PRIVATE LAW

a. Property

Plato said that in the **ideal republic** there would be no mine, no yours, everybody would have property and economy. And Aristotle said that may be fine in principle, but in practice it will lead to **quarrels among all people**.

If you want to give people an **incentive** to work for this property and conserve it, you better give them something of their own. Notice as soon as we do that, we're going to have to deviate it from our principle of equality. And aristocracy may not like it, but unless they give incentives to merchants and manufacturers, they aren't going to have stock produced. Democracy may not like it, but unless they give incentives to people who are good at coming up and manufacturing and producing wealth, you're not going to have as much wealth.

The principles have to be compromised in the **interest of productivity**, having enough to divide. First you want to avoid quarrels, secondly you want everybody to have the right amount, and to avoid quarrel there is private property, therefore we're not going to be able to give each person according to his needs. So, you make a compromise right there by giving people a share to avoid quarrels.

What about property? Even if you need the money more than I do, you can't use my property, which is an interesting justification of this. We can compare that with **modern justifications** like John Locke, that says that you enter society because property's your own and you want to preserve it. So, it's a **compromise**, it starts out from Aristotle and you can see it right through Lessius, Grotius. What happens, what changes? Take a look at Lessius: he is trying to integrate what he has to say within an existing legal system. Sometimes the existing legal tradition is that of Roman law, and sometimes the existing legal tradition is that of canon law.

Canon law says it's legitimate to have property, but you have a duty to give away the amount that you don't need. Now, they rested that on two authorities, and one authority was Ambrose.

Leonard Lessius, *De iustitia et iure ceterisque virtutibus cardinalis libri quatuor* lib. II, sec. i, c. 6.

St. Thomas q. 66, arts. 1, 2

*I respond that after man had sinned this division of dominion was not only legitimate but for the good of the human race. Certainly, it must be held to have been legitimate according to many passages in scripture one may lawfully possess something as one's own. The contrary was held by certain heretics who were called "**Apostles**" as is described by St. Augustine, De Haeresibus 40; Epiphanius, De Haeresibus 61: "**Who asserted that man could not be saved unless he lived in the manner of the apostles, lacking all property and wealth**." Pelagius taught the same as may be gathered from Augustine Epistola 106 (to Paulinus).*

Now compare that with Grotius, who is not interested in roman law and canon law. He's quoting Aristotle, Aquinas, Ambrose, and so forth.

Hugo Grotius, *De iure belli ac pacis libri tres*
*"God gave the human race generally a right to the things of a lower nature, at the Creation, and again, after the deluge. Everything was **common** and **undivided**, as if all had one patrimony. Hence each man might take for his use what he would, and consume what he could. […] What each one had taken, another could not take from him by force without wrong. […] And this state might have continued, if men had remained in great simplicity, or had lived in great mutual good will. One of these two conditions, a community of goods arising from extreme simplicity, we may see in some of the peoples of America, who have lived for many generations in that state without inconvenience. The other, a community of goods from mutual charity, was exhibited formerly among the Essenes, and then among the first Christians at Jerusalem, and now in many places among Ascetics. The simplicity of the first races of men was proved by their nakedness. They were rather ignorant of vices than acquainted with virtue: as Trogus says of the Scythians. So Tacitus, Macrobius, the Book of Wisdom, St Paul. […]".*

Why do we have property? We want to have individual property. Recourse work. Rent quarrels. Same thing as Aristotle. Lessius tries to combine it with canon law. Grotius is trying to convince you that this is good common sense, based on classical authors. He's writing for gentlemen, who would understand that.

The core of the theory is that property is established to avoid the disadvantages that you have if you do not have private property. And therefore, the conclusion follows, the rights of the owner are going to be limited to the purposes for which property is established.

This is different than what we get in the 19th century. In the **19th century**, they define property as the right and the will of the owner to do as he chooses. We're not talking about the purposes of property, instead we are talking about his definition. And once we define property that way, we're going to be very troubled by any of the rules that limit the ability of the owner to do what he wants with his own.

b. Necessity

The second area we looked at when we were talking about limits to property rights in the Middle Ages was the doctrine of necessity. Starting from **Jerome**, they said that in a time of necessity, you have to help people by giving them some of what you have. If they're starving, they can even take your stuff.

Thomas Aquinas, Summa theologiae II-II, Q. 66 (pag 133)

Art. 7. **Whether It is Lawful to Steal through Stress of Need?**

Objection 1. *It would seem unlawful to steal through stress of need. For penance is not imposed except on one who has sinned. Now it is stated (X. 5.18.3): If anyone, through stress of hunger or nakedness, steal food, clothing or beast, he shall do penance for three weeks. Therefore it is not lawful to steal through stress of need*.

Objection 2. *Further, the Philosopher says (Ethics II, 6) that there are some actions whose very name implies wickedness, and among these he reckons theft. Now that which is wicked in itself may not be done for a good end. Threfore a man cannot lawfully steal in order to remedy a need*.

Objection 3. *Further, a man should love his neighbor as himself. Now, according to Augustine (Contra Mendacium VII), it is unlawful to steal in order to succor one's neighbor by giving him an alms. Therefore neither is it lawful to steal in order to remedy one's own needs*.

*On the contrary in **cases of need all things are common property**, so that there would seem to be no sin in taking another's property, for need has made it common*.

Well, in the 19th century, the idea that you should be able to take somebody else's food, use somebody else's property, because you're in need of it, seems to violate the **entire principle of property law**. Property in the 19th century is the will of the parties, and it is conceived as an **absolute right**. There was a huge argument in Germany over whether to deduct this rule or not. The first draft of the Civil Code eliminated the doctrine of necessity to use somebody else's property in an emergency. The second draft brought it back, again, for pragmatic reasons.

The late scholastics think differently, in an excellent example of their way of thinking: you have to look at the rights of the owner by asking for what purposes the property established. What purposes did property establish? The ultimate purpose is to get people what they need for their own well-being, that's the ultimate purpose. We establish property rights to prevent quarrels, to encourage people to work, encourage production.

What Thomas Aquinas said, persists with Lessius, who tells you the same thing, which is in times of necessity, you have the right to take another person's property. So, we've got an exception to the general rule of property. Why? Because I'll die otherwise. And that would **frustrate the ultimate purpose of property**, which is to give each person what he needs for his well-being. So, if we look at the purpose, we find this solution.

Leonard Lessius, *De iustitia et iure ceterisque virtutibus cardinalis libri quatuor* lib II, sec. I, c. 12. (pag 135)

*'I say, secondly, that it is probable that not only in extreme necessity, but also in **grave necessity** such as sickness, hunger or nakedness, you can secretly take things from the rich if you know of no other way of avoiding a serious evil.*'(And Lessius cites some late scholastics) *'By grave necessity you should understand not grave in any manner but exceedingly grave even if not extreme. The proof is, **first**, that just as by nature the power of relieving extreme necessities by the things of man is conceded to all, so also is that of relieving extremely great necessity. Why indeed should this power to be restricted to extreme necessity? **Second**, it is easy to fall from grave into extreme necessity, and so what is conceded in the case of extreme necessity ought to be extended to grave necessity. **Third**, the division of things should not and lawfully could not deny a*

person the right, in extreme necessity, to take from those who are not in a similar necessity what by nature is superfluous. So the right could not be denied, under the pressure of grave necessity and when no other remedy avails, to take what is superfluous or barely necessary to another. Thus the division of things so that no one has a right in the thing of another always must be understood with this tacit condition (*: unless there is extreme or exceedingly grave necessity'*

The purpose of property is to assert distributive justice. What that means is that if there are people who are not just in danger of starving tomorrow, they're sick and they need medicine right now, there is a snowstorm and they don't have a coat or a house or a home to go to, these people are not only allowed to take the bread, the money from the medicine, the money from the coat, if you don't give to them you are **liable**.

What about people who are perennially hungry, regularly underfed, perennially suffering from cold? What can they do? Same thing. Notice that he's not citing any legal authority. He's talking really about what they can do with **conscience**.

if you're stealing out of necessity, you're not stealing. This is the extreme limit that this doctrine gets pushed to. But it means that you're now conceiving a distributive justice this way. ***Why does he say you're not stealing?*** Because you are not violating another person's property rights because the rules of private property are established to serve a certain purpose. They don't extend beyond that.

But you also see that one thing he wants to do is to explain the previous authorities, he's citing the same authorities that the medieval jurists cite. You want to put the whole thing together: the Judeo-Christian tradition, the philosophical tradition, and the Roman legal tradition, which are three of the things that shaped Western thought. This is the closest you're ever going to see somebody try to put them all three together.

Hugo Grotius, *De iure belli ac pacis libri tres II, ii, 6* (pag 136)

'1. Let us consider whether men have any Common Right to those things which are already made private property. Some may think that this is a strange question, since property seems to have absorbed all the Right which flowed from the common state of things"(and he goes on to argue that property setting up property, people would have wanted it to be a condition).

The law has kind of dropped away. Although he mentions civil law, and he does it as though it's a matter of common sense.

In case of necessity, you can take it under this property. And he cites the theologians without telling us which ones, and then he cites Seneca, Cicero, Curtius and then he says if you have the money you pay tonight, after I've eaten your bread, I have to give back the money.

2. **Delictual obligations**

Leonardus Lessius, *De iustitia et iure ceterisque virtutibus cardinalis libri quatuor* lib. III. sec. 2, ch. 7.

'*Problem 5. Under What General Headings the Obligation to Make* ***Restitution*** *Arises*'.

So, what is restitution? Aquinas would have said restitution means you compensate something for some loss you've caused them. And it has a special meaning in canon law. St. Augustine asked a question. 'What would happen if somebody stole something and then he confesses he stole something, but he didn't give it back. Can you absolve him?' He says, 'no, you can't absolve him'. This led to the major distinction between:

- **Sins against justice** -> you have to make it up = the **duty of restitution** (e.g. if you hurt someone)
- **Sins against charity** -> there is **no direct obligation**, so you don't have to give it back.

For example, if I didn't give a poor man money, that's a sin against charity, but I don't have to go out and find that very poor man and give him the money I should have given him then. But it's uncharitable, so, therefore, I can be forgiven. I can continue in the future, but I don't lose money right now.

So all the different things Aristotle has said freely would be **restoring equality**. You have less than you should have, I have to make it up. So you've got two different sources of the duty to make an **restitution**, to make compensation:

1. **Unjust taking** -> I took or destroyed your thing and whether I have it or not, that means I have to make it up for you and compensate you since it was an unjust act
2. **Thing taken**, whether justly or unjustly -> I still have it and now I think I have to give it back, because I've been versed with your expense.

Now both of these things are supposed to follow from the principle of justice. Aristotle said that if one person gains and the other person loses, then they have to make it up. Out of this, we get what is going to grow into an explanation of not only tort law, but the law of unjust enrichment.

Unjust enrichment

The overriding principle here is supposed to be: if you lose, you have less than you have, you should have, and I have more. That's a **violation of commutative justice**. Aristotle was talking about cases where I assault, attack, rob, steal, destroy. What about cases where you just happen to have my thing? Would I have an obligation there?

The greatest expert on Grotius said that when Grotius claimed unjust enrichment is a separate branch of law co-equal with property and tort, he took this right out of the lessons of Lessius, who took it, as you can see, out of trying to explain Aristotle. But henceforth, we now have three branches of law.

I'm liable because I had your thing and profit, I'm liable because I took your thing, and I could be liable because I'm in a contract and I cheated you in some way, I charged you much. All of those are supposed to be **violations of equality**, all of them call for compensation, or, as the canon lawyers say, all of them **call for restitution**.

Lezione 15-11

Thus far, we have considered instances in which the canonists developed remedies and rules of their own to address problems like those faced by the medieval civilians. In other instances, they drew upon **Roman law** as interpreted by the civilians to formulate moral principles that should govern Christian life. One example is the principle that a **person must make compensation** for any **harm** that he has done another through **fault**, **intentionally** or **negligently** (derived from the Roman **Lex Aquilia**).

The canonists found yet another reason why he might owe a duty of restitution: participation in an **illegal activity**. Nevertheless, they adopted the principle that he must make **compensation** if he was at fault for acting intentionally or negligently (Lex Aquilia). If he was not at fault in any way, he had not committed a sin and need **not make restitution** in order to be forgiven.

There are two types of justice.

- **Distributive justice**, which gives everyone a share
- **Commutative justice**, which preserves the share

If I take your horse, I've gained at your expense. The principle is simple, it's always about **someone gaining at another's expense** because we want to keep the shares even. I have to give the horse back. Once I return the horse, our shares are even again.
But here's where it gets interesting: suppose I destroy the horse. The horse no longer exists. In that case, I have to pay you the value of the horse because your share has become smaller, and we need to restore **balance**. To do that, we will take part of my share and transfer it to you. This ensures you're back to where you were before the loss.

Aristotle discusses **involuntary commutative justice**, explaining that in such cases, one person gains while the other person loses. The judge's role is to restore **equality**.

Thomas Aquinas. ***In decem libro Ethicorum Aristotles ad Nicomachum espositio V.vi.no 952*** (pag 138)
*"**Aristotle**:*
For the term gain is applied generally to such cases, even if it be not a term appropriate to certain cases—e.g, to the person who inflicts a wound.—and 'loss' to the suffer; at all events when the suffering has been estimated, the one is called loss and other gain
***Aquinas**: And he says that if one of two people strikes and the other is wounded or, indeed, one kills and the other dies, the action and suffering is unequal because he who strikes or kills has more of what is accounted good, that is, because he has fulfilled his will, and so is deemed to have, as it 138 were, a gain. The one who is wounded or killed has more of what is bad inasmuch as he is deprived of security or life against his will, and so is deemed to have suffered, as it were, a loss. But the judge is held to restore equality depriving the one of the gain and restoring the other the loss…."*

Aristotle acknowledges that while the person who suffers harm clearly experiences a loss, the person inflicting the harm isn't necessarily a "gainer" in the traditional sense. Instead, the terms are used more as **estimators**: one side is said to experience a loss, and the other side is said to experience a gain.

The principle remains: if I gain at your expense, I owe you compensation. However, Aristotle recognizes the objection: if I wound you, I don't seem to gain at all. Nevertheless, he says, it's still referred to as a gain.

So, how do we get rid of that objection?
Now, let's suppose I shoot your horse—not for any practical reason, but simply because I don't like you. I wanted to kill your horse, and I succeeded. Whatever gratification I gain from this act, I cannot be the one to put a price on it. Therefore, to restore balance, we take away my gain and **compensate for your loss**. The cost of satisfying that desire—the loss of your horse—falls entirely on me.
My gain is your loss, and I owe you compensation. If I shoot you or your horse, what is my gain? My gain is that I wanted to shoot you—and I did. That desire counts as a **gain**.

When Aristotle discusses these issues, he focuses on the **intentional wounding** of someone or the **intentional taking** of their property. Today, if you negligently or intentionally harm someone, you have a **moral duty** to address that harm. For the Romans, this wasn't just a moral duty; it was a **legal principle**: **if you caused harm, you were liable**.
For the **Canons**, it's framed as a **moral principle**: if you harm someone—whether intentionally or negligently—you owe restitution. Thomas Aquinas takes it further, saying that if you harm someone intentionally or negligently, you violate **commutative justice**.

This is significant because **negligence** is treated as **more than just an accident**. For an Aristotelian, a human being is a **rational animal**, acting through **practical reasons**. Everything attributed to a person must be tied to a choice they made. Whether it's a bad choice or even a malicious one, it's still a choice.

Practical reason governs how choices should be made, and making the wrong choice is a failure to adhere to its principles. Negligence is a violation of practical reason. By framing negligence this way, it's integrated into a broader framework of **intentional choices**. Even negligence reflects a **failure of practical reason** and is treated as a **moral** and legal failing.

Tomasso di Vio (Cajetan), Commentaria to Thomas Aquinas, Summa theologica19 post Q. 64, a. 8. (pag 139)
[Suppose a nurse puts a baby in bed with her to stop the baby from crying, falls asleep, rolls over on the baby in the night, and smothers the baby.] [I]] the bed is large and there is nothing else near it, the nurse is always accustomed to find herself in the same place and position in which she put herself to begin sleeping, and the implacability of the infant required it, she seems to be excused, because it is not rational when these things concur to fear the risk.

But when exactly is she excused?
Suppose the bed is large, the nurse sleeps quietly on one side, and the baby is crying. The only way to calm the child is to bring them into the bed. If she then rolls over and accidentally smothers the child, is she truly negligent? According to this reasoning, no—she is not negligent.

What is the balancing process? Practical reason operates by evaluating the danger, assessing how severe the consequences might be, and weighing that against the potential benefit, such as getting the child to sleep. It involves balancing factors to determine the reasonableness of her actions.

The Learned Hand Formula

The Learned Hand formula gets its name from an American case involving a barge called The T.J. Hooper. A barge is a large, flat-bottomed boat used for transporting goods. In this particular case, the owners of the barge had tied it up in Miami but failed to leave a man on board to ensure it didn't come loose. Unfortunately, the barge broke free—not because it was tied improperly but because there was no one present to monitor it. The legal question was: Is it negligent to fail to have a man on board in case the barge comes loose? The answer depends on several factors. Hand expressed this balance in a mathematical formula:

$B < P \times L$

- **B**: The **burden** (cost of precaution, such as having someone on board).
- **P**: The **probability** of loss (likelihood the barge would come loose).
- **L**: The severity of the **loss** (damage caused if it does).

If the cost of precaution (B) is less than the product of the probability of the loss and its severity ($P \times L$), then failing to take the precaution would be negligent. This formula is why it's called the Learned Hand formula for precaution. In this specific case, the cost of keeping someone on the barge overnight was compared to the potential damage and likelihood of the barge breaking free.

In the example of Cajetan, the loss is sleep, as the baby cries all night. The probability of rolling over is small, but if it happens could be severe, such as the baby dying. The small probability and the intensity of the noise might justify that the nurse is not negligent.

Richard Posner, a pioneer of the law and economics approach, later observed that when Learned Hand introduced his formula, he was unconsciously **hinting at an economic principle**. The formula is a precise way to determine negligence by weighing **costs** and **benefits**. In court cases, this process is typically presented to a jury, which then decides whether negligence occurred.

There's a debate in Germany: **Hein Kötz**, a leading comparative lawyer, likes the formula. He makes a famous example about **schnitzel**: somebody puts rat poison in an unmarked shaker, you shake it on the schnitzel you're cooking thinking it's pepper or salt, you're poisoning somebody with a schnitzel. The burden would have been very slight to label it poison and put it somewhere else, while the loss is catastrophic.

However, B and L in the Learned Hand formula as numbers **oversimplifies** the **practical aspects** of negligence. You could represent them by **quantities** (e.g. B is higher or lower), but that doesn't mean they are numbers. Also, it could be difficult to determine love as a quantity or a number.

Posner's approach extends the Learned Hand formula by suggesting that the "B" (burden) and "L" (loss) in the formula represent the amounts people would be **willing to pay** to either gain a benefit or avoid a loss. This concept is tied to **wealth maximization**, which aims to increase the **total value** people are willing to pay for something, whether for the benefit or to avoid harm. This idea is closely related to the **Kaldor-Hicks efficiency**, which seeks to **improve overall economic welfare** by ensuring that the gains from an action outweigh the losses.

Kaldor-Hicks Efficiency

Pareto efficiency means both parties benefit from a transaction, like when the value of your watch is greater to me than my money, and vice versa. In contrast, Kaldor-Hicks efficiency, or wealth maximization, allows one party to benefit enough that they could compensate the other (even if they don't) and still come out ahead. This concept focuses on **maximizing total value**, but it doesn't require that everyone benefits, just that the overall gain is enough to compensate the losses

Posner's example: imagine you're running down the street, and someone else is carrying a bag of oranges. You run into them, causing the oranges to drop. Posner suggests that the question should be this: how much would you be willing to pay to run fast, and how much would the other person be willing to pay to ensure their oranges aren't in danger? So, the formula weighs your desire to run fast against the risk of harm to the other person's oranges.

In ***A Tale of Two Cities***, the aristocrat races his horses through the streets of Paris, enjoying the thrill of speed. After causing an **accident**, he nonchalantly asks if the horses are injured, showing little concern for the potential harm to others. Using Posner's framework, we would compare the **value of the harm** caused—such as a child being injured or killed—to the **value** the aristocrat places on his privilege to **race his horses**.

The example raises an interesting question: If a child risks their life for a gumdrop, would the value of the child's life be equivalent to the gumdrop's worth, or would it be the value parents place on their child's safety? In this scenario, we should consider the **amount the parents would be willing to pay** to protect their child from the risk posed by the aristocrat's reckless behavior, rather than simply the child's actions. Suppose, the parents are poor and the amount that they are willing to pay would be lower than aristocrat's one According to this logic, there's **no negligence**, and even if the aristocrat hurts the child, he isn't required to compensate the parents. Yet, under this framework, "wealth" has been maximized.

Value Judgments

The **late Scholastics** would have had no issue with this, as for them, doing the right thing was always about **practical reason**, which is inherently tied to value judgments. A **value judgment** arises when you compare a good thing with an evil thing and make a decision.

There is a reluctance among decision-makers to admit that they are making a value judgment, and they might be attracted by the idea that it's all a matter of maximizing wealth or maximizing utility. But the truth is, someone has to make that judgment, or there will be dangers, and people will get hurt. This approach has faced significant criticism over the past decade, particularly from those who disagree with it.

Roman Law and the Evolution of Tort Actions

Roman law viewed negligence as involving a general value judgment, but their understanding of a value judgment was wrapped up in the **philosophy** they believed in. Specifically, it was a value judgment made through **practical reason**, which allowed you to make right and wrong decisions based on things that were clearly good, such as sleep, life, and money. Practical reason enables you to **balance** these things.

Roman actions have evolved into a simplified principle: if you are **negligent** or **intentional** and **harm** someone, you must pay. Harm can result from actions such as theft, homicide, adultery, debauchery, insult, or any other form of wrongful taking. This collapse of Roman actions highlights the shift to the **principle of negligence or intent as the basis for liability**.

Causes of damage can affect a person, property, dignity, or anything else, and in such cases, there is a **right to compensation**. The distinction between Roman actions is disappearing, what used to be **iniuria**, which is a separate action, is now **harm to dignity**.

Commutative justice holds that causing harm, including to reputation or dignity, makes you liable. This leads to the general formula for tort law: **if you negligently or intentionally cause damage by depriving someone of something they have a right to, you must pay**.

Hugo Grotius, De iure belli ac pacis libri tres Il, xvii (pag 139)

From such fault arises by Natural Law an obligation, if the wrong be accompanied with damage: namely, the obligation of repairing the wrong. Damage, damnum (perhaps from demo) is when a man has less than what is his, whether it be his by mere nature, or by some human act in addition, as ownership, pact, law. Things which a man may regard as his by nature are life, not indeed to throw away, but to keep, his body, limbs, fame, honor, his own acts.

If you are at fault and cause harm to someone, you have an obligation to repair the damage, as it is a natural law obligation. This concept aligns with the ideas of **Leonard Lessius**, which were later found by Grotius.

The roots of this principle can be seen in **Grotius**' work**,** which influenced the **French Civil Code**, and subsequently, the **Italian Civil Code** (art.1224). While not directly derived from Roman law, the Civil Code reflects the principle: if you cause harm, you must pay.

Robert Pothier, Traité des obligations 116-17. (pag 139-140)
On delicts and quasi-delicts 19
*One calls a **delict** the act by which one person causes a harm or wrong to another by willful wrongdoing or malice.*
*A **quasi-delict** is the act by which one person causes a wrong to another without malice but by an imprudence which is not excusable.*

Essentially, intent or negligence causing harm means liability. This is reflected in Articles 1382 and 1383 of the French Civil Code, now Articles 1270 and 1271, which state that if you harm someone through intention or negligence, you must compensate. This principle, derived from the lex aquilia, is central to the French Civil Code.

One notable **development** is the **abandonment of Roman actions** for **liability without fault**, such as cases where harm is caused by an animal. In Roman law, liability without fault existed, but these cases disappear when interpreting the Lex Aquilia. In fact, if an event occurs despite my **best efforts**, and it turns out to be a **chance event**, I am not at fault and I should not be held liable.

The principle of liability for negligence is generally followed today, even though proving negligence can be challenging. **Grotius**, in **maritime law**, states that when two ships collide under admiralty law, the focus isn't on who is at fault, as proving fault is difficult.

In the 20th century, liability without fault began to emerge due to **modern technology**, which introduced new ways to cause harm, making **strict liability** necessary. In many countries, strict liability applies to **particularly dangerous activities**, such as using poisonous gases, storing explosives, or blasting for mining: if you engage in a risky activity for **personal benefit**, you should be liable.
However, strict liability isn't explicitly stated in the French Civil Code, and the German Civil Code lacks a **general provision** for it, though special statutes govern dangerous activities like blasting or transporting people. If an activity isn't covered by these statutes, you're not liable.

1. Contractual Obligations

In Roman law, contracts are **formed by consent,** but only some contracts are **binding by consent**, and the Romans didn't have a clear theory for why this distinction existed. Some other contracts, however, are binding through **delivery**, some are not binding at all (**non-contracts**). Medieval jurists, drawing on Roman law, linked contracts to **natural law**.

a. Typology

The **scholastics** further developed this by distinguishing between **voluntary contracts** (like sales or leases) and **involuntary actions** (like theft) that require **compensation**. Now, contracts are only binding if you make a **formality**, which in the Middle Ages became **notarization** and in the Roman times, was something called **simulation**. Voluntary contracts can be:

- Contracts of **commutative justice** = keeps the party even (fair exchanges)
- Act of **liberality** (e.g. gifts)

Liberty is an ethical virtue tied to giving without expecting anything in return, which is described by **Aristotle**. Since we are **social animals**, in order to exercise the virtue of liberality, we have to give away money in a way that promotes the **well-being** of others by using **practical reason**.

Aristotle, Nicomachean Ethics IV (pag 140)
Let us speak next of liberality. It seems to be the mean with regard to wealth; for the liberal man is praised not respect of military matters, nor of those in respect of which the temperate man is praised, nor of judicial decisions, but with regard to the giving and taking of wealth, and especially in respect of giving. Now by 'wealth' we mean all the things whose value is measured by money. ... Now virtuous actions are noble and done for the sake of the noble. Therefore the liberal man, like other virtuous men, will give for the sake of the noble, and rightly; for he will give to the right people, the right amounts, and at he right time, with all the other qualifications that accompany right giving; and that too with pleasure or without pain; for that which is virtuous is pleasant or free from pain -- least of all will it be painful. But he who gives with pain for he would prefer the wealth to the noble act, and this is not characteristic of a liberal man.

So, there are two kinds of **causa** (= reason to conclude a contract) in a contract:

1. **Liberality** = giving something freely to help another
2. **Commutative justice** = exchanging things of equal value. They decide what they need to live a good life by exercising the **Prudencia Economica**.

We are going to consider the way in which **Grotius reclassifies** the contracts that go along according to what the causa is. As we said before, there are two types of contracts: acts of liberality (such as **gifts** and **favors**) and contracts of commutative justice. The law enforces contracts based on these underlying causes, ensuring that the parties' actions promote the common good and the well-being of both parties involved. The acts of liberality divide in:

- **Gifts** = require a **formality** since it changes the **distribution** (= one become poorer and the other richer). The formality was required already by the Romans to ensure that the gift is well-earned.
- **Favors** = acts that **don't change the distribution** much where one has a benefit, while the other doesn't. Since the parties remain as wealthy as before, there's no need for formality.

For example, I'm loaning you money without interest, or lending you my horse to ride without charging rent or looking after your horse while you're gone without charging you.

The contracts of commutative justice divide in:

- **Exchange** = divide the parties and
    - **Sale** = I give you something and charge you rent
    - **Lease** -= I give you the use of a thing and charge you rent
    - **Barter**
- **Partnership** = create a mutual interest. *For example,* we pool our resources for a business and divide the profits based on our contributions.

Contracts that divide the parties, like an exchange, involve **giving what you receive in return**. Sale and Lease are **mutual contracts** with **mutual interests**. However, they still require **equality**.

This reclassification forms a fundamental doctrine of contract law: **a contract must have a causa for the law to enforce it.** This isn't about limiting what people can do; it's about understanding what people are trying to do. There's no other sensible reason why a reasonable person would want to make a contract unless it serves a purpose.

For each type of contract, there should be **terms** that correspond to this purpose. How wise the Romans were to organize their contract rules around different kinds of contracts, each with their own terms. What have we changed? We've changed the explanation. The reason there are separate contracts is that people can achieve well-being through voluntary agreements in different ways.

Jean Domat, Les lois civiles, I, pp. 19-20. (pag 143)
The use of contracts is a natural result of the order of society and the ties that God forms between men. For He has made it necessary that all their needs be met by reciprocal use of their activity and work, and by different types of commerce in things, and it is principally through contracts that these needs can therefore be accommodated. Thus, for the use of activity and work, men associate themselves, hire each other, and form different relationships with each other. Thus, for the use of things, men trade through sales and exchanges when they need to acquire, and rent or borrow when they need things only for a time. And corresponding to every other different need there is a different type of contract.

Put another way, these contracts exist by **natural law**, which is the principle that creates **practical reason**. If you want to promote the common good, these are the kinds of contracts you have, and they do promote the common good.

Robert Pothier, Traité des obligations (pag 143)
*§ 12. **Contracts** of **mutual interest** (contrats intéresses de part et d'autre) are those which are made for the reciprocal interest and utility of each of the parties. Such are sale, barter, lease, … partnership, and an infinity of others."*
***Contracts to do good** (contrats de bienfaisance) are those which are made for the utility of only one of the contracting parties. Such are a loan for use (prêt à l'usage) loan for consumption (prêt de consumption), deposit it (dépôt) and mandate (mandat). . . .*
*§ 41. Every engagement must have an **honest cause**. In contracts of mutual interest (contrats intéresses) the cause of the engagement which one party contracts is that which the other party gives him or commits himself to give him. In contracts to do good (contrats de bienfaisance) it is the liberality which one party wishes to exercise towards the other*.

According to Potier sale, barter, lease, partnership, and many others are **contracts of mutual interest**. These are the contracts Grotius would say are "owners." Then there are contracts made for the limited utility of only one party, which include those for consumption, such as **mutual use agreements** (**commodatum**), loan for use, deposit, and so on. Finally, there are **favors**. So, as with Grotius, we have contracts that **benefit only one** party, such as debts for favors. Every contract must have a causa, and these are the different types of causa.

The document is incorporated into the **French Code** of Laws and later borrowed by the Italian Civil Code. All sections under the law of obligations are taken by Pothier. How much of Aristotle's original ideas they truly understood is unclear, but they did grasp that in certain contracts, liberality is the **virtue** of giving something away without insisting on any formality. This type of relationship ensures that the contract is valid, and in principle, it must be **qualified**. The one thing that's clearly understood is that contracts must be **legally binding** and **based on consent**. The French embraced the idea that contracts are **voluntary**. In doing so, they retained the idea that contracts are based on the will, although they moved away from the concept of commutative justice.

A contract reflects the **will of the parties**, and that is what the law enforces. Moreover, a fair price doesn't make sense in the context of contracts. If there were such a thing as a fair price, for the law to impose it would interfere with the will of the parties, **contradicting the principle of contract law**.

We're not concerned with the virtues of liberality; we're concerned with the will of the parties. The **doctrine of causa**, adopted by the French Civil Code, means either I get something back for what I give, or I don't. By the 19th century, the French tried to make the doctrine more meaningful: maybe it means that I must receive something back, even of negligible value; maybe it means the contract has to have an honest cause in the sense that it's not a contract to assassinate someone or prostitution.

And then in **2016**, the French **abolished** the doctrine of cause. And there was great applause from the people who had been saying for a very long time it doesn't make sense. There's no result you can achieve with the doctrine of cause that you couldn't achieve with doctrines of **mistake** and **inequality** and so forth.

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RECAP OF CONTRACTS

Contracts were another area where medieval legal scholars contributed significantly, reshaping Roman traditions. Romans classified contracts based on their binding nature:

- **Contracts by Consent**: Agreements enforceable by mutual consent.
- **Contracts by Delivery**: Agreements that became binding upon the transfer of an object.
- **Contracts by Formality**: Those requiring specific legal or ceremonial formalities.
- **Non-Binding Contracts**: Agreements without enforceable obligations.

Medieval jurists, however, sought to create a more philosophical basis for contracts. They argued that contracts exist to enable justice, particularly in cases involving *complicated justice* (ensuring fairness in exchanges). They also introduced the concept of *causae*, the underlying reasons for entering a contract, such as mutual benefit, moral duty, or the intent to assist others.

Key Examples of Contractual Motives:

- **Gratuitous Contracts (Gifts)**: Reflect moral virtues like charity and liberality, where one party gives without expecting direct benefit.
- **Reciprocal Contracts (Exchange)**: Require both parties to give and receive something of equal value, maintaining balance.
- **Mixed Contracts**: Combine elements of generosity and reciprocity, such as lending property for temporary use without charge but expecting it to be returned.

b. Why contracts are binding

Leonard Lessius, *De iustitia et iure ceterisque virtutibus cardinalis libri quatuor* lib. 2, sec. 3, c. 17.

Problem 4. Whether all Contracts Produce an Obligation in the Forum of Conscience and the External Forum

*I say first, every contract, even if naked, produces a **natural obligation** in the **forum of conscience** such that it cannot be rescinded against the other party's will.* […]
23. *The proof is, first, that everyone is **bound by law** to perform what he **promises** when the other has accepted whether he promises gratuitously or onerously. Nor does it matter whether his promise is a naked agreement or a clothed one because the **law of nature** and of nations does not draw this distinction but only the civil law.*
. . .

I say secondly, the contract which is called a naked agreement nevertheless does not produce an obligation in the civil forum.

Scholastics viewed contracts as extensions of natural law. They argued that all agreements, even those without formalities ("naked" means without a subject), are morally binding because they align with principles of fairness and justice.

PROMISES AND OBLIGATIONS

One of the major debates in medieval contract law concerned promises. Scholars disagreed about whether **promises** should be binding and, if so, under what conditions (v. **Leonard Lessius, *De iustitia et iure ceterisque virtutibus cardinalis libri quatuor* lib. 2, sec. 3, c. 18**., pag 144)

- **Cajetan's View**: Promises are morally binding only because breaking them constitutes **lying**. A person's obligation to fulfil a promise arises from their **duty to truthfulness**, not from the inherent nature of the promise itself.
- **Lesbius' Argument**: Promises transfer rights to the recipient (**complicated justice**), giving them a legal claim to enforce the agreement. According to this view, a promise is not merely a statement about future intentions but a **transfer of a right** to the other party.

The debate had significant implications for contract law. If promises transfer rights, then breaking a promise is akin to taking back something already given. This reasoning influenced later legal theories, such as Grotius' assertion that contracts are fundamental to maintaining justice and societal order.

Grotius says that when you make a promise you can mean three things (v. ***Hugo Grotius, De iure belli ac pacis libri tres I***, xi, pag 145):

1. **Expression of your intentions**: what you feel like doing or might do in the future.
2. Can be more serious, where you genuinely commit but don't transfer the right to enforce it. In this case, the promise is meaningful, but it's not enforceable.
3. Can be a **full promise**, where you not only make the commitment but also transfer the right to the other party. Here, the promise is binding, and the other person can hold you accountable if you don't deliver.

c. Consent

Medieval scholars examined how errors and fraudulent acts impact the validity of contracts (v. **Leonard Lessius, *De iustitia et iure ceterisque virtutibus cardinalis libri quatuor* lib. 2, sec. 3,** pag 146). They identified key distinctions:

1. **Substantive Errors**: If a party is mistaken about the essential nature of the object (e.g., buying copper thinking it is gold), the contract is **void** by the **law of nature**. This is because consent was given under false assumptions about the substance of the agreement.
2. **Fraud in the Motive**: If a party is misled about the reasons for entering into a contract (e.g., being told a horse is young when it is old), the contract becomes **voidable**. The defrauded party has the option to rescind the agreement.

Robert Pothier, *Traité des obligations* 17-19, 21-25; 28-32. (pag 149)

Error is the **greatest defect of contracts** because contracts are formed by the consent of the parties, and there cannot be consent when the parties erred in the object of their contract.

Scholastics argued that mistakes affecting the **substance** (what the contract is about) invalidate consent altogether, as the parties are not truly agreeing on the same terms. On the other hand, errors regarding **accidents** (non-essential attributes, such as size or age) typically do not invalidate the contract but may warrant remedies, such as price adjustments.

Late scholastics (v. Lessius, pag 147) introduced a further refinement: the doctrine of **tacit conditions**. They argued that every contract implicitly assumes certain circumstances remain stable. If these conditions change drastically (e.g., illness preventing the use of a purchased item), the agreement could be revisited. This concept of tacit conditions allowed for greater flexibility in addressing unforeseen events while maintaining fairness.

Roman law provided a foundation by asserting that certain elements must be agreed upon, such as the price, nature of the contract, and the object of exchange. However, medieval jurists expanded this idea, analyzing the role of errors, fraud, and changed circumstances.

d. The Just Price

The just price doctrine, rooted in Aristotelian justice, played a significant role in medieval economic thought. It asserts that transactions should maintain fairness, preventing one party from gaining at the expense of another.

Scholastics argued that the value of goods should reflect:

1. **Cost of Production**: The expenses incurred to produce the item. This aligns with Aquinas's emphasis on fairness in transactions, where neither party should gain at the other's expense.

2. **Scarcity**: How readily available the item is in the market. In case of extraordinary circumstances, the deviation of price is justified.
3. **Need**: The demand for the item, reflecting its importance to buyers. Contracts and exchanges aim to provide equality, where each party receives something they value more than what they give.

Medieval jurists distinguished between minor price deviations, which were permissible, and significant inequities, which warranted legal remedies. For instance, selling land at less than half its fair value was considered unjust and subject to correction.

By the 19th century, the idea of a "just price" was largely replaced by market-driven principles. Modern economic theories emphasized supply and demand, questioning whether moral fairness had any role in determining prices. This shift marked a departure from scholastic views, which saw economic transactions as governed by both market forces and ethical considerations.

THE EVOLUTION OF CONTRACTUAL OBLIGATIONS

Over time, the basis for enforcing contracts shifted. Medieval scholars emphasized fairness and balance, while later jurists focused on individual autonomy and consent. By the 19th century, contracts were seen primarily as instruments of mutual agreement, with less emphasis on moral obligations.

Reliance emerged as a critical concept in this evolution. Legal theorists argued that contracts should compensate for harm caused when one party relies on another’s promise. This approach connected contract law more closely with tort principles, where the focus is on rectifying harm rather than enforcing promises for their own sake.

THE DECLINE OF JUST PRICE DOCTRINE AND THE ROLE OF MARKET FORCES

By the early modern period, the just price doctrine began to lose influence as economic systems evolved. Market dynamics, such as supply and demand, increasingly shaped how prices were determined.

Medieval scholars argued that the market price—reflecting cost, scarcity, and need—aligned with the just price in most cases. However, critics in the 19th century noted that market forces often diverged from moral considerations, particularly in highly commercialized societies.

For instance, if scarcity drove prices significantly higher than production costs, some argued that it unfairly enriched sellers at buyers' expense. Others contended that price-setting was beyond the scope of moral or legal intervention, emphasizing the autonomy of contracting parties and the efficiency of free markets.

In the 2016 reform of the French Civil Code, lawmakers explicitly moved away from just price principles. Modern commentators agreed that the idea of regulating fairness in pricing no longer aligned with contemporary economic realities.

MISTAKES, TACIT CONDITIONS, AND FLEXIBILITY IN AGREEMENTS

One of the most significant contributions of medieval legal thought was the recognition of tacit conditions—implied assumptions underlying agreements. This innovation provided a way to address unforeseen circumstances without nullifying the entire legal framework of a contract.

For example, if a buyer enters a contract based on an assumption that later proves false (e.g., purchasing a boat but subsequently discovering they cannot use it due to health reasons), the concept of tacit conditions allows for renegotiation or adjustment. This flexibility reflects a balance between fairness and legal certainty.

However, modern legal systems have generally moved away from such doctrines, favoring stricter interpretations of contractual obligations. Exceptions are rare and typically limited to cases of fraud, coercion, or significant errors.

LEGACY OF SCHOLASTIC LEGAL THOUGHT

Medieval legal theories have left a lasting impact on contemporary law. Principles such as the binding nature of promises, the emphasis on fairness in transactions, and the moral dimensions of property rights continue to inform legal debates.

However, shifts in economic and social contexts have reinterpreted many of these ideas. For example:

- The focus on individual autonomy has diminished the role of moral considerations in contracts.
- Market-driven principles have replaced the just price doctrine as the dominant framework for pricing.
- The rise of modern finance has normalized practices, such as charging interest, that medieval scholars once viewed with skepticism.

Despite these changes, the integration of Roman law, Christian theology, and Aristotelian philosophy during the Middle Ages remains a foundational influence on Western legal traditions. Modern legal systems, while often diverging from scholastic principles, still grapple with many of the same questions about justice, fairness, and the role of law in regulating human relationships.

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The late scholastics and legal institutions

A key to understanding modern law is to loot at modern law and have a sense for **what is not there**. In fact, modern law is Roman law with things subtracted.

What drops out? For example, in tort law the only thing that's left is the Lex Aquilia (all the other actions are subtracted), so if you hurt somebody and it's your fault, you pay them.

In property, the only thing left is the oath that means "I own this good" (predecessor of ownership).

The late scholastics adopt this "subtraction" system: what drops out are the concepts and notions particularly rooted in the Aristotelian philosophy. Let's make some examples:

1. **Property** the doctrine of necessity drops out and all you have left is property as a right.
2. **Tort** late scholastics don't look at the rationality of humans ("if I understand, I choose"), but they're left with the concept that if I hurt somebody, I have to pay them.

These concepts are left without the Aristotelian theory about what a person is, why he's responsible, without any notion of complicated justice, without any notion of distributed justice.

3. **Contracts** the concept of liberality and complicated justice drop out, so all there's left is that "I made a promise".

The doctrine of **changed circumstances** (tacit condition) is of interest because the late scholastics dropped out all the notions of what the source of consent is, and what's left is that changed circumstances don't destroy consent.

In the 19th century, this doctrine came under attack as scholars started to think that it was not a tacit condition. In fact, since the contract is the will of the parties, if the latter didn't think of it then the doctrine should not be applied. However, the doctrine of changed circumstances came back in the 20th century.

The doctrine of just price and market price

Until the 19th century, the doctrine of the **just price** was in use too.

The late scholastics explain this doctrine in light of the principles taught by Aristotle and Aquinas.

The general principle is that a contract exchange must be made at just price. The relief is given for a deviation on the just price (Problem 2 and 4, Lessius "*De iustitia et iure ceterique virtutibus cardinalis libri quatuour* lib. 2, sec. 3, c. 21" pag 153). The latter idea was taken from the medieval jurists, alongside with the idea that the just price is the **market price**. However, medieval jurists didn't have a theory. The late scholastics found the ratio in Aristotle: "if I give you something, you give me something back of the same value". That's how they know the principle is correct.

How can the market price be just? The market price varies from day to day, region to region.

To explain how the market works, the curve of **supply** and **demand** have to be drawn. The demand curve is the amount of the commodity that people will buy, at any particular price that's offered. The supply curve indicates the amount that people will offer for sale at any given price. The market price is therefore determined by supply and demand.

If the need is greater, the price goes up a lot. Moreover, supply is determined by two things: scarcity and cost.

Supply and demand intersect at a **unique price**. The State can only intervene when the price should be different from the one determined by the market. So, the State can condemn anomalies of the market.

The **defect** in a thing makes it less valuable than it seems to be. (Article 3 pag. 152, T. Aquinas "*Summa theologiae* II-II, Q 77"). However, the seller sells at a price, and that's because anytime two people make a contract in advance of delivery, they're making a *bet* on what the market price is going to be. This is the condition of the purchase (they think in margins). It's a fair bet (pag. 154, H. Grotius, De iure belli ac pacis libri tres, II, xii).

When making a contract, there's an allocation of the risk of fluctuations in the market, and that's what makes it fair.

Each party makes adjustments to preserve their share, but a lot of random events can affect it (accidents…). The complicated adjustments don't guarantee that the party will have its share, they guarantee that in a transaction with somebody else, either party will be enriched. The gainer party gains a share at the expenses of somebody else who loses. Loosing is an inherent risk.

Poitier explains the just price in a different way than the medieval civilians. According to him, in principle, equity must be equality. He continues by saying that equity is set by Grotius and Lessius, and this is what is used by courts. The principle is used to educate lawyers.

What remained in practice, in the 19th century, of the medieval civilians is the resolution of courts' problems. In fact, judges would take all the papers and the witness tapes and send all of it off to three professors. Or they may just ask the professors for a concilium and advice and take the censors to court, and they'd pay attention to it. Even nowadays, to know the theory of law it's important to know the practice of law.

Unfair terms

According to the **principle of equality in exchange**, the seller has to disclose the fact that the product is defective. Otherwise, the buyer pays the price for a good commodity and receives a bad commodity. In fact, the market price for a bad commodity would be lower than for a good commodity.

However, if the seller doesn't disclose the defect and the buyer pays a price for a good commodity, the equality will be *maintained*.

Nevertheless, there are remedies to the defectiveness of the good:

1. **Reduce the price**

2. **Set aside the sale**

The seller should be liable under the **warranty**, because the buyer is buying the good and thinking that the seller will be responsible for the defects. But what if the seller waives the warranty and the product turns out to be defective?

The reason the seller must warrant the commodity is because the buyer is expecting the good not to be defective, and it's the seller that assumes the risk of defects.

The seller could transfer the risk of defects to the buyer, but the price should be changes, so the buyer can be compensated for bearing the risk (to preserve equality).

That's how it's possible to say that implied terms come from the principle of equality.

Contracts and obligations

The source of the party's obligations is the **will** of the parties. How is it then that the parties are bound by terms that they never thought of? A French scholar tried to explain this by saying that parties are bound by these terms because it's what they would have wanted, without having to write them out.

A German scholar, on the other hand, stated that parties are bound, not because they knew the terms, but because they wanted their contract to be governed by the terms that the law would want. But why does the law want these terms rather than others? Because they correspond with the will of the parties.

In the modern world, many legal systems today will give **relief** when the price is unfair ("unconscionability" in the U.S.). In France, they refuse to adopt this principle, even though a relief is granted when the price is very unfair, as they consider it a fraud.

What if somebody sold something at a high price because they know that the person is in need and cannot do otherwise? Modern legal systems grant relief in this situation too. In the U.S., for example, there's the Conscionability Principle, while in France it's considered duress.

Even a European directive is centered on unfair terms in consumer contract, and that is based on equality.

According to Lessius, there are two cases in which a buyer paid a price that's unfair:

1. **Necessity** something that the buyer can't get to the market
2. **Ignorance** the buyer doesn't know the price of the good

Again, one way to understand the modern world is to look for what's missing. What's missing is that there isn't a doctrine of just price, and maybe the 19th century people are perfectly right in saying there is no such thing as a just price.

Lesson: 28/11/2024

Summary of the previous lesson: just price for the late scholastics

Just price and market price

In the previous lesson, we saw what they meant by the just price, was the market price. Now how did they know that you should be relieved for a just price and a just price is the market price? Because the medieval civilians and canonists told themselves; we saw how they looked at their texts and decided that the principal solution would be for the just price, and then they looked at more texts that had to do with damages and valuing the property, said, "I think the just price must be the market price." They didn't explain why.

The late scholastics, Grotius, they think they know the reason why. The reason why is this: prices must rise and fall to reflect factors which they call mean? scarcity and cost. That must happen; you can't just freeze prices. Therefore, when I buy or sell with you, the two of us are anticipating how prices may change in the future, so is everybody else on the market that day. The current price represents the commune system as to what the price should be to reflect need, scarcity, and cost in the future. In other words, we set the price today thinking that the price may go up, it may go down tomorrow. You sell to me; you're betting the price will up go down if I buy from you, I'm betting the price might go up, but we're insuring against the risk and that risk is an inherent risk of buying proper property on the market, buying goods on the market, just like the risk that the goods may be destroyed.

I buy a horse from you two days later, unpredictably it dies: I'm stuck. The risk of the horse transfer goes with the owner, change the owner, you change the risk. The risk that the price will fly, rise and fall goes with the owner, change the owner, a new party is bearing the risk, but at the moment of transfer, the price reflects the risk that will go up, the risk that will go down; we both know for example, that a cow may have defects. You sell it to me, you warrant the commodity, the risk that will have defects falls on you, to sell it. But I paid a full price: compensate me. If you just claim the warranty, the risk that there will be a defect falls on me, the buyer; but the law says you must lower the price so as to make the contract a fair one, so this is how they think about fairness. They think about it in terms of risk.

Expected value, and the Aristotelian notions of commutative and distributive justice

James Franklin, an Australian (?) mathematician, who wrote a history on probability before Pascal, said it was these guys, the late scholastics, who discovered what we now call expected value. The way to decide what debt is worthwhile is to think, what is the payoff? What are the odds of getting the payoff? What is the other payoff? What are the odds of getting that payoff? Just count it back, and you have the fair bet.

If my odds of winning are 1 in 50, then I would get 50 to 1 odd, but not more than that. That sounds very modern, as you said. But behind it is the current notion of expected value. But behind it is not only the Roman law texts and the medial interpretation of those texts, which we're trying to explain. But behind it is the whole philosophy of Aristotle. And that's what's going to go out of fashion. So, if you ask them, well, OK, but why should there be a just price? The answer is, because a commutative justice requires it. And if you say, what's

that? The answer would be, well, when we exchange, neither party should enrich the other. Neither party should enrich himself, the other party's expense. The share should stay the same. Why is that? Well, because the object of distributive justice is to give everybody a fair share. And it can be imperfect. We may not achieve full distributive justice, but whatever we achieve, who wants to preserve it? So, you can't charge the other person too high a price any more than you can take his horse without paying it. We want to preserve the share of wealth of each person. And if you say, well, why do we want to do that? They'd start talking about the common good. They'd start talking about general justice. They'd start talking about the need to get goods to the person that we use them the best. And to understand that we have to get back into Aristotle's notion that the sense of thing is either money or wealth being a good way to live your life and for this, you need goods. And so, it's not somebody getting you something you want, it's getting you something that you need to support your life.

And that whole view of how we're going to do justice is very Aristotelian. And when Aristotle goes out of fashion, it stops making sense to people. So, this idea, the just price, disappears in the 19th century.

The doctrine of just price and usury: a comparison

Let's compare that with usury. And the idea that you cannot loan money with interest, otherwise it's usury.

In the 17th century, Lessius already thinks that his views are majority opinion. Let's look backward and see how we got into committing ourselves to the proposition that you can't loan money with interest.

Let's go back on pages 92 and 93. There were three fathers of the church plus the Bible say you can't loan money with interest.

Glossa ordinaria to Decretum Gratiani C. 14, q. 3

St. Augustine –page 91

That to take profit beyond the amount given is to demand usury is proven by the authority of Augustine who wrote on Psalm [37:26], at the verse "He is ever giving liberally and lending…."[a]

c. 1. One who exacted more than he gave accepted usury. (Augustine on Psalm 37)

If you take usury from a man, that is, if you lend your money expecting[b] to get back something more than[c] you gave, not only the money but wheat or wine or olives or anything else, if you expect to receive more than you gave, you are a usurer, and unworthy in doing so and not to be praised

St Jerome – page 92

c. 2. Whatever is required to be given in excess is usury. (Jerome on Ezekiel, I, viii)

Some believe that usury is only in money[d]. Divine scripture includes any taking of things in excess so that you may not receive more than you gave.

Some people accept small presents of various kinds

in return for money lent, and they do not consider

what they take to be usury or excess which,

however, was accepting more for what was given.

c. 3. Whatever exceeds the principal is usury.

(Ambrose on Tobit)

A great many people take refuge from the precept[e]

of the law[f] by giving money to businessmen[g] and

receiving merchandise from them in the place of

the profits of usury instead of exacting the usury in

money. Let them listen to what the law[h] says. It says

you shall not take as usury food or any other thing.

Deuteronomy, 19] [And shortly thereafter:] Food is

usury.

Psalm XV

Lord, who can find a home in your tent, who can dwell on your holy mountain?

Whoever lives blamelessly, who acts uprightly, who speaks the truth from the heart,

who keeps the tongue under control, who does not wrong a comrade, who casts no

discredit on a neighbor,

who looks with scorn on the vile, but honors those who fear the Lord, who stands

by an oath at any cost,

who asks no interest on loans, who takes no bribe to harm the innocent. No one

who so acts can ever be shaken

And what canonists decided that no you can't. And the explanation they gave is this is not like usury. But we're not objecting to modern profit. You can lease land and get money, rent. You can lease a house and get rent. For that matter, you can form a partnership between money and interest.

You can get a share of the profit, even if you don't do any work. That's not the problem.

The problem is when you loan fungibles. That is, when you loan corn, wine, wheat, or especially money. Those are things whose use is their consumption. And you're told this by the glossator on page 93.

When I loan you land, over the course of the year, the land will produce a crop. If I loan you a cow, over the course of the year, the cow will produce milk. But if I loan you so much money, so much milk, so much whatever, it doesn't produce anything over the course of the year. At the end of the year, you've still got exactly the amount that I owe you, unless you've lost it somehow.

So that's the amount you should have in the back. It doesn't produce anything. Now, I'm not saying that's a very good argument. In fact, that's the argument we're going to have to get out from under. But that's supposed to be the basis for it. Now, let's walk very closely through what Aquinas says, and then let's walk through what Lessius says. Aquinas and Aristotle are the intellectual heroes of people like Lestius, and the late

Scholastics, and what they're trying to do is to combine Aquinas and Aristotle with what they've been taught by the medieval canonists and civilians. And so far, there's been a remarkable degree of fit. Every time those people said something, the late Scholastic would manage to put it together. Here's Aristotle. Here's the law. We'll put it together.

And this time, they do something fairly surprising. They claim, Lessius claims, he's done it again. He's shown you what Aristotle meant, what the law really was, what Aquinas meant.

But did he? We've seen what the law was, the law of the church. Let's look at what Aquinas says. Then let's look at the magic trick, if it is that. Because Lestius claims to be faithful to both. You might suspect that he's being faithful to neither, but you'll have to judge. Let's watch it closely, because this is the argument. The whole thing is going to turn, and the document used is going to be, as was understood earlier in these changes.

Thomas Aquinas on usury

We begin by reading Aquinas, who starts by using the same arguments as the canonists.

Thomas Aquinas, on "Whether this is the same to take usury for money alone" – page 157

[T]o take usury for money lent is unjust in itself, because this is to sell what does not exist, and this evidently leads to inequality which is contrary to justice (commutative justice)

In order to make this evident, we must observe that there are certain things the use of which consists in their consumption: thus, we consume wine when we use it for drink, and we consume wheat when we use it for food. Wherefore in such like things the use of the thing must not be reckoned apart from the thing itself, and whoever is granted the use of the thing, is granted, the thing itself; and for this reason, to lend things of this kind is to transfer the ownership.

And therefore, I can't sell you the use, which is the price of wine; I can also charge you for using it. By that, I would you charge him twice.

I've never quite understood that argument. Maybe it makes a lot of sense to you. If I give you wine and ask for the wine back, the equivalent amount of wine, then I'm getting back what I gave you. If I charge you for drinking the wine, I'm charging an additional amount. So, if I give you a barrel of wine and ask you back a barrel and 2 litres extra, I'm now charging an additional amount in addition to the use of the wine.

All right, that's the argument. It's the same one as the kind of lawyers. And what does he have to say about risk? And what does he have to say about lost profit? Suppose I enter into the agreement. Here we are talking about lost profit on page 159, reply to objection one.

Thomas Aquinas, Reply to objection 1 – page 159

"*A lender may without sin enter an agreement with the borrower for compensation for the loss he incurs of something he ought to have, for this is not to sell the use of money but to avoid a loss. It may also happen that the borrower avoids a greater loss than the lender incurs, wherefore the borrower may repay the lender with what he has gained. But the lender cannot enter an agreement for compensation, through the fact that he makes no profit out of his money: because he must not sell that which he has not yet and may be prevented in many ways from having.*"

The lender cannot enter an agreement for compensation, through the fact that he makes no profit out of his money: because he must not sell that which he has not yet and may be prevented in many ways from having.

That's weird. I'm going to lend you a thousand to florins. I could have invested that money in a partnership, and I could have gotten back at the end of the year a thousand plus a hundred more.

Now I'm going to give you the thousand. You're going to use it for whatever purpose. At the end of the year, how much can I get back? Can I get back eleven hundred and say, I was prevented from making this profit? Aquinas says no.

And that is extremely weird because when Aquinas talks about damages, how much compensation do I owe you if you take my thing? Well, if you take my field, the value of the field, if you take my money, Aquinas says not only the money that you took, a thousand, but the amount of money I could not make because I lacked a thousand.

And that's a Roman law rule of damages we saw earlier with the Roman lawyers. Why is it that if you take my money, I get back not only the money you took but the money I could have made if you hadn't taken it? And here you have Aquinas saying, well, you cannot sell what you do not yet have and may be prevented in many ways from getting it. Doesn't that look like a contradiction? Maybe.

Then on the next page, he talks about the risk. I loan you money. I loan you a farm. In the case of a farm or a cow or something like that or a house that I loan you, if it's destroyed, the risk falls on me, the lender. The lender. Therefore, I can charge for it. The canonist's argument was, if I lend you wine or money and so forth and they should be destroyed, the wine just spills, before you use it, you still owe me the wine. The risk falls on you.

And so, Aquinas once uses that argument. The buyer holds the money at his own risk and is bound to pay it all back therefore, the lender cannot charge for a risk. On the other hand, even to entrust money to a merchant or a craftsman so as to form a kind of partnership is not transferring the ownership of the money but remains his so that it is at his risk. If I put money in a partnership and the partnership loses, I've lost the money. I invest a thousand. The partnership has a 10% loss and I'm down to 900. Supposedly, that's why if the partnership has a 10% gain, I can get $1,100. I lend you the money, you have to pay me back $1,000 even if you lose a whole lot of money, the risk of how it's invested is on you.

And therefore, supposedly, I can't charge. But does that really follow? What if you do go broke? What if you lose all your money? Should I be able to charge you for the risk of bankruptcy? So, if I loan you the money and I think there's a good chance that you won't repay me, wouldn't I charge you 5% or 10% to reflect the risk? Well, Aquinas doesn't discuss that, or he discusses it and doesn't think it's true. Because I'm transferring your money, you pay me back a fixed amount whether you prosper or you don't.

Lessius is going to going to claim that he agrees with Aquinas and yet he's going to come out with a different conclusion. Now, you look at Lessius and I'm on page 161. He says exactly what Aquinas is saying.

Lessius on Usury – page 160-161

One who takes usury or accepts anything beyond the principal is taking a two-fold price for the same thing, namely an amount equal to the entire principal and beyond that the usury.

He's saying, it's a loan for consumption, the patent is transferred to the borrower, so is the use of the thing. The use cannot be disguised in the thing itself, so you can't charge for the use of the money. Here are the requirements.

So, then he considers lost profit. First, he notes that even Aquinas says if you were compelled to lend money by fraud or force or if somebody were to steal the money from you, you could require compensation for the lost profit, profit you don't make from the person responsible. So, as a legitimate force is a loan, Aquinas says this compensation for the fact that he borrowed the money fraudulently, illegally. And if you steal my money, the force can lend to you. Then when you pay me back, I can recover as contract damages, damages for the tort, I can recover back the money I would have paid.

So, if you take the money away from me against my consent, the thousand, I get back not only the thousand, but I also get back eleven hundred, a hundred extra is what I would make if I kept the money. And then he says, "and St. Thomas seems to say the same thing", and the same view is held by many canonists, but the opposite opinion is nearly as common.

And his answer is: "I cited the opposite opinion, and the proof is that the money you lend to another is worth more to you than it is considered in itself, as by your industry you can make a profit from it. It is the seed, fertile with profit through industry that contains the profit virtually, therefore more can be demanded for it.

I loaned you the eleven hundred, if I kept it myself, I could have invested it, I could have made a hundred extra, therefore I've given that up, therefore I can get it back. Even though St. Thomas seems to say the opposite.

Why then does St. Thomas say, I can't get it back?" Well, Lessius, on the next page, says:

Lessius – page 162

I answer that St. Thomas is speaking here of remote profit, that is, when money was not

intended for trade. Or he means that one cannot demand as much as the amount of possible profit.

Well, you're a late scholastic, you want to make all your sources reconcile, and make sure they don't contradict. Is it possible that the kind of Aquinas wrote what he wrote? What he's really saying is: of course, you give them money and interest, provided it reflects your lost profit, but not profits that are so remote that you wouldn't invest in anyway, and you are keeping the money for trade, and not your highest possible profit, only the expected value of that profit.

That's what he says, he's going to reconcile his opinion with that of Aquinas and watch what you find. But is it conceivable that Aquinas would accept that? I'm very doubtful, I'm very doubtful.

He says, and Aquinas seems to see the opposite. Now suppose I'm lending at risk, I'm risking the fact that you may not pay me back, and I'm charged with that, and now the next question, on the lower part of page 162.

Can I demand anything in addition to the principal on account of the risk to the principal? He says, look, remember the guarantor, I, you want to lend money to my nephew, you're afraid my nephew won't pay you back, I say, I'll guarantee the debt, I'll guarantee the debt.

Another merchant comes to me and says, "I want to borrow money, they don't trust me", I say, don't worry, I'll guarantee the debt. I can charge the nephew or the merchant money for guaranteeing the debt. Imagine he's a really risky proposition, here he has the money, he's borrowing a thousand, and his creditor doesn't want to lend to him, unless the creditor has paid $1,100, or unless the creditor gets the debt guaranteed.

If I guarantee the debt, I can charge 100 for the nephew or the merchant; he borrows the thousand, I guarantee the debt, I charge him 100, that's fair, gives us one chance at 10, he'll go broke, and that's what the Roman law on guarantees says, and the canonists agree with it.

And he says, now if that's true, then surely, I can charge not only because of the obligation, but still more on account of the risk.

Now he turns to the guarantor and says, "You pay me the thousand", and I have to do it. I know this; the original debtor came to me and said they won't loan me money unless you promise to pay my debt. If I don't, I said, okay, but I'm going to charge you a hundred. Now if I'm entitled to do that, Lessius asks: how is it possible that I can't loan you the money myself, and say, "I'm going to charge you eleven hundred" because I'm taking the risk that you won't pay me back? Now the guy who is risk-free, I can only charge him a thousand, but I'm going to charge him less, so I get to charge for the risks.

Canon law and usury according to Lessius

And now we want to check if what we just read is consistent with sources in canon law. He wants to insist that that first source we read about loaning and buying cinnamon, so I buy this cinnamon; I get it now, I agree that the price of the cinnamon right now is a thousand, and I agree to pay the eleven hundred at the end of the year. He says, "That's okay," provided this is the Pope speaking; he says, "that's okay, provided that the price may be higher at the end of the year, but you can't charge just for the waiting time." Well, he didn't say you can't charge just for the waiting time. He said you can't charge. It's like the risk of the price.

Glossa ordinaria to Decretales Gregorii IX 5.19 – page 93

6. (Alexander VI to the Archbishop of Genoa)

You say that in your city it often happens that some people buy pepper or cinnamon or other merchandise which then is not worth more than five pounds and promise payment of six pounds at the end of a fixed term to those from whom they receive the merchandise. A contract of this type is permissible and cannot be censured, according to its form,[c] as usurious.[d] Nevertheless the sellers[e] will commit sin unless there is doubt as to whether the merchandise will be worth more or less at the time of payment. And therefore let your citizen reflect well on their salvation, whether they will refrain from such contracts, as no human intentions are hidden from almighty God.

So, let's hold it to that. And that's what we meant. What are we going to do with Brother R, which is another Pope writing a letter to Brother R, which says, “You cannot lend money to the merchant who's going to the fair.” He's going to trade. I can make a partnership with the merchant and put in $1,000, and he pays me back a percentage of the profit, a percentage of the loss. But Brother R says, 'I can't loan money to the merchant going to market $1,000 and say, pay me back $1,100.' I have to take both the share and both the gains, and the loss. What do you make of that?

And he says, well, (Lessius) I think maybe the Pope was talking about a case where I'm charging you an amount that would reflect the fact that there's a guarantee, and then I'm charging you an additional amount. I'm imagining he makes two contracts at once. One, you pay me back $1,000. Two, you pay me $100 for guaranteeing the loan. And now I want more money on top of that. Yeah, that would be an evil thing to do with the deed. So, if you just take what the Pope said literally, he can get by with it. But can you imagine if that's what Brother R had in mind when he drafted this letter to the Pope? No.

Once you said, guarantees are OK. I can charge for guaranteeing a loan. Once you said, if you take my money or force me to lend, I can get back as damages more than the amount. OK. It's like I lost profit. Sooner or later, you have to reconcile this.

And if you have to reconcile it by saying, “I guess people misunderstood once, that's OK unless you're Scholastic. And if you're Scholastic, you want to say, everybody was always right. But you're entitled, you think, to read what they said in a very limited way, in a logically contradicting of what the earlier writer said, which is a lot different from the humanist method of saying, look at the context, what's it likely that they meant. So, this is the last voice of Scholasticism. Curiously enough, it sounds like the first voice of a very modern idea, which is you can lend at interest.”

Lessius, Antwerp and other “remedies” for merchants

Now, when Aquinas was writing, there were huge commercial enterprises all throughout Europe. One of the people who wrote it, Penitential Magna, based on Aquinas was St. Antoninus of Florence, a confessor to Cosimo de Medici. Now it would be interesting to hear his confessions. How did he loan without formally asking for interest? There were ways around it. There were ways around it. Charging people for the services, cashing into checks. I don't know.

So, it was a commercial empire, but he's in an accident when Lessius is writing, he's not writing in Spain. He's the only one who relates to the Late Scholastics, who isn't a Spaniard. He's from Flanders. He's writing Antwerp. Antwerp is a very, very busy commercial city. And in his other writings, he defends all sorts of things that the merchants are doing and have to do to make commerce work.

One of the most common is, I sell something to you. It could be two bulbs. It could be wheat. It could be sheep. Well, I sell it to you. You give me a note. And the note says you're paying me in six months.

I'm selling that credit. What I'm going to do is discount the note. What I'm going to do, I'm not a bank. I'm not a bank. I want the money now. You can't pay the money now. So therefore, I sell to you for $1,000. You owe me $1,000 and you give me a document that says at the end of the year, you'll pay me $1,000. And I then sell that document to somebody else. And he's not going to give me $1,000 for it. He's going to give me $900. But now I have the $900 right now. (sconto bancario)

I forget which economist in the 19th century said, if you want to know who the greatest benefactor of mankind was, the greatest benefactor, the greatest invention over time in history, it's the man who realized that you could sell a debt as though it was a product.

Because that's what drives modern finance. When you buy something, the merchant from whom you're buying immediately turns to someone else who protects your debt and sells his accounts received to someone else who gives him the money that he needs to offer his business. And obviously, there's a discount. Unless he says that's perfectly OK. Is it perfectly, OK? What would Brother R. have thought? I don't know. But Lessius is writing this commercial for him. And Brother Arden, I mean, he's wise in the ways of Congress. So maybe we'll ... And yet, the same commercial instruments were in use in the medieval law of mercanty as were in use in Antwerp, the negotiable note, banks, refraction reserves, and reserve banking. So, it's hard to explain it by a difference of economic need, which you maybe can explain it by a difference in economic perspective.

People are looking to Lessius in Antwerp to find out what they can do.

Limits of Lessius

So, there you have it. I agree with his arguments, but he cannot go a step further.

His arguments are, I'm lending to you. And that's okay because I could have used the money to invest and make money. Or I'm lending to you, and that's okay. I'll charge you interest because you might not pay me back. What he doesn't talk about is your needing the money.

See, if I sell you wine, it's so you can drink it. Sell it to you. If I sell you a horse, it's so that you can ride it. If I sell you money, I charge for my risk, I charge for my danger if you fall. What do you get out of it? What do you get out of it? There's nothing in the system that explains why that's like buying consumer goods or buying investment, buying a field or a house. You just buy it. And that's sort of weird because a modern-day economist would say, no, the money has greater value than you because you're willing to maybe even buy something now that you otherwise have to wait for.

If it's consumer goods, you get the goods and you can borrow the money and buy the television set and the car right now. And you don't have to wait until you save enough money to buy the car or the house. You can get a mortgage. And you can have the house right now instead of someday or instead of just renting it. If it's an investment, I can loan you the money and you're like the merchant going to the fair. What’s the matter?

I want 10% of my money. And you assume the whole risk. What's wrong with that? I mean, I have a different risk preference than you have. And the economists would think this is an efficient transaction, just as if you want a house more than I want one. And I want the money more. It's efficient by selling the house. If we have different risk preferences, it's efficient for the business to borrow the money at 10% rather than give you a share. In other words, stocks and bonds are both investment vehicles. And from the point of view of modern economists, they just differ in where you put the risk. If I buy stock, I get a share of the profits of the corporation.

If I buy bonds, they have to pay me 10%, whether they make any profit or not. What's the matter with that? What's the matter with that? In other words, it's not a complete theory of what's OK. It's OK when you're saying a lender can charge for what he could have made or what he might lose. It's not OK when you say, but he's also doing a service to the buyer, which is what we say today. Now, having said that, any loan you can think of today on the market would pass Lessius's test. If I buy bonds from you, I could have bought stocks. So, I'm giving an investment opportunity. I'm giving up an investment opportunity.

And if you lend me money as a mortgage, you could have used it to buy bonds or stocks. So, you're giving up an investment opportunity. And you're taking the risk I may not pay you back. And on the market, you can see how bonds and stocks are priced. They're priced according to risk level. You pay more for a stock because if you pay less for a stock, it's risky. That's why you have a higher long-run return. But also, you know, with a bond, you get a higher interest rate for a riskier bond. That's just the way the market works. And so, it all would work from Lessius's perspective.

Conclusions: Usury today, time to return to Lessius?

Having said that, having said all that, this is the body of the following statistic. Let's take a debt where you borrow money from your consumer, and you borrow money, and you get something sooner. I Googled this. There are two ways the consumer often raises money in the United States. One is by getting a big credit card balance. You never pay small. The credit card interest rate is 20%. Another way is getting a discount on a pay check he hasn't got yet. So, if you're going to be paid $1,000, he gets $900 down. That can be done. In fact, it's done very often.

Now, if you ask, what percentage of the wages of the bottom 20% of the United States are paying in interest. Think about that for a minute. What percentage would you be asking? Forty percent. No, it's not 40. It's 26.

Twenty-six is a lot. Imagine imposing a 26% tax on people who are the lowest earners in the United States. Imagine a reform if you suddenly increase what they make by 26%. The thing about that is if you do it, what you're doing is now very paternalistic. What you're telling them is you shouldn't be borrowing. You shouldn't be borrowing. The loan isn't good for you.

And now take corporations. If they borrow money from issuing bonds, what happens is the risk of the corporation going bankrupt increases. That's exactly why the bond holder wants to increase the money.

It's a good thing we have corporations who raise the money partly through stock, partly through bonds because the result of this is the corporation is in greater financial risk than if they hadn't done that. And the more fixed debt it must pay, the more chance there is there will be a crisis in the year 2007, let's say, or 1929 when suddenly you can't pay its debts.

I'm not seriously advocating that we return the prohibition against usury. All I'm saying is, number one, the Lessius doesn't tell us why the buyer should want the loan. Number two, modern economists do. It has to do with risk preference. Number three, the minute you start questioning people's risk preferences and saying the company shouldn't go that far in debt, the individual shouldn't charge up his credit card that much, now I think we're being paternalistic in the sense that we're saying this mortgage is not for you.

For what it is worth, after the great collapse in the length of our real estate market in the year 2007, some courts started saying that. What had happened in the United States was when, you know, in 2007, the banks started going broke. The government bailed them out and set off the worldwide financial crisis. It was the banks who were issuing mortgages to people who really couldn't afford them. Partly because the way the reward system worked, they were rewarding people who would go out and come in and say, look, I've written another mortgage for our bank. To write the mortgage they'd convince people to borrow money, even though, unless the housing market continued to rise so that it could be financed, these people would be paying 50% of their income on mortgages.

What they were doing was loaning money where they knew that unless the housing market would change, which it hadn't in years, these people couldn't pay back their money. And we have courts saying that that's unconscionable. You shouldn't be able to loan money. In fact, you shouldn't be able to sell a product to

someone who can't use it. Now I said that's different than the just price. That's different than it could be if the rates of the mortgage were perfectly fair given the risk the bank was running. But we were still selling that mortgage to somebody, and you knew he couldn't pay at all. That is a different kind of unfairness entirely.

Let me give you an example of other cases in the United States where people have said this is unfair. The courts have said we won't enforce it. And yet the objection really is not that the price was wrong, too high, too low. The objection is when you sold it to them, you knew they couldn't use it. One example is this. There was a salesman. Door-to-door knocks on your door. He found two elderly women who shared the same apartment and, the court said, the same rug. And he sold one person a vacuum cleaner. He said, 'This is a wonderful vacuum cleaner. See? Exactly. Do you need it? Yes.' He bought it. Then he turned to her roommate and said, 'Your roommate has made a wise decision. Why don't you buy a vacuum cleaner?' So, he sold two vacuum cleaners to two women who had one rug.

She couldn't possibly use a second vacuum cleaner. She bought it anyway. The court would not make her pay for the vacuum cleaner. Now, that may seem obvious, does it? That you couldn't use it?

Let me give you a second case. There was a salesman in the United States who went to neighbourhoods inhabited by Spanish-speaking people. Most of them had come from Mexico earlier. And going through one of these neighbourhoods, he sold encyclopaedias for word of mouth. Today, you can't do that. People just go on Wikipedia. But it used to be encyclopaedia sales were going to roam the countryside banging on people's doors and trying to sell an expensive set of encyclopaedias. So, he found a Spanish-speaking labourer bachelor. The man spoke no English. He was single. He had no children. The negotiations were in Spanish. The man understood exactly what he was going to get. An encyclopaedia. He understood the encyclopaedia was written in English. And he understood the price. And later he said, 'I shouldn't have to pay for it.' He should have known at the time, 'I'm never going to use that.

There are only rare universities in Italy where you have paid tuition like this one. Most universities in Italy don't pay tuition. Most universities in the United States do.

At Tulane where I teach it's $60,000 a year. And that's true also at universities you've never heard of. We've got hundreds of universities in the United States. Everybody wants to get a college degree. And their tuition will be fine, $50,000, $60,000. How do you afford it? The answer is you take out a student loan and the government will provide guarantees on these loans. So, the interest rate is going to be high. But you can never, never, never discharge that in bankruptcy.

You will be paying it for the rest of 20 years in the future. And you figure you are kind of ahead. Well, as it happens, if you look at the number of people enrolled in American colleges, this is not Yale, this is not Tulane, enrolled in Berkeley, this is at colleges; you find out that I think 20, 30% of them do not graduate. And yet they've taken on these loans. And they don't graduate within six years.

Another 20% get a job you don’t need a degree for. Nobody's going to hire them because they went to this university, and nobody ever heard of them. So, they get a job you can get without the college degree. And that's a lot of people owing a lot of money. Now suppose someone went to court and said they shouldn’t have to pay for a degree they’re never going to use.

As soon as you start getting paternalistic about people borrowing money, people buying products, gee I don't know what to say. I don't like it when people are running off credit card bills where they're milking their savings and 20% of what they earn are credit card bills. I don't like it when you sell two vacuum cleaners to two ladies.

What I want to say though to somebody who's moved once, if I take out a mortgage, I'm sorry. The mortgage is not only a house it's not real. Yeah, I know you think you're going to take the risk just to own a house and maybe you're confident. I just think you're going to stay. Owning a house is not for you. You want to go to college? No. You're going to be one of the people who never finish. Probably won't get a job. Going to college is not for you. I don't care if you want to borrow the money. It's not for you. Take the Spanish speaking Bachelor. I'm sorry. What makes you think you can learn English? Maybe it's not for you. It's not for you. Why didn't you buy something else with your money? Do you want to say that? I get very, very nervous. On

the other hand, if you wanted to re-institute something like a usury provision on excessive interest, wouldn't that be paternalistic?

Part 2 – The Late Scholastics and Public Law

The late scholastics have been recognized by people who do the history of private law as making a revolution. For the first time they gave Roman law a doctrinal structure, a systematic explanation. Grotius, people like that, borrow the structure; they borrow conclusions in the century after Grotius wrote. He's still influencing people. Dumas, Potier, from whom they take the code. But the influence of Aristotle falls away, and you kind of have a ship drifting after it's been cut loose. Nobody reads Rodeus after having studied Aristotle and Aquinas the way the late scholastics studied Aristotle and Aquinas. They're not supposed to. He's trying to write so you don't have to do that. Nobody who is Dumas, for that matter, studies Roman law the way either the late scholastics or the evil jurists did. But they're studying a format. A general description. A structure that they've inherited. And that's a big change. A change that began in the 19th century.

Now another big change, and maybe a bigger change, is a revolution in public law. 70 years ago, a man named Quentin Skinner, who's sort of a legendary figure in political theory, he wrote a two-volume history of political thought, which is considered a classic. He noticed the fact that theories of representative government, theories that the right of the government coming from the people, theories that the government has responsibilities to the people, the government can be overthrown if it betrays those responsibilities. All this stuff comes from the late Scholastics, and it finds its way forward in history. Partly because it's picked up by Protestants, such as Beza, who was a Calvin successor in Geneva, and partly by Huguenots, who find that a very useful doctrine when they're confronting kings they don't like.

It gets picked up by English Puritans, who are fighting a king, and they like this idea of limitations on his authority. It gets picked up by later writers, who are Whig writers in England, criticizing the power of kings, and it passes, then, to the United States, about the time of the Revolution. We all from the United States grew up thinking it was all invented by John Locke. John Locke didn't invent much of any of it. So, we'll look at the original sources, and we'll see just how much these guys invented. And then you can fill in the blanks and think, well, now, how much have we borrowed from them? And the starting point was, once again, is, what is the best form of government?

Government for Aristotle

The best form of government is one, according to Aristotle, in which everyone, whoever he is, can live well, can be happy, which is a translation of the word eudaimonia, which doesn't mean feeling happy. Eudaimonia means living well. You go to your mother's funeral, you don't feel happy, but you're living well. You're feeling what you ought to feel under those circumstances. Eudaimonia is each person is the object of government. It's also the object of the virtue of general justice. If you want general justice, you want a situation in which each person, whoever he may be, can live well. And that's the objective. And from there, as we saw before, you launch off into distributive justice, commutative justice, and you change private law. Well, suppose we start from there and start looking at the government.

1. Social Animal

Step number one. According to Aristotle and Aquinas, a human being is a social animal. And what that means is there are certain things, as we saw earlier, that you just know to be right without proof. Now, that's because you're a rational animal, otherwise you wouldn't know anything to be right. But you know it without proof. And, for example, you know knowledge is better than ignorance. You know it's better to have friends than be lonely. You know, among other things, that it's better for you to live in a society. You grow up living in a society, and you just know that that's a good thing for you compared to living off in the woods by himself. Why? Because only in society can you attain a state of well-being.

And so, the first readings you have here from the late scholastics on page 164 just say that. If you did not have a community of many families, you would not learn the arts of which you have a need, or you'd take a long time. You couldn't use the industry and work of others to acquire knowledge of things. Nobody else had

thought before, and you wouldn't be able to think very well. You wouldn’t develop friendship. You wouldn't develop the other virtues.

Franciso Vitoria, Relectio de potestate civili no. 5, 297 – page 164

I, indeed, would say that they are beasts, and not even human, who say that they ought to live so that they care for no one, acknowledge duties and take trouble over no one, take no pleasure in the good of another, are not bitter over the perversity of others, love no one, and wish to be loved by no one. Accordingly, as human society is instituted so that each assumes duties to every other, and of all societies, civil society is that which most abundantly provides for human needs, it follows that this community is a most natural union and most in agreement with nature.

So, you’re a social person. That means it's in your nature to live in society. You don't think to yourself, 'I know my nature is a human being, therefore I know I should live in society.' No, you're just able to know this is good for me, compared to isolation, the same way you know learning is good for you. Compared to ignorance. Children are born immediately wanting to socialize. Children are born wanting to learn. It's hardwired. And they know this is good. They know this is good. According to Aristotle, good. Not just something you're hardwired to do. Really good. So, you'd have a bunch of people in principle who are going to live together in society.

2. What about a government?

And then the question is, what about a government? And Molina says at the bottom of the page, the members of the republic, the community, would find it very difficult without a government to decide what to do that requires common effort. Because you've got a bunch of people. You need a government to translate that into action, to be taken on behalf of the community. Some actions need to be taken for the common good. How does that happen? And the answer is the people must choose a government. So, do the people choose to come together to live in society? Not exactly. They're born knowing that this is good for them. Do they see it's good? Do they know it's good? Yes. Do they want it? Yes.

But it's a sense they're not going to be able to choose otherwise because that's the way you're built. It's sort of like if you chose not to live in society, it'd be like deciding to cut your arm off without having thought about it much. You value both of your hands, both of your arms. Without having thought about it much, you value living in society. So, to call that a contract theory of government is weird because on the one hand, everybody wants it, but on the other hand, nobody would want to live any other way. It's not like everybody's living their own life and when they choose to come together to protect their interests, you can't live a human life outside of society. This is one of the differences between this and the later philosophy that I've given to Locke's.

But then we're living in society, and we need a government. Now we have a real choice in the sense that there are different good alternatives, and we must choose one, meaning it has to be a real choice made by human beings in history. And according to Aristotle, the three good forms of government are monarchy, aristocracy, and democracy.

In monarchy, he does not mean a hereditary king. He means a rule by one executive. Power is translated, is lodged in one person who could be elected, or he could be a hereditary king.

In aristocracy, what we think of as accounts and books and so forth of the Middle Ages, that's not what he means. Aristocracy literally means rule of the best, the aristoi. He means rule by an elite which is deemed to be wiser and better than most of the people. Wiser and better.

He contrasts it with an oligarchy. An oligarchy is a group chosen based on wealth or family. So, if you inherit your position in aristocracy, it's an oligarchy. If you get there because it's a plutocracy, it's a bunch of rules of the rich, it's an oligarchy. Aristocracy is rule of the wisest and the best, and democracy is the rule of everybody.

And each one of those forms of government has its own advantages. The advantage of a monarchy of rule by one is unified action. That's why in times of war, power tends to concentrate in the executive. Policy is made at the top and goes downward.

The advantage of an aristocracy is supposed to be its wisdom and virtue. These people know better than we do what's good for the republic, what's good for us. And the advantage of democracy is, in a way, the purpose of the commonwealth is that each person, whoever he may be, lives well. So why not give each person the vote? Particularly if you're suspicious about what a person might do with his power or what an elite might do. Because if the one person uses his power in his own interest, or if the elite uses it in the interest of their own class, you have a tyranny, not a monarchy. You have an oligarchy, not an aristocracy. And if the democracy uses it in terms of its own class, the bad form of democracy, unfortunately, we only have one word in English and one word in Latin, or two words in Greek, good democracy and bad democracy.

And I might translate that, how can the people rule in terms of its own interest? I probably would translate the bad form of democracy as interest group pluralism. You form alliances to promote your private interest and manage to exploit it at the expense of your fellow citizens. You're no longer willing to the common good.

Lesson: 29/11/2024

Natural Law: Late Scholastics and Iusnaturalists

Pierre Crokaert, a professor at The University of Paris, rejecting the philosophy of William of Occam, he approached more closely to the philosophy of Thomas Aquinas, about whom he writes again the Summa Theologiae, with the help of Franciso De Vitoria, who ultimately trained one of his brightest pupils Domingo De Soto a fellow Dominican. The late scholastics used the principles of Aristotelian and Thomistic philosophy to explain Roman and Canon law as interpreted by the medieval jurists. Domingo de Soto wrote one of the first works in which this program was carried out, Ten Books on Justice and Law, explaining why people like him should have been writing about law. In fact, he stated that theology, canon law, and civil law are **not separate and isolated fields** but are i**nterconnected through philosophy**. **Theologians** can and should **engage** with **canon law**, adjusting it to align with the Gospel and the broader **ethical** and **philosophical principles**, just as **philosophers** should **examine civil law** according to **philosophical norms**. Cicero's perspective is invoked to reinforce the idea that the true foundation of all law - whether ecclesiastical or civil - is philosophical wisdom. He tried then to **follow** the **philosophy** of **Aquinas**. This work started by the Dominicans had been completed by Jesuits like Louis De Molina and Leonard Lessius.

Late scholastics drew Roman and Canon Law on the model of Aristotle and Aquinas, stating also that human understanding starts with the discovery of particulars, discovering also the principle that lies behind all these particulars.

Nous for Aristotle and **intellectus** for Aquinas. The principle can be yes explored by deduction, but not proven by it instead it can be proven dialectically. For Aristotle this was the conception of a science starting with man upward movement followed by a downward deductive process. **Hugo Grotius** extensively borrowed these notions by late scholastics. Cicero had hoped that the civil law could be reduced to an art or science. They claimed, instead, to have made an **art or science** of natural law. Hugo Grotius then still said that its purpose, as the humanist ideal required, was to produce a cultivated man suited or public life. “There is nothing more worthy of a gentleman (***homine nobili***),” Grotius said, than the study of law.” Also, Barbeyrac meant this work for Gentleman. It was important anyway to deal with natural law, because as **Pufendorf** stated, “Everyone knows,” if we do not separate those which concerns “the law of nature and of nations” from that which is “positive,” any knowledge of law cannot avoid being confused, unstable and fraught with idle controversies. Another paradox was that the work of iusnaturalists was possible only because of that of the late scholastics.

Suárez on Natural Law: A Synthesis of Practical Reason and Rationalism

Francisco Suárez (1548–1617), a pivotal figure in late scholasticism, provides a nuanced understanding of natural law that bridges traditional Aristotelian perspectives and the emerging rationalist philosophy of the 17th and 18th centuries. His insights into practical reason, the universality of natural law, and its immutable principles are foundational to the evolution of moral and legal philosophy.

Practical Reason and the Circumstantial Nature of Moral Application

Suárez places significant emphasis on the role of practical reason, highlighting its dependence on circumstances. He acknowledges that while natural law is universal and unchanging, its application may vary depending on the situation. This flexibility arises not from a change in the precepts themselves but from their contextual interpretation and execution.

For example, Suárez argues that natural law "prescribes one thing as to the material in one situation, and another for that in another," while itself remaining unchanged. This perspective underscores the dynamic interplay between immutable principles and the diverse contexts in which they are applied.

Universality and Timelessness of Natural Law

Unlike Aristotle and Aquinas, Suárez contends that the concepts of all things, including natural law precepts, are timeless and invariable. He asserts that moral knowledge consists of understanding these precepts, and moral action is their practical conformity. This rationalist perspective departs from the Aristotelian tradition, which often emphasized the developmental and contextual aspects of human nature.

Suárez maintains that natural law "contains every rule for every circumstance that can arise," affirming its comprehensive scope. The distinction he makes between the existence of precepts and their obligation or exercise reinforces his argument for the unchanging essence of natural law. Even when certain precepts are not actively in use, the law of nature remains the same, composed of principles and conclusions necessarily derived from them.

Rationalist Influences and the Shift in Natural Law Interpretation

Suárez's metaphysical approach to natural law laid the groundwork for rationalist philosophers like Gottfried Wilhelm Leibniz and Christian Wolff. Rationalism sought to derive moral conclusions through logical reasoning with mathematical precision, a departure from the Aristotelian reliance on practical reason. Leibniz's vision of resolving moral disputes through calculation epitomizes this rationalist dream.

However, Suárez's work blurred the boundaries between Aristotelian scholasticism and rationalism. His Disputationes Metaphysicae became the academic standard across Europe, influencing both Protestant and Catholic thought. While Suárez claimed to interpret Aristotle, his work effectively supplanted the original Aristotelian-Thomistic synthesis. As Etienne Gilson noted, "Suárezianism has consumed Thomism."

Immutable Natural Law and Variable Circumstances

Suárez's treatment of variability in natural law is particularly striking. He argues that the principles of natural law are not defective in any situation, even when precepts are not actively applied. This allows natural law to accommodate the complexity of human circumstances without compromising its universality. For instance, in discussing whether a deposited sword should be returned to its owner, Suárez asserts that the principle itself does not change; rather, its application is determined by the specific context.

This distinction between the internal constancy of natural law and its external variability reflects Suárez's sophisticated understanding of moral and legal reasoning. While rationalist philosophers later sought to systematize moral reasoning through logic alone, Suárez's approach preserves the interplay between universal principles and practical reason.

Legacy and Influence

Suárez's influence extended far beyond his immediate scholastic context, shaping the rationalist philosophies of the Enlightenment. His synthesis of metaphysical principles and practical reason created a framework that jurists and philosophers like Wolff and Leibniz adapted to their systems. Even Immanuel Kant's philosophical awakening, spurred by David Hume, can be traced back through the rationalist tradition that Suárez helped to establish.

While rationalism eventually faced criticism and decline, Suárez's integration of timeless principles with situational applicability remains a cornerstone of natural law theory. His work bridges the Aristotelian tradition and modern rationalism, offering a model of moral reasoning that is both universal and adaptable.

In conclusion, Francisco Suárez's contributions to natural law theory highlight the enduring tension between universal principles and practical application. By emphasizing the constancy of natural law while accommodating its contextual expression, Suárez provides a framework that continues to inform contemporary debates in moral and legal philosophy.

Lesson: 05/12/2024

Christian Wolff, a central figure of the German Enlightenment, developed a systematic philosophy that unified metaphysics, morality, and law, all based on a rational and deductive approach. One of his fundamental premises was that everything that is possible exists. This statement has profound implications: if we can conceive of being and the idea of being, they exist at least as possibilities, regardless of their concrete realization. Wolff, inheriting the Cartesian tradition, integrates this intuition with the rigor of mathematical logic, proposing a method that combines rationality and scientific precision.

Natural Law and the Mathematical Method: A Revolution in Legal Thought

Wolff believed that natural law, understood as a set of universal principles governing human behaviour, could best be understood through a method inspired by mathematics. His approach began with systematic doubt, allowing everything that was not evident or demonstrable to be questioned. This method, akin to that of Descartes, extended beyond philosophical speculation to the construction of a coherent legal and moral system.

Just as geometry begins with definitions and axioms to construct entire systems of knowledge, Wolff believed it was possible to deduce the universal laws of nature and society from fundamental principles. For instance, in geometry, one defines a triangle to develop complex theorems; similarly, Wolff defines basic concepts such as natural law, contracts, and property to build an organic legal theory.

This mathematical approach revolutionized law, transforming it into a moral and legal science. Laws were no longer seen as the product of traditions or local customs but emerged as universal rational truths deduced with precision. This vision marked an epochal transition: law was anchored in logic and rationality, making it accessible not only to jurists but also to philosophers and scientists.

Moral Duty and Human Perfection

In *The Human Condition*, Wolff introduces an ethical conception based on both individual and collective perfection. He argued that every individual has the moral and legal duty to use their faculties to pursue the perfection of their soul, body, and the condition of others. This perfection is not limited to oneself but extends to others, creating a universal ethic in which altruism is as important as self-realization.

According to Wolff, humans are rational beings who must avoid all forms of imperfection in themselves and others. This principle reflects a profound moral equality: no one should consider themselves more important than others. The perfection of others, therefore, becomes a shared ethical goal, requiring a balance between personal interest and collective good.

Private Property: A Necessary but Imperfect Institution

To explain the origin of private property, Wolff draws inspiration from the theories of Francisco Suárez and Hugo Grotius. In his *De iure belli ac pacis*, Grotius uses biblical references, such as the Tree of Knowledge, to illustrate the relationship between humans and material goods. Wolff builds on this narrative, linking it to the concept of humanity's fall. In his view, in an original state of perfection, humanity had no need for private property, as goods were shared and sufficient for all. However, the increasing complexity of social life and moral corruption made the introduction of private property necessary.

Wolff defines *occupatio* (occupation) as the primary means of acquiring property. This process involves declaring that an unowned good (*res nullius*) becomes one's own, subordinating it to individual will. Yet, this transition from universal sharing to private ownership also reflects a loss of harmony: private rights, while necessary, are inherently self-serving, allowing individuals to dispose of their goods without restrictions, regardless of others' needs.

Distributive Justice and Compensation for Harm

Justice, according to Wolff, is a fundamental principle governing relation among individuals. In the context of distributive justice, he argues that anyone who causes harm must compensate the victim, reflecting a concept of responsibility rooted in natural law. In his *Ius Naturae*, Wolff clarifies that we are morally and legally obligated to act rightly and avoid any defect that is within our power to prevent. Culpable harm is therefore prohibited not only for legal reasons but also moral ones, as it violates the principle of rectitude.

Contracts and Promises: The Logic of Consent

Another central theme in Wolff's thought is the contract, understood as a transfer of rights based on mutual consent. He defines a promise as a declaration of the will to perform an act for another, accompanied by the recipient's right to demand its fulfilment. In this conception, promises are binding because they represent both a moral and legal obligation.

Wolff also addresses the issue of errors in contracts, drawing on Grotius's theories. If an error concerns the *causa* of the promise, that is, the fundamental reason for which it was made, the contract can be deemed invalid. This perspective departs from the medieval tradition of the "just price," asserting that the value of goods is determined solely by mutual consent. According to Wolff, in a natural state, prices cannot be imposed but must emerge freely from negotiations between parties. Only in extraordinary circumstances, such as the difficulty of accessing essential goods, does the concept of a just price become relevant.

Wolff's Contribution to Legal Philosophy

Christian Wolff's thought represents a fundamental turning point in the philosophy of law and morality. By applying mathematical logic, he elevates law to a deductive science, where universal principles are discovered through reason rather than imposed by tradition or convention. This vision, rooted in a deep trust in human rationality, offers a model of law and morality that transcends cultural and historical boundaries, proposing a universal structure for understanding human relationships.

His work lays the foundation for a global ethic in which the balance between individual and collective interest, respect for justice, and the centrality of consent become cardinal principles. By combining metaphysics, logic, and law, Wolff not only broadens the horizons of philosophical thought but also builds a bridge between rationalism and jurisprudence, leaving a legacy in the history of Western thought.

Lesson: 6/12/2024

The Political Dimension of Policymaking

In this context, "politics" does not refer to the act of dismantling governance but rather to the process of shaping policies. This involves adopting specific political strategies and declaring them as one's intended course of action, much like other legislators do. This notion aligns with Bergeros' argument.

Critique of 19th-Century Rationalism

An intriguing aspect of Bergeros' argument lies in his description of natural law and intelligible essences as a critique of 19th-century rationalism. Hunter, a highly educated figure with extensive readings, provides a perspective rooted in historical retrospection. His approach involves looking back to the last iteration of natural law that underpinned his stance - namely, the rationalist theory.

The Rejection of Objective Values in Science

When analysing Hunter's critique of the theory of objective value (referenced on page 182), he outlines three key reasons why reverting to the concept of objective values or intelligible essences would be unacceptable. The first reason is that such concepts are not utilized in other disciplines, particularly in science. In fields like physics, observations are based on mathematical formulas and predictions that are then tested against

empirical data. This process, according to Hunter, operates independently of any notion of "essences." This argument, as he presents it, appears valid.

Critique of Rationalism: The Role of Choice

The second criticism of rationalism is that it denies any significance to individual choice, reducing it to the passive acceptance or rejection of independent truths. However, moral judgment, as experienced by individuals, appears to involve an active role in shaping the ends we pursue. This critique highlights a fundamental flaw in rationalism.

In a rationalist framework, moral behaviour is deduced logically, akin to solving a geometric problem. In situations requiring moral choice, the correct course of action would already exist as an independent rule. Individuals would have no role in shaping these rules but would merely need to understand and obey them. This concept accurately describes rationalism but stands in stark contrast to the Aristotelian tradition.

Practical Reasoning in the Aristotelian Tradition

In the Aristotelian theory, morality begins with certain ultimate goods, such as knowledge and friendship. However, determining which specific things are good depends on practical reasoning. Natural law is not a collection of abstract principles to be learned and obeyed. Instead, it emerges from the process of asking what the right course of action would be in each situation. Natural law, in this view, exists only in the mind of the individual and is contingent on circumstances. Different circumstances might lead to different expressions of natural law.

This contrasts sharply with rationalism, where rules are invariable and claim to dictate actions in all situations without accounting for specific circumstances. Practical reasoning in the Aristotelian tradition involves adapting objectives to achieve the best possible outcome under given conditions.

The Misinterpretation of Natural Law

One question arises: could Werner, when discussing natural law, be describing rationalism - the last form of natural law? This seems plausible, as Werner describes natural law in terms like those found in Aristotle’s ethics and medieval theories. Supporters of the doctrine of intelligible essences argue that the standards of right and wrong also have inherent essences, a view exemplified by Plato's ethics and Aquinas' theory of natural law.

References and Further Exploration

Plato’s ethics and Aquinas’ theory exemplify the argument for intelligible essences. For further development of this perspective, Christian Baldwin provides a detailed exploration. Misunderstandings, such as those attributed to Storrs, Baldwin, and Leibniz, highlight the complexity and debate surrounding these theories.

Concluding Remarks on Rationalism and Natural Law

The critique of rationalism outlined earlier serves as a foundation for understanding the broader teaching of natural law. Before concluding the discussion, the question arises of how various historical figures might have responded to contemporary interpretations, such as those of Roberto Unger, regarding the subsequent history of law.

Roman Perspectives: Concepts Over Essences

Imagine posing these ideas to a Roman jurist. They might argue that law cannot exist without concepts and that concepts rely on intelligible essences. However, the Roman would likely redirect such questions to the Greeks, dismissing the need for discussions about "essences" while emphasizing practical legal concepts like possession, fault, negligence, and sale. Romans might defend their system by pointing out that their concepts - once developed and exemplified - have become the foundation for legal systems worldwide. This enduring influence, they might argue, challenges the notion that Roman legal concepts were arbitrary.

Medieval Legal Authorities: Reconciling Texts Over Philosophy

A medieval scholar might reject discussions about intelligible essences altogether, preferring to focus on legal authorities. For them, the priority would be reconciling authoritative texts - statements from the wisest legal minds. - rather than seeking philosophical justifications. They might view the invitation of philosophers into law schools as a mistake, arguing that philosophy complicates legal interpretation unnecessarily. For these scholars, the essence of their task lay in textual analysis, not abstract philosophical debates.

Humanist Interpretations: Contextualizing Language

Humanists, in contrast, would emphasize the importance of words' meanings as derived from the intent of those who used them. They might critique the idea of attaching abstract essences to legal terms, such as "contract," and advocate for understanding words within their historical and social contexts. For humanists, the key to legal interpretation lies in examining how terms were used by lawmakers and jurists within specific contexts, rather than detaching them from their practical origins.

Later Scholars: The Right Philosophy and Legal Success

Later scholars might argue that possessing the correct philosophy allows for a comprehensive explanation of Roman law's success. Figures like Hubert Brodick, for instance, continued to apply the doctrines and conclusions of earlier legal systems, even if they moved away from their original philosophical underpinnings. These scholars might attribute the enduring success of Roman law to its alignment with a philosophy that captured the true nature of humanity, allowing it to evolve and adapt across centuries.

Reflections on Legal Philosophy's Role

The overarching theme in these perspectives is a tension between philosophy and practical legal reasoning. While philosophy can provide a broader justification for legal systems, many historical jurists prioritized context, precedent, and textual interpretation over abstract principles. This ongoing debate underscores the diverse ways in which law has been conceptualized and practiced throughout history.

Hubert Brodick’s Critique of Rationalism

Hubert Brodick critiques the rationalist approach, particularly the abandonment of a philosophy rooted in judgment and practical reasoning in favour of irrationalism. According to Brodick, natural law relies on practical reasoning, not on grasping the intelligible essences of things and deducing their consequences. While rationalists may advocate for theoretical reasoning, the foundation of natural law lies in practical considerations, such as defining concepts based on their purposes.

For instance, the concept of a contract is defined according to its purpose: in the moral sense, it is meant to distribute money sensibly; in the context of exchange, it enables both parties to obtain what they want without unfairly disadvantaging one another. Legal concepts cannot exist independently of their purposes, as these purposes align with societal notions of distributive and compensatory justice.

Purpose and Justice in Legal Concepts

Broader legal concepts, such as courts, voluntary compensated justice, and contracts, are informed by their role in maintaining societal order. Rationalism, however, criticizes this practical approach, arguing that true reason operates with mathematical certainty. Rationalists dismiss practical judgment as subjective, favouring an abstract, definitive form of reasoning.

Promises, for example, are enforceable by definition: a promise inherently involves an obligation, which cannot be separated from its nature. Rationalists argue that this principle holds universally - whether on Earth or Mars. Property, likewise, is defined by the owner’s right to use it as they wish, a definition that remains immutable.

Rationalist Justifications: Kant and the Nature of Promises

The rationalist perspective is exemplified by Immanuel Kant, who argued that promises must be kept as a universal principle of reason. Kant equated the necessity of keeping promises with the geometric truth that the angles of a triangle sum to 180 degrees. For him, the obligation to honour promises follows logically from their definition, leaving no room for further justification.

This rationalist insistence on the inherent necessity of promises underscores the tension between practical reasoning and theoretical rationalism. While rationalists believe practical approaches confuse the issue, proponents of natural law argue for a more context-driven understanding of legal concepts and their purposes.

Historical Development of the Idea of Liability for Harm

Organizing the Answer

When addressing a question about the historical development of the idea of liability, such as liability for harm caused by coal, the first step is organization. Before beginning to write, take a few minutes to structure your response. Create an outline with key points numbered sequentially, such as:

1. Ancient Romans,
2. Medieval jurists,
3. Canon lawyers,
4. Late scholastics.

This outline ensures clarity and allows you to focus on each point without distraction. If time runs out, you can quickly sketch the remaining points to earn partial credit.

Ancient Roman Contribution

The discussion begins with the ancient Romans. Roman law established that causing harm, whether intentionally or negligently, required compensation. Although the Romans did not formally define "fault," they illustrated it through examples. Liability was tied to specific actions that caused harm, such as injury to a person or damage to property.

Medieval Jurists: Systematization of Roman Texts

Medieval jurists sought to systematize Roman legal texts. While they clarified certain principles, their contributions were primarily organizational rather than innovative. One significant advancement was distinguishing that liability could arise not only from harm to property but also from harm to a person.

Canon Lawyers: Moralization of Liability

Canon lawyers introduced a moral dimension to the concept of liability. Harm caused by negligence or intent was no longer merely a legal matter but also a moral one. They emphasized restitution, framing liability as a requirement to rectify the harm caused by a sinful act.

Late Scholastics: Philosophical Foundations

The late scholastics added a philosophical layer to the understanding of liability. They connected human actions to reason, providing a deeper explanation of liability based on human rationality and ethical responsibility.

Humanists: Limited Contribution

In this context, the humanists made minimal contributions specific to liability. Their primary focus was elsewhere, such as contracts, and their influence on this subject remains marginal.

Liability and Methods of Reasoning in Legal History

Liability and Practical Reason

Liability arises not only from intentional actions but also from negligence. This principle is grounded in practical reason, which requires individuals to take responsibility for their actions. According to Aristotle, such liability is rooted in commutative justice, particularly in involuntary transactions. The rationale for compensation is straightforward: if one party gains at the expense of another, justice requires redress.

Aristotle further highlights that the concept of liability is intrinsic and does not require an elaborate theoretical framework. A promise, for example, implies an obligation that must be fulfilled. Introducing unnecessary elements or tangential points in an explanation only detracts from the clarity of the response.

Approach to Exam Questions

When addressing exam questions, avoid unnecessary introductions or conclusions. Instead, immediately engage with the substance of the question. For example, if asked about historical development, begin directly with the relevant legal tradition, such as Roman law. Similarly, concise and relevant illustrations enhance answers, ensuring focus on the core issues.

Late Scholastics, Rationalists, and Brody: A Comparison

The late scholastics aimed to integrate Roman law with philosophical reasoning, particularly emphasizing restitution and human rationality. They viewed liability as arising from human actions grounded in reason, which extended to both intentional and negligent acts. Additionally, they developed concepts of quantitative justice, emphasizing proportionality between harm and compensation.

Hubert Brody, by contrast, approached law as a rational enterprise but did not anchor his ideas in technical Roman law or rigid philosophical doctrines. Instead, he presented law as a reasoned system accessible to broader audiences.

Rationalists, on the other hand, sought to transform legal reasoning into a deductive framework akin to mathematics. They started with definitions, axioms, and postulates, deriving legal principles through deductive logic. This method, while systematic, often lacked the practical grounding found in the scholastics and Brody's approaches.

Examples of Fault and Consent

Illustrating these differences, the late scholastics linked fault to the rationality of human beings. For them, liability was tied to intent and negligence, underpinned by a framework of justice. By contrast, rationalists approached fault as a logical deduction, disconnected from practical or moral considerations.

Regarding consent, the scholastics rooted it in tacit conditions tied to natural law principles. Rationalists, however, sought to prove consent as a logical construct, often resulting in abstract conclusions.

These varying methodologies highlight how different schools of thought shaped legal concepts through distinct reasoning processes.

Liability, Just Price, and Rationalist Approaches to Law

The Concept of Just Price

The idea of "just price" reflects principles of commutative justice in voluntary transactions. For late scholastics, just price was a cornerstone of fairness and equity in contracts. Hubert Brody, while acknowledging the existence of just price, did not explicitly root it in a theory of commutative justice. The rationalists, in turn, largely abandoned the concept, though they retained an ethical intuition that prices should not exploit the poor, emphasizing practical fairness over systematic reasoning.

In the context of examinations or discussions, brevity and focus are essential. Responses should target the question directly, avoiding unnecessary elaboration or tangents.

Liability for Harm: Intentional and Negligent Acts

Liability arises when harm is inflicted upon another, whether by intentional actions or negligence. The principle is straightforward: if harm is caused wrongfully, the individual who caused the harm is obligated to compensate the injured party.

A central argument supporting this obligation posits that failure to compensate would render meaningless the distinction between right and wrong. According to this reasoning, if one has an obligation not to harm another but is not required to make amends for harm caused, the moral foundation of the obligation itself becomes incoherent.

Critics of this argument highlight its circularity. While the claim that no one ought to harm another may seem self-evident, the conclusion that the injured party is entitled to be restored to a pristine state is not necessarily derived from this premise. This leap undermines the logical foundation of the proof.

Rationalist Legal Philosophy

Rationalists sought to construct law as a deductive system based on reason. Their approach emphasized logical consistency and systematic explanations. For example, they argued that the obligation of a promise arises from the rational nature of the act itself: a promise, by definition, is a statement of self-obligation.

Despite the appeal of such a system, rationalist legal philosophy faced significant criticism. Its reliance on abstract reasoning often disconnected it from practical realities and led to inconsistencies in application. While its influence peaked in the 17th and 18th centuries, rationalist approaches have largely receded, with only limited application in modern legal thought.

Legacy and Challenges of Rationalist Theories

The rationalists represented the last major attempt to construct a comprehensive philosophy of law rooted entirely in systematic reasoning. Their influence waned due to the challenges of aligning abstract principles with practical legal norms. However, their legacy persists in certain theoretical discussions, such as the binding nature of promises or other obligations derived from rational consent.

Rationalism and the Role of Reason in Morality

Property and Individual Freedom

The concept of property is fundamentally tied to the notion of individual freedom. Property is defined as what one can freely do with what is their own. This view aligns with rationalist explanations of property, contract, and legal obligations, which often appear to be grounded in common sense.

Critique of Rationalism: David Hume's Perspective

Rationalism, as a philosophical framework, was significantly challenged by David Hume, one of the most influential modern philosophers. Hume critiqued the rationalist assertion that reason is the source of moral and legal obligations, arguing instead that moral distinctions cannot be derived from reasoning.

Hume rejected the idea that morality is discovered through concepts or immutable measures of right and wrong. He posited that morality is rooted in actions and affections rather than in rational deductions. According to Hume, reason itself is incapable of exciting feelings or prompting actions; it simply distinguishes between what is true and what is false.

The Relationship Between Reason and Desire

Hume identified two primary functions of reason in relation to desire:

1. **Identifying Objects of Desire**: Reason can reveal the existence of things one might desire. For instance, if someone desires wealth, reason can show that obtaining a good job could lead to wealth. Similarly, if someone seeks power, reason can outline the steps necessary to achieve it, such as pursuing a high-ranking position.

2. **Determining Means to Achieve Desires**: Reason can guide an individual on how to attain their desires. For example, if someone desires a specific goal, such as attending law school to earn money or pursuing a career to gain power, reason can outline the pathway.

However, reason alone cannot generate desire or motivate action. Desire is the driving force behind action, and reason merely acts as a "slave to desire," providing the means to achieve what one wants. Without desire, reason has no directive power.

Morality as a Matter of Feeling and Desire

Hume argued that morality cannot be based on reason because it influences actions and feelings, which are beyond the scope of rational deduction. Instead, morality must stem from a form of desire, sense, or feeling. Since morality prompts individuals to act, it is inherently connected to emotions and affections rather than to abstract truths or falsities.

Rationalism and the Naturalistic Fallacy

The Role of Reason in Moral Judgments

Consider this example: when witnessing someone feeding a child or giving money to a beggar, we instinctively judge the action as good. Conversely, observing someone sneering at a beggar or slapping a child prompts a negative judgment. These reactions are not derived from reason but from feelings and moral intuition. Reason, by contrast, is concerned with understanding relationships among concepts or factual matters, such as the relationship between the sides of a triangle. It provides knowledge about what is true or false but does not address moral validation or judgment.

Hume and the Naturalistic Fallacy

David Hume famously identified a critical issue in moral reasoning, often referred to as the "naturalistic fallacy." He noted that many authors begin their arguments by describing what *is* - making statements about facts or human nature - but then abruptly shift to prescribing what *ought to be*. This transition introduces a new kind of proposition, one that cannot logically follow from factual statements.

Hume argued that statements about what *is* are descriptive and can be true or false, whereas statements about what *ought to be* are prescriptive and reflect feelings or moral evaluations. For example, one might observe that human nature tends to behave in certain ways (what *is*) and then conclude that people *ought* to act in a specific manner. However, Hume contended that this leap from fact to prescription is unfounded.

The Limits of Rationalist Moral Theories

Rationalists often attempted to derive moral duties from abstract concepts or the nature of human beings. Yet, as Hume demonstrated, moving from conceptual relationships to prescriptive statements is another form of the naturalistic fallacy. The issue lies in assuming that moral duties can be logically deduced from factual or conceptual premises.

A more modern critique of this approach was articulated by the philosopher Kelser in his essay *Natural Law at the Bar of Reason*. Kelser argued that while natural law theories might make valid statements about nature, they fail to provide a logical bridge to moral obligations. According to this view, moral duty arises not from reason but from moral sense - the feelings and intuitions that shape our distinctions between right and wrong.

The Fall of Rationalism and the Emergence of New Legal Theories

By around 1750, the rationalist system of moral and legal philosophy began to fall apart. Two key figures in the development of new approaches were Jeremy Bentham, the founder of utilitarianism, and Immanuel Kant. Bentham claimed that reading Hume was a revelatory moment for him, as he realized there was a new basis for morality rooted in pleasure and pain. According to Bentham, actions leading to pleasure are good, while those causing pain are bad.

Kant, similarly, credited Hume with awakening him from a "dogmatic slumber." Raised within Christian Bolt's philosophy, Kant found a new foundation for morality, influenced by Hume's critique. Kant sought to understand what law a rational being would accept as binding upon itself, and he concluded that the moral law was one where individuals should act in a way that the maxim of their actions could be universally willed as a law.

By the 19th century, many legal thinkers no longer relied on philosophers for moral and legal guidance. While figures like Hume and Kant emphasized will, choice, and the theories of contract and tort, 19th-century lawyers increasingly focused on legal sources like codes and common law, especially in Germany. They sought to distance themselves from philosophy, which had been discredited, particularly the rationalist natural law theories. The legal profession shifted its focus, leading to new directions in law, but the problems that emerged during this period are still relevant today, as they stem from either rationalism or the collapse of rationalism.

Roberto Unger and the Critical Legal Studies Movement

In the 1970s, Roberto Unger, the founder of the Critical Legal Studies movement in the United States, presented a radical critique of the legal system. Unger's views were influential during his time at Harvard, where he began to challenge traditional conceptions of law. He argued that the rule of law, as it was understood, was over. In his 1975 book *Knowledge in Politics*, Unger questioned the very foundations of law and politics, arguing that law was inevitably a tool of political interests, often aligned with the political right.

Unger's critique resonated with the left-leaning faculty at Harvard, though some felt betrayed, while others saw it as the future of legal thought. His ideas quickly gained traction, and the Critical Legal Studies movement spread across the U.S. Legal scholars and students alike debated Unger's radical shift, with some embracing the view that law could no longer be separated from politics.

Unger's message was clear: the idea of a neutral, objective rule of law was obsolete. He argued that liberalism, which succeeded natural law, could not justify the rule of law either. Thus, he concluded that nothing could justify the rule of law. This marked a turning point, as Unger's radical perspective challenged the foundations of legal theory and its relationship with political power.

The Decline of the Rule of Law and the Rise of Critical Legal Studies

On one of the last days of class, the professor, a short man, would lecture, then pause, walk a little, think, and speak again. This approach was quite effective. He told the students a story about a Persian general who commanded a division of the Persian army the night before the Battle of Mount Xander. The general observed the fires across the plain, signalling a large Persian army. He knew that the next day, the empire would be destroyed. The general, in this story, represented the professor, and the students were like the soldiers - trained for a profession that was about to disappear.

The professor was approachable, talking to anyone, even fellows like me. He told me that the next morning, many students came to him asking what they should do with their lives. His response was that law was about to fade away, so it made sense they were questioning the purpose of completing their law degrees.

The Critical Legal Studies movement, which emerged in the 1970s, was a dominant force in American scholarship for a decade. By 1980, however, it had largely faded. One reason for this decline was that its proponents couldn't offer an alternative after declaring the death of the rule of law. Another reason was that many left-leaning individuals, initially supportive of the movement, realized that if law couldn't be separated from politics, it would become difficult to defend causes like labour rights, women's rights, or minority rights.

Despite the decline of Critical Legal Studies, the discussion around the rule of law continues to influence legal scholarship. For instance, some scholars, comparing American and European legal thought, point out that European legal scholarship tends to focus more directly on law, while American legal scholarship often leans toward social theory. A Yale law student, for example, noted that the focus in his studies was on social theory rather than legal doctrine, leading him to conclude that Yale was more a school of social theory than a school of law.

The shadow of Critical Legal Studies remains, suggesting that law should be viewed through lenses such as social theory, political theory, or law and economics. Since the movement's decline, law and economics has gained prominence, stepping into the void left by Critical Legal Studies.

This shift in perspective is not entirely new. In 1899, a scholar argued that logic alone cannot interpret the civil code. The idea that one could derive a definitive answer from the civil code was flawed, as there would be no need for lawsuits if this were the case. This was also the conclusion of the legal realists in the 1920s and 1930s, who asserted that there is no one right answer that can be deduced through objective logic. As a result, they concluded that the rule of law was impossible.

After World War II, the German legal community stopped promoting such views. They recognized that they had not valued the rule of law sufficiently. The American legal realists also shifted their focus after the war, acknowledging that law is often based on case law. When a new case arises, it may resemble previous cases but cannot be decided purely by applying logic to past precedents. This flexible approach to law recognizes that there are often multiple interpretations of a case, and no single "right" answer can be determined from the application of logic alone.

The Impossibility of Law and the Collapse of Natural Law

Under is essentially presenting a similar argument, but he tries to provide a philosophical foundation for it. Let's go through a few pages of Under's work. If you think you can answer his argument, I suggest you publish it, preferably in English and in the United States, as it has largely been ignored. However, it remains unresolved, and people still don't know how to answer it or how to live with it.

Under argues that law is impossible. He compares this situation to a key mouse, which is unaware that it is walking in mid-air until it looks down and realizes that it is unsupported. This highlights the precariousness of the situation - one is walking without solid ground.

On page 179, Under states that the world can be divided in an indefinite number of ways, but no division truly reflects the reality of the world. This is because things lack intelligible essences. For example, the natural law thinkers believed that entities like stones and plants had essences that could be grasped and understood. According to them, contracts, courts, and other legal concepts had essences as well. This was the foundation of metaphysical systems in ancient and early modern times.

However, under suggests that this view is incorrect. On page 80, he argues that the only standard we can rely on is whether a classification serves the purpose we had in mind when we created it. Classifying things as plants, animals, tables, or anything else makes sense not because of any inherent relationship among the objects, but because it is useful for our purposes to treat them as a single category.

Thus, there is no natural classification of objects. Classifications are determined by purposes. He then proceeds to discuss the collapse of natural law theory. The ends, or purposes, are individual, specific to each person. If this is true, then objects are classified only according to the purposes of individuals. Therefore, values are subjective, determined by choice. Under emphasizes that an end is simply an end because someone holds it. Different people may have different purposes, and the classification that makes sense to one person may not make sense to another.

In liberal political thought, values are seen as subjective. By rejecting intelligible essences and objective values, liberals accept that values are determined by individual choice. This presents a challenge: how can we have a rule of law under these conditions? This is what Under sees as impossible. On page 183, a difficulty arises. If there are no intelligible essences, how do we classify facts and situations, especially social facts and situations? Since facts have no intrinsic identity, everything depends on the names we give them. The conventions of naming, rather than any inherent quality of objects, determine whether something is classified as a "table" or whether a particular agreement is treated as a contract.

We create terms like "contract" to describe situations that serve our purposes. But this leads to a problem: if all values are subjective, how can we apply the rule of law? The liberal idea in the 19th century, which Under refers to as formalism, is based on the belief that legal rules can be applied to reach a single correct outcome.

Formalism holds that legal rules, such as a contract law, can deduce a single right answer. In its strictest form, formalism asserts that the legal system will dictate the correct solution in every case as if it were an automatic process. This allows for adjudication and legal education that disregards the individual policies or purposes behind the law.

According to strict liberalism, a case can be resolved simply by asking whether it fits under a given rule, without considering the purposes of the individuals involved. To apply this method, one must deduce, from concepts like "contract," whether a particular agreement qualifies as a contract and is therefore enforceable.

The Subjectivity of Law and the Role of Judges

If the meaning of a contract is arbitrary and based on our purposes, how can we determine whether a particular bargain is enforceable? It appears we are still holding onto something from rationalism - the idea that words can have fixed meanings. This is akin to the natural law perspective, where concepts like "contract" are thought to have a fixed, intelligible essence. According to this view, we could ask, "What is a contract?" and expect an objective answer, one that does not depend on our individual purposes.

However, we have rejected this belief. Instead, we adopt a civil code and case law where contracts are enforceable. But how do we determine if a transaction qualifies as a contract? Since classifications like "contract" are based on human conventions rather than objective truths, there is no inherent meaning that dictates whether something is a contract. Therefore, the question becomes: who decides what qualifies as a contract? The answer, according to the law, is the legislator. The legislator defines what is enforceable by law.

But the question remains: how does the judge decide whether a particular transaction between two people is a contract? A contract has no inherent meaning; it only has the meaning that human beings assign to it. Thus, its interpretation is subjective. The judge does not have a fixed answer but must instead decide based on certain purposes. The judge must ask, "Given the circumstances, would it be meaningful to treat this situation as a contract?" The challenge lies in the fact that the interpretation of the law cannot rely on fixed meanings; it is influenced by the purposes involved.

There are laws that guide how to interpret other laws, but this only complicates the issue. For example, if the legislature wants all contracts to be enforced, but has in mind a specific type of contract, how does a judge decide whether a case fits the definition of a contract? If the legislature didn’t define the term in specific circumstances, how should the judge interpret the law? The answer is not clear, because every case involves ambiguities that cannot be resolved by a literal reading of the text.

If we ask what the legislature meant by "contract," we don't have a definitive answer, as the legislature didn’t specify what "contract" means in every possible situation. If we ask about the purpose of the legislature, we face another challenge: the purposes are individual. I have my purposes, and you have yours. The purposes behind a contract for a bank may differ from those of a homeowner paying a mortgage, for example.

Thus, we cannot rely on fixed meanings for words like "contract" or "property," because language is conventional. Words like these do not have inherent essences. If we rely on purposes, we encounter another problem - purposes are individual and subjective. Therefore, a judge can interpret the law however he or she wishes, leading to a form of adjudication that is, in effect, political. Politics, in this sense, is the process by which individual purposes are reconciled into a rule.

Every time a judge decides a case, they are doing what the legislature would do in creating a law. As Janice said in 1899, when there is a gap in the law, the judge is in the same position as the legislator. Therefore, the judge decides the case according to their own interpretation, which is subjective. Politics involves the process of creating rules that everyone agrees to live by, but adjudication follows those rules.

Judges never gather to discuss different interpretations and collectively create a single rule. They are independent and make their own decisions. They are responsible for their decisions, but they don't make rules together. Instead, they decide what seems best to them in each case. This leads to the conclusion that judges are not deciding according to a

rule of law but are instead deciding based on their personal preferences. Thus, adjudication becomes a matter of individual interpretation, not objective legal reasoning

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