# Codes in the Middle Ages

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From a historical point of view, the medieval West sets the framework of a long evolution, marked with strong changes, of the materials, forms, and modes of the production of codes and norms. The last two terms are not equivalent. If some legal works have been refered to as "codes" in the Roman Empire as from the third century, the notion of codification did not exist as such before the nineteenth century. Strictly speaking, it did not mean setting in writing the existing law, but replacing obsolete rules by an exclusive law, better adjusted to the needs of the time, and so sweeping away the past. This was first achieved under Napoleon's rule. As a counterpoint, the compilation of Roman law ordered in the sixth century by Justinian, the Emperor of the Eastern Empire – the rediscovery of which, in the second half of eleventh century Italy, was a unique event in legal history –, is more like a "coordination" work (Honoré, 2010: 106), or even a "fossilization" process of the former law (Rivière 2013). The effort to put things in order and the forward-looking perspective show the concern for "reform", allowing to conceive the Justinian corpus[1], if not as a "code", then at least as a milestone in the history of codification (Coriat 2000: 283). More literally, it corresponds to the cultural phenomenon of "putting into *codex*", which consists in the recording of rules in a book (*codex*), where they could be kept and used[2]. Even in this perspective, very few medieval rules could correspond to the strict definition of what codification means. In some fields, like that of canon law, the idea that codification is a process or a historical milestone is not irrelevant. As for the rest, the more plastic notion of "norm", impliying neither novelty, nor systematization, nor exhaustivity, would be more suited to the medieval context.

The difficulty of grasping the referents and the cultural expressions of the norms, in such a length of time and in a political space marked by the diversity of its structures, is increased by the legal pluralism that characterized the Christian West after the disappearance of the Roman Empire, and was reflected in the fragmentation of rights and the multiplicity of

[1] Consisting of four parts – the Codex, the Digest, the Institutes and the Novellae –, the Justinian's *Corpus iuris civilis* was promulgated between 529 et 534.

[2] At the end of the third century, the Gregorian and Hermogenian Codes, consisting mainly of private rescripts and arranged thematically under titles, were probably the first legal works to appear in the new *codex* rather than roll format (Corcoran 2013).

normative authorities. Furthermore, if one combines two recent approaches – the pluralist viewpoint which consists in considering the existence of the law as beyond state control (Rouland 1998: 119-122 ; Moutouh 2003: 1158-1162), and the historiographical perspective that tends to consider the norm as a body of "reference values meant to discipline medieval society" (Gauvard 2002: 469), whether or not these values became formal rules, and whether or not they implied coercion or sanction –, this period opens such a large range of norms that trying to describe their contents would be pointless. Roman law, Church law, secular legislation, treatises of government or education, statutes of urban guilds, universities or faculties, norms constructed in differents fields of learned culture, common culture or social life, are in keeping with the specific chronology of the institutions or social formations which produced them. They could not be accounted for by any lineary or typological presentation.

[46] From a medieval thinker's perspective, this period more plainly comes within an "age of grace" supposed to last until the end of times. This "age of grace" is the last step in the Christian history of salvation, that started with the "age of natural law", considered as the state of innocence and followed by the "age of the Law", received at the time of Moses in order to avoid, after the original sin, the extinction of the naturally instituted precepts. This organization of the history of salvation is a commonplace of learned medieval culture. It can be found in a treatise by archbishop Hincmar of Rheims at the end of the ninth century (Hincmar 1852, chap. 20: col. 354), as well as in the *Summa* by Henry of Ghent four centuries later. As this famous theologian said, "nature itself is the master of all justice" (Henry of Ghent 1953, art. 8, qu. 4: I, fol. 66v). As a matter of fact, the whole normative culture of the Western Middle Ages is dominated by the identification of the law with nature as created by the divine legislator, and by the idea that the "fall" made it necessary to repair the law that nature had inscribed in the hearts of men, but whose precepts had been clouded by sin. The Gospel was thus considered to be the *recordatio* of the natural law (Henry of Ghent 1953, art. 8, qu. 5 : I, fol. 67v), at the end of a process adapted to man's ability to receive the law after sin.

In this Christian history of salvation which merges into a history of the law, the heterogeneousness of grace raises an instant difficulty. Hardly supported in legal terms, the notion of grace still opens up to a particular culture of law, which finds its source, as will be seen, in the links that the Christian doctrine had established and developed with the Old Testament. Generally speaking, the Western system of norms and the knowledge contained in the sacred text are indissolubly linked (Legendre 2005: 82). It will be interesting to understand how those Christian norms have been constructed or reappraised in this "legal"

framework, by observing the cultural forms and conceptions enforced in this construction. These forms and conceptions have deeply changed. They show the presence of law in culture (from the twelfth century, the judicial inquiry provides a methodological pattern to the different disciplines of knowledge) as well as the presence of culture in law (the reconciliation of *auctoritates* which is the goal of the work of the codification of canon law is not unrelated to the ideas about musical harmony). And last, the theological science, constituted as such from the twelfth century and intellectually prevailing from the thirteenth, appears as a *locus* for the production of norms. It has close and complex links with the law, whose language it uses to deal, in original cultural forms, with difficult and ambiguous cases in all fields of the religious, political or social life.

## The Anti-Code : from Antilegalism to the New Law

### *A Code without Norms : Universality and Indeterminacy of the « New Law »*

Originally, Christianity presented itself, as distinct from Judaism, as an "anti-code". The opposition of faith to the law is at the core of Paulinian doctrine (See Rom. 4). The Christian faithful were "not under the Law" any more, "but under grace" ; they had "died to the law through the body of Christ" (Rom. 7, 4). The political, social and cultural triumph of Christianity had nevertheless altered the perspectives Paul had opened up, to such an extent that the initial antilegalism had been replaced by a "new monism" (Simon 1948: 100). The opposition of the "law of Christ" to the law of Moses[3] replaced the opposition of Christ to the law. As a matter of fact, Paul himself used phrases such as *lex fidei* or *lex Christi* in his epistles (Rom. 3, 27; 1 Cor. 9, 21; Gal. 6, 2). Christianity therefore came [47] to present itself less as a rupture than as a new type of the same genre (Brague 2005: 252-253). As a counterpoint to the original code (the Law), the "new law" was always specified : the combination of words expressing the "law of grace" or the "perfect law of freedom" (Simon 1948: 101) solved the tension between grace and the Law. Besides, the *Traditio legis* – namely the gift of the new law given by Christ to Peter – constitutes one of the most popular and representative iconographic motifs of Christian art between the fourth and sixth centuries. The alcoves in the transverse axis of Saint-Constance in Rome [48] (mid-fourth century) are decorated with mosaics representing the gift of the law : on the right, God is giving the Law

[3] The opposition between the Old Law and the New one is first attested in the Tertullian's treaty *Adversus Iudeos*, 6, 1 (Gaudemet 1985 : 15).

to Moses ; on the left, Christ is giving the law to Peter in the form of a scroll bearing the inscription *Dominus legem dat* (Congar 1962: 916 ; Grabar 1966: 192, n° 207). On most of the friezes of sarcophagi where it is carved (Snelders 2005: 330), the motif of the *Traditio legis* is associated with that of Christ teaching, with a book in his hand, and with that of the mission given to the apostles (Congar 1962: p. 918-919 ; Snelders 2005: 330).

The content of the law given by Christ the legislator was still indeterminate. This indeterminacy essentially represented the new law, which was neither a particular code, nor a set of precepts, but Christianity itself. In patristic literature, Christ the lawgiver is himself identified with the "eternal law", "the new covenant" (Brague 2005: 253), or "the living law" (Lactance 1992, IV, 25: 204). And it is to the "holy cross of Christ" that an unknown author, a contemporary of Tertullian, likens the "law of Christians" (Congar 1962: 930). These associations reveal a major paradox: the "new law" was not conceived of as a set of commandments, but as a "new system of salvation" (Brague 2005: 254); the perfect and universal "law of grace" was a code without norms. Indeed, the relationships between Christianity and the Law were not expressed in terms of opposition or substitution of the new to the old. Christ had not come to "abolish", but to "fulfill" the Law (Mt. 5, 17). That is why the Old Testament, indispensable to understanding the Christian message, remained the foundation of the faith of the *Verus Israel*. Thus, Christian culture fundamentally considered itself as a culture of the fulfillment of the Law.

***Modes of the Fulfillment of the Law***

The process of dialectic succession involved a model of unity between the two laws. Around 1290, Peter John Olivi asserts that "the new law and the old law do not differ absolutely in species", but that, "in the same way as the fruit and the branch of a tree constitute the whole and perfect tree along with its roots, so the new law is contained in the old one like a chicken in the egg". The Old Testament differed from the New one "in the way in which that which is implicit, imperfect, and material, differs from what is explicit, perfect and fully formed" (Peter John Olivi : fol. 6rb-va). The fulfillment of the Law by Christ lay on the distinction between the permanent essence of the *moralia* (moral precepts) and the transitory and obsolete essence of the *cerimonialia* (ceremonial ordinances). Around 1230-1235, Robert Grosseteste said that Christ had "fulfilled" both, by giving the *moralia* "the permanence and the life of charity", and by putting an end to the literal sense of the

*cerimonialia* “through the production of a spiritual meaning and a spiritual work” (Robert Grosseteste 1986: 66).

Still, was the Revelation to be continued, as the words of Christ in John’s Gospel suggested: “I have much more to say to you, more than you can now bear. But when he, the Spirit of truth, comes, he will guide you into all the truth” (John 16, 12-13)? According to Henry of Ghent, those words did not announce a supplement of truth, because there was nothing to add for the justice of the law to be accomplished, since Christ had replaced the *lex talionis* by the “ultimate degree of justice, proceeding from the law of charity” (Henry of Ghent 1953, art. 8, qu. 6: I, fol. 68r-68v). But those words promised a more perfect understanding of the truth revealed and contained in the Gospel. Besides, by interpreting the spiritual meaning of the *cerimonilia* and by completing the *moralia*, “the evangelical doctrine had not so much fulfilled the law of the Old Testament, but rather expounded it, by explaining the perfect way to observe all the legal precepts” (Henry of [49] Ghent 1953, art. 8, qu. 6: I, fol. 69r). The Gospel was the *expositio legis* (Henry of Ghent 1953, art. 8, qu. 6: I, fol. 69r). The “codification” of the new law had been continued by the apostles, whose doctrine was to be found in the evangelical doctrine, “not in the way in which the perfect was in the imperfect, but in the way in which the explicit was in the implicit, and the exemplified in the example”, then by the doctors, destined to explain what neither Christ nor the apostles had explained, “without being content with former explanations” (Henry of Ghent 1953, art. 8, qu. 6: I, 69v). “Formally” given, the new law was thus to be “materially” constituted by the ongoing elucidation of the divine truth (Henry of Ghent 1953, art. 8, qu. 6: I, fol. 68v). This requirement summarizes a peculiar conception of the institution of the norm, oriented towards salvation, inscribed in a process of permanent elaboration, and told, more than produced, by doctors who presented themselves as mere interpreters of a complete and perfect law.

The *Bibles moralisées* of the late Middle Ages (Lowden 2000), reserved for the French kings and their kin, significantly express the perfect totality of the Scriptures and visually show the fulfillment of the Law. Each page consists of eight medallions arranged in two columns, whose illustrations are paired. The superior miniature of each pair illustrates the short extract of the Old Testament which accompanies it. The inferior miniature represents a corresponding scene of the New Testament, associated with a short commentary explaining the typological link between the two pictures.

***Biblical and Roman Models : A Culture of Law Imitation***

Theological exegesis and its iconographic expressions in the late Middle Ages are of course not the only cultural forms of the "fulfillment" of the Law. The latter provides, as from the High Middle Ages, not only the major referent, but the very substance of some legal texts. If the Bavarian Law, set in writing in the Merovingian period, opens with a quotation from Isidore of Seville putting Moses first among the law-makers of the world (Wormald 1999a: I, 43), Charlemagne's *Admonitio generalis* (789) makes direct use of the Old Testament, whose authority explicitly supports nine of its chapters (Charlemagne 1883: 58-59). The *Liber ex lege Moysi*, an Irish compendium of Mosaic law which was diffused in the West as early as the eighth century, one copy of which at least reached England at the end of the Anglo-Saxon period (Wormald 1999a: 419 ; Fournier 1909), is sometimes considered as a possible source of the *Domboc*, compiled by Alfred the Great, king of Wessex (871-899) (Preston 2012). This "book of law" remarkably exemplifies the "fulfillment" of the Law in secular legislation.

This law code opens with the old-english translation of chapters 20 to 22 and of the first third of chapter 23 of the Book of Exodus. There, the Decalogue comes before the Mosaic laws which are derived from it regarding various crimes, offences, and damages. This "Mosaic preface", representing one-fifth of the *Domboc*, is immediately followed by a short history of the law as it passed from Moses onto Christ, then onto the apostles, and eventually onto the holy bishops and the scholars. The purpose was neither to incorporate the Law as an exemplary monument nor as a still valid authority, but to show how it was to be received in Christian times: the fulfillment of the Law by Christ did not reside in a series of additional statutes, but in the principle of mercy. The *Domboc* may be read as an effort to give concrete expression to this principle in the kingdom of Alfred (Treschow 1994: 86-89). Proclaimed as the essence of Christan law – to such an extent that its possession made any law code useless –, mercy was nevertheless circumscribed by a concern to maintain the rigour of justice. The fundamental system of monetary compensation "for the sake of mercy", replacing the corporal or capital punishments, did [50] not apply in cases of repetition of the offence or of treason against the king. A balance had to be preserved between the demands of justice and those of mercy (Treschow 1994: 89-90), in the manner of divine judgment itself. A deliberate effort to fit in with the context of the times completes this objective (Wormald 1999a: I, 420-421)[4]. Mosaic law is actually translated into Anglo-Saxon language and legal practice. Its harmonization with Christian culture ensures the authority of the law code (Treschow

[4] Detailed examples of such adaptations are given by Treschow 1994 : 90-102.

1994: 91). Finally, "Alfred mirrors Christ's approach to law […]: just as Christ adapts Mosaic law for the Christians, so Alfred adapts Mosaic law for the Anglo-Saxons" (Preston 2012: 25). The sovereign significantly uses the language of instruction, thus echoing the replacement of the "commandments" of Mosaic Law by the "teaching" of Christian Law. The kernel formed by the Book of Exodus still kept an operational role.

Patrick Wormald highlighted the convergence between the *Domboc*'s preface and Hincmar's ideas about the law. The king of Wessex and the archbishop of Rheims apparently shared the same conception of the structure of legal human history, and particularly of the essential continuity of "God's legal revelation" (Wormald 1999a: I, 425). By dealing with Mosaic law in a more sophisticated way than any other medieval legislator, Alfred somehow implemented the Hincmarian principle according to which human law should as much as possible conform to divine law. He thus showed "that West Saxon law […] belonged from the outset to the history of divine legislation for humanity" (Wormald 1999a : I, 425-426). In this perspective, Alfred's law-book should be mainly considered as "an ideological statement" (Wormald 1999a: I, 426).

Still, medieval norms cannot only be accounted for from the perspective of their link with the primordial biblical text. In a period when the imperial legacy was highly valued, barbarian rulers were patently willing to follow the Roman model. Besides, the laws they produced are not viewed any more as the conservatory of ancient "germanic" customs, supposedly founded on a unified culture, common to all barbarian peoples. These barbarian laws comprise many more measures inspired by Roman law than had been previously thought (Joye 2012: 96-97). Even the first Anglo-Saxon kings followed this model, although their codes were not written in Latin and did not contain as many elements of Roman influence as Visigothic or Burgundian codes (Joye 2012: 94). To account for the different uses of Roman law, P. Wormald suggested that a distinction be made between the inspiration both ideological and practical characterizing the presence of this law in southern Europe and the mere ideological inspiration which probably prevailed in northern Europe (Wormald 1999b: 25), where the production of laws patently unsuited to actual use in court has no practical explanation (Wormald 1999b : 30-31), and suggests that the formal procedure of making law and administering justice was still essentially oral (Wormald 1999b: 23). This distinction could also help explain the paradox lying in the Carolingian interest in written law: the fact that Charlemagne ordered the conflation of the two divergent recensions of *lex Salica* and ordered the revision and completion of existing laws without bringing their contents up to

date, may lead us to consider this legislative effort as an aspect of the new imperial dignity the sovereign assumed in december 800.

Some of the barbarian law codes are more than inspired by the Roman model. The Breviary of Alaric (or *Lex Romana Visigothorum*) appears in 506 as an actual completion of the Theodosian codification. The Code that emperor Theodosius II had promulgated in 438 only partially achieved his project of exhaustive, exclusive and final compilation of applicable law. It contained the imperial constitutions (*leges*), but not the jurisprudence and the classical doctrine (*ius*). The jurists that the visigothic king Alaric II had commissioned [51] carried out the synthesis of the *ius* that the compilers of the Theodosian Code had not. Designed as an exhaustive, forward-looking compilation of the current law, the Breviary thus contains the *leges* issued from their Roman model, accompanied by short abstracts (the *interpretationes*), organized within a similar structure and joined to excerpts of the *ius*. The selections performed by means of juxtapositions or basic, but efficient omissions, highlight the new policy of repression of the visigothic rulers (Liebs 2013). The Roman legal culture is thus reinvested and Theodosian codification perfected in the barbarian code [52].

## The Birth of the Learned Law and the Textual Convergence between Theology and the Law

### *Gregorian Reform and Learned Law*

This Roman legal culture remained significant in the High Middle Ages, but some of its basic texts were forgotten for several centuries. The Digest, an anthology of jurisprudence and the most important book of the Justinian corpus, was not quoted any more after Pope Gregory the Great, in 603 (Cortese 2002: 58). The eleventh century was a breaking point. The entirety of the rediscovered Justinian codification became part and parcel of the learned medieval culture because it supplied the material basis for the academic teaching of Roman law. This resurrection of Roman law essentially helped to build papal sovereignty, but the "Gregorian" reform – which was actually initiated during the pontificate of Leo IX (1049-1054) – had crucial cultural impacts. It provided a frame for the development of new methods, which changed the approach to ancient texts, sought as "building materials for a new legal order of the Church, adapted to the principles of the reform" (Cortese 2002: 58). Under the papal impulse, this search resulted in the rediscovery of Justinian's original works

as from the second half of the eleventh century. The jurists adopted the new intellectual procedures to interpret the texts of the rediscovered Roman law.

Besides, Gregorian reform had a revolutionary impact on canon law. From the pontificate of Leo IX, the assertion of papal legislative prerogatives implied a strengthening of the Church's legal arsenal. The synod at Rheims in october 1049 exemplified the intertwining of canon law and reform: there, the pope underlined the importance of papal law for the faith, stipulated that it was to rank among the canons, and confirmed, in the same perspective, the reform of the legislation he had produced during his previous synods. As Kathleen Cushing puts it, "perfection in Christian terms had long been seen as entailing adherence to an established code of behaviour. At Rheims, Leo demonstrated that the pope was the appropriate person to determine what that code should be" (Cushing 1998: 20).

The distinction between the two learned laws – Canon Law and Roman Law – could only be artificial. Together, they constitute the *ius commune*. The civilists borrowed, in many ways, from the innovations produced by the *ius novum* of the papal and conciliar legislation. Above all, Roman law contributed, from the twelfth century, to the development of a technical canon law, by offering it a model of the unity of the sources, a technique, and a language (Legendre 1965: 913-930), which enabled the elevation of "canon law to the level of Roman law, by having the canonical rules fit into the Roman formulations" (Legendre 1964: 100). If the idea of the "twofold dependence" between ecclesiastical and Roman law should be preferred to the simplifying pattern of reception (Legendre 1965: 923), the Gregorian theoreticians nonetheless claimed the self-sufficiency and supremacy for canon law, by showing that the validity of Roman laws in the Church only depended on papal approval (Legendre 1964: 63-64). On various subjects, such as usury or divorce, Roman law provided answers that the Church would not accept (Legendre 1965: 923). Besides, it had been a weapon in the hands of the laity in the political conflicts of the eleventh and twelfth centuries. Even if the popes and canonists often recalled that it represented an essentially Christian legislation – that of the "very Christian emperor" Justinian (Legendre 1964: 89) –, who had "not felt above imitating the holy canons" (Legendre 1964: 19), Roman law "had to be both used and disqualified, assimilated, but [53] perceived at the same time as a contradiction and dominated" (Legendre 1965: 923). The sophisticated monument of the Justinian codification had to be recovered in every detail and its teaching made it alive again: glosses, commentaries, summas, questions, *consilia*, thus constituted a massive set of juristic

writings[5]. As a counterpoint, canon law, like the "new Law", was then to be built, as a set of heterogeneous rules whose coherence was about to be improved by the canonical knowledge, so that human norms could be integrated into the divine order of salvation. Therefore, from the twelfth century, it is with theology that canon law had the closest link.

***Canon Law and Theology***

In medieval culture, the relationship between theology and law was perceived as very close, as we can see in the *Divina Commedia* of Dante. In the tenth Canto of *Paradise*, the poet can see, around Beatrice, a garland of dazzling characters, whose voices respond to one another with an unparalleled harmony. Among them, Thomas Aquinas shows him Gratian, "who helped both forums so much that Paradise is pleased", and next to him, Peter Lombard, "who with the poor widow offered up his treasure up to Holy Church" (*Paradiso*, canto 10: 211). This closeness is more accurately expressed in a thirteenth-century legend, which relates that Gratian (the father of the science of canon law), Peter Lombard (the father of scholastic theology), and Petrus Comestor (the father of ecclesiastical history) were born to the same mother, who conceived them from three adulterous unions (Ghellinck 1948: 285). While assigning founders to disciplines which were in fact gradually elaborated, these literary expressions account for the perception of a simultaneous birth of theology and canon law. Actually, the *Concordia discordantium canonum* or Gratian's *Decretum* and Peter Lombard's *Book of Sentences* appear more or less at the same time, around 1140, as collections of authorities which were thematically gathered, and with their contradictions. The two books, which had been written with a practical purpose and had no official character, were almost instantly successful: the *Decretum* set the teaching basis and first pillar of the classical canon law (the *Liber extra*, compiled at the instigation of Pope Gregory IX in 1234, setting the second one), while the *Book of Sentences*, whose authority had been confirmed by the fourth Lateran Council in 1215 (canon 2), gave rise to hundreds of commentaries, whose very production determined the accession to the rank of master of theology. In both works, the proportion of interpretations is limited to linking texts and to the expression of a few opinions.

The heuristic effects of discordance seem however more important in the *Decretum*. Its very title of *Concordia discordantium canonum* uses a musical metaphor to describe its purpose, which is not to constitute a mere collection of canons, but to bring back harmony

[5] On these forms of exposition and diffusion of the legal science, see Bellomo 1995 : 128-148.

from dissonance. By the middle of the sixth century, the *Concordia canonum* attributed to Cresconius already used that metaphor (Brundage 2008: 97). Moreover, around 1096, the prologue of the *Panormia* by Ivo of Chartres, which was the most widely spread canonical collection before Gratian's, was often copied as a separate treatise entitled *De consonantia canonum* (Brasington 2004: 115-142). By promoting the transfer of certain principles of biblical and rhetorical hermeneutics to the field of sacred canons, this text was going to have considerable effects on the development of the emerging canonical and theological sciences. Now hermeneutics and divine harmony were closely linked. The importance of musical theory in the Augustinian conception of the providential order of the world has been highlighted (Kuttner 1980: I, 3-4). The zither helped for instance to explain the existence of evil: some strings produced a low [54] and unpleasant sound; others made a higher and better one. The musician could tune the zither so that all the strings produce a more perfect higher sound, but he would then lose the right consonance of the instrument in its totality: the diversity of sounds was indispensable to the production of music (Bianchi and Randi 1993: 196). This antique conception based on harmony had many applications in the fields of politics, esthetics, and sciences (including theology) (Bianchi and Randi 1993: 208-210). In the thirteenth century, Bonaventure thus compared the Holy Scriptures to a zither, whose "inferior string does not produce harmony by itself, but with the others; in the same way, each passage of the Scriptures depends on another; to go even further: each passage depends on a thousand of others" (Spitzer 1963: 35). This image of the harmony reached by reconciling dissonances can be found again in the *Consonantia* by Ivo of Chartres, then in Gratian's *Concordia*.

If, as it was said, the heuristic effects of discordance are less emphasized in the *Book of Sentences* by Peter Lombard, this does not mean "that theology had weakened the model invented by the law" (Boureau 1992: 1114). As a matter of fact, by highlighting the success of Gratian and Peter Lombard, the legend overlooked the founding figure of the theologian Peter Abelard. Around 1130, his *Sic et non* appeared as a voluminous collection of the Church fathers' contradictory opinions, preceded by a prologue explaining the way in which it could be used. Abelard resumed Ivo of Chartres' hermeneutical principles, but he used a specific expression by proposing to build the truth through inquiry: "because doubt leads us to inquiry; and it is through inquiry that we can understand the truth" (Abelard 1976-1977: 103). The dissonances "[encouraged] the inexperienced readers to make a deeper inquiry into the truth, and [made them] more perceptive thanks to the inquiry" (Abelard 1976-1977: 103). The link with the law, in a context when the procedure of contradictory investigation was

starting to develop, was reinforced by the judicial purpose claimed by Abelard in the very first lines of his prologue: "Since, in such a wide array of discourses, some of the saints' words seem not only diverse, but also adverse, it is not irrelevant to judge those by whom the world itself will be judged" (Abelard 1976-1977: 89).

The methodological convergence of theology and canon law, linked to the wide speading of the model of the adversarial inquiry, which from the twelfth century onwards established itself as a "general form of knowledge" (Foucault 2001 : 1454), is completed by a textual convergence. Even before Gratian and Peter Lombard, Ivo of Chartres and Abelard "brought into play the same stock of legal and theological authorities, suited to the universal and new inquiry" (Boureau 1992: 1116). The connections between theology and law cannot be reduced to a mere interplay of mutual borrowings, though. Their convergences showed a major cultural phenomenon – the "scholastic mutation" (Boureau 2007: 170) –, which initiated a "new regime of the truth, perceived as a construction or a reconstruction, against the tradition, narration, and custom" (Boureau 1992: 1116). In this context, because of the interweaving of their techniques, sources, and purposes, law and theology participated in the "scholastic *épistémè"* (Boureau 1992: 1116), seen as a set of knowledge and methods, linked organically.

The perception of the novelty of those disciplines has been accompanied by some uncertainty about their difference. At the beginning of the thirteenth century, in the Bolognese school of the canonist John of Spain, it was still questioned whether Gratian's *Decretum* should be put among the legal books or among the theological ones. The question arose from the hypothesis that a testament might make two separate bequests for those two categories of books (Cortese 2002: 65, n. 32; Legendre 1964: 94). On [55] a different note, E. Cortese drew attention to the phenomenon of the "canonization" of the Justinian codification, seen "as the expression of a near-theological truth" (Cortese 2002: 70). By borrowing the image of the temple of justice from the Justinian constitution *Deo auctore*, medieval jurists gave it a "mythologic value" and literary expressions which disguised the Roman law as revealed truth (C. 1, 17, 1, 5; Cortese 2002 : 70-71 and n. 47). Thus, the corpus of the Roman law could be conceived, like the Holy Scriptures, as a perfect totality : *omnia in corpore iuris inveniuntur*[6], said Accursius, the author of the *glossa ordinaria* in the middle of the thirteenth century. Its contradictions could only be surface ones and had to be resolved. The fact that the Justinian codification lies here among the biblical declinations of the paradigm of the Law is

[6] Accurse, gl. *notitia* to Digest I, 1, 10, *de iustitia et iure*, l. *iustitia* ; E. Cortese 2002 : 71, n. 48.

all the more striking that an anecdote relates, at the end of the thirteenth century and at the very beginning of the teaching of the rediscovered Roman law, a confusion between the Roman law and the Mosaic one. The hero of this anecdote is *magister* Pepo, presented by the famous Bolognese jurist Odofredo (d. 1265) as the first teacher of the Justinian laws, while Irnerius was traditionally considered as the "founder" of the Bologna law school (Cortese 2002: 62). E. Cortese showed that the memory of Pepo was more vivid in France, and seems to have been particularly so among the theologians. Thus, in the 1180s, Radulphus Niger, an English master who was teaching in Paris, made Pepo a symbol of the triumph of Roman law over the barbarian legislation (Cortese 2002: 63): during an assembly held by Henry IV in Lombardy, the master seems to have obtained from the emperor that the sentence passed on a slave murderer should be capital penalty instead of the monetary compensation prescribed by the Lombardian law. According to Pepo, natural law demanded that the culprit suffer the same fate he had inflicted upon his victim[7]. As noted by E. Cortese, the Justinian inspiration seems weak here, and it is the biblical *lex talionis* which is invoked, in the Isidorian perspective in which it was seen as a rule of natural law[8]. Although Radulphus Niger presents him as a technician of the Roman law, Pepo reasons more like those canonists and theologians who identified Roman law with Mosaic law, and also with the Gospel, and claimed its pre-eminence over all human laws (Cortese 2002: 64-65).

This cardinal principle is codified in Gratian's *Decretum*, which asserts that "mankind is ruled both by natural law and morality", that "natural law is what is contained in Law and Gospel", and that it "takes precedence over all other laws on account of its dignity and antiquity" (Gratian 1879, *dictum ante* D. 1 c. 1 and *dictum ante* D. 5 c. 7). Anything that contradicted natural law had to be held null and void (Gratian 1879, D. 8 c. 2 *dictum)*. Laurent Mayali noted that the *Decretum* "thus [transposed] the unity of faith in the law, by placing natural law, of divine origin, at the top of a normative hierarchy" (Mayali 2011: 475-476), without overlooking human law, which also represented all human activities. Thus, the reconciliation of opposing rules was "made clearly easier by a legal argumentation", which benefited, especially in the second version of the *Decretum*, from the supplies of Roman law, "numerous principles of which support the transformation of religious norms into legal rules" (Mayali 2011: 476). This "juridification of religion" affected in return the representation of the law, by bestowing upon it "a renewed legitimacy, in the framework of a

[7] This passage from the *Moralia regum* by Radulphus Niger has been edited in Schmugge 1977 : 3.

[8] Cf. Isidore of Séville, *Etymologiae*, lib. 5, cap. 27, § 24 (availabble online : http://www.thelatinlibrary.com/isidore/5.shtml).

Christian normative model in accordance with the divine plan", and by attributing to it the "authority of a universal knowledge" (Mayali 2011: 476).

Substantially or formally linked to the Law, medieval "codes" gave birth to cultural productions based on similar methods, exemplified by the *quaestio*, which derived [56] from the model of the adversial inquiry and was used in every discipline of scholastic knowledge. These codes have however federated distinct, and, in certain fields, rival "textual communities"[9]. As of the thirteenth century, the theologians claimed a superior ability to elaborate the norms of natural law.

## Theological Normativity and Absorption of the Law

This claim participates in a cultural movement favoured by the "academic policy" of the papacy. From Innocent III (1198-1216), the will to make of Paris the supreme instance regarding doctrinal orthodoxy strenghtened the authority that the Parisian theologians had acquired. It is the very perspective in which pope Honorius III issued the bull *Super speculam*, prohibiting the teaching of Roman law at the university of Paris. Gérard Giordanengo showed that this prohibition confirmed an actual situation. The "scientific disarray" of the Parisian jurists, combined with the decline of the French school of canon law since the 1210s, left the field open to a normativity which was neither legal nor coercive, but based on the supreme authority of the theological science.

### *Legal Frameworks of Enunciation*

The questioning which was the driving force or the theological inquiry was not confined to a merely speculative area. It also addressed concrete cases, whose variety finds a particular expression in the quodlibetal disputes. Originating in the Parisian faculty of theology in the second half of the thirteenth century, these disputes were optional and only took place over two annual sessions (Advent and Lent). They were open to a larger public than the usual one of the masters who supervised them, and left the initiative of raising questions to the audience. The frameworks of the enunciation of the questions and the very content of their "determination" (final resolution) by the masters show a special interaction between the quodlibetal genre and the law. The normative purpose immediately appears in the

[9] This Brian Stock's phrase has been adapted by Alain Boureau in order to describe the « initial gathering [of the theologians] around the *Sentences* by Peter Lombard » (Boureau 2007: 53).

wording of the questions in terms of lawfulness, obligation or advice, in fields that can briefly be described in terms of the right to things (tithes, ecclesiastical benefices, commercial profit, usury, theft…) and of the obligations and indivivual responsibility (marriage, vows, forced baptism, host desacration, drunken homicide…) (Marmursztejn 2006 and 2007). Among these questions, those which delt with the relationships between *spiritualia* and *temporalia* – and primarily with the plurality of ecclesiasical benefices – often echoed some legal debates initiated in the previous century (Miramon 2004).

Moreover, some of the questions take the form of extremely detailed cases, analogous to legal *casus* (Boyle 1981: 245-246). This teaching method, widespread in the law schools at the end of the twelfth century, involved the presentation of a problem in relation to a particular situation, whose solution was to serve as a model in all similar situations. In the penitential field, the authors of confessors' manuals likewise employed it, in the wake of the *Summa de casibus penitentiae* by the Dominican Raymond of Peñafort, and their works appear as "traités de morale juridisée"[10]. This use of the *casus* form did not marginalize the quodlibetal determinations in a normative context when the Roman technique of the rescript was still vivid (Giordanengo 1989: 288; Coriat 1985). As an imperial answer to the question raised by a litigant in a particular case, before or during a trial, the rescript is the most frequently represented source in the Justinian compilations. This procedure continued in the Middle Ages through royal legislation, [57] which long remained generally ineffective. However, the most obvious parallell has to be found in papal decretals, which had no decisive value, except for the cases addressed, and cannot be seen as laws before the *Sext* promulgated by Boniface VIII (1298), which formed a genuine "corpus of papal laws, issued as a whole, and a faithful imitator of the Justinian Codex" (Fransen 1972: 36).

### *The Captation of the Law and the Claim for Theological Superiority*

The closeness to the law also appears in the content of the arguments used by the theologians, who widely resorted to concepts, definitions and authorities of legal origin. Besides, in their reasoning, the allegations to canon law have no less weight than biblical quotations. In 1271, when dealing with a question about the possibility for the pope to give a dispensation to bigamists so that they could be promoted to holy orders, Thomas Aquinas thus opposed a canon of Gratian's *Decretum*, attesting that a pope had actually given such a

[10] Among the 24 sections forming the first two books of the *Summa* by Raymond of Peñafort, 23 have the same titles than the sections of the decretals collections. Cf. Michaud-Quantin 1962: 36.

dispensation, to the Epistles to Titus and Timothy, asserting that only those who had been married just once could be promoted to holy orders. In this case, the apostolic prohibition did not pertain to divine law, but "to a rule established by the human authority that God conceded [to the apostle]" (Aquinas 1996b, IV, 13: p. 334). As far as he could grant a dispensation from norms of human or positive law, the pope could lawfully do so in the case at stake.

Finally, and in more general way, the masters of theology put into legal terms the conflicts between norms or between norms and practices involved in the cases they were submitted. For instance, the questions about marriage (conceived as the right of ownership over one's spouse's body), about forced baptisms of children (who, according to natural law, belonged to their parents as oxes or horses belonged to their owners) (Aquinas, 1996b, III, 18: 274-275; II, 7: p. 223), or about the escape of a man sentenced to death (which was justified if he was loosely guarded, because he had a superior duty to preserve his life) (Henry of Ghent 1983, IX, 26: 307-310), are tackled according to the categories of rights of usage and property rights. In all cases, the "divine or natural law" is the touchstone of theological normativity. The masters constructed the normative legitimacy or their discourse on this supra-legal foundation, and based their own authority on their special ability to grasp and express the derived principles of natural law, such as justice, intention, contractual freedom, or extreme necessity. As a matter of fact, if the first principles of natural law were considered universally accessible, its secondary precepts may vary from one case to another. Those with outstanding knowledge and reasoning skills were in charge of their determination.

Besides, the theologians have openly claimed their superiority over the jurists in that field. In a question dealing with ecclesiastical benefices, Thomas Aquinas makes it clear that the theologians had to tackle the questions insofar as they pertained to divine law, whereas the jurists had to deal with the questions pertaining to positive law (Aquinas 1996b, II, 8: 226). In the same way, Henry of Ghent, dealing with the case of a married cleric and facing the contradiction between the chastity required by priesthood, and the marital duties entailed by marriage, proposed to draw a distinction between the "nature" of the sacrament, pertaining to divine law and therefore to the theologian's scrutiny, and his "accidental observance", pertaining to human law and therefore to the canonist's one (Henry of Ghent 1518 : fol. 214r). The cultural convergence is here coupled with a competition with the jurists. The theological norms were specifically constructed in a paradoxical movement of appropriation and of exclusion of the law.

[58] In a context marked by the "dissemination of the law in medieval culture", and by a "scientific change" linked to the development of a "legal consciousness gradually

[penetrating] the other fields of culture" (Mayali 1992: 129-130), the intellectual procedure of the scholastic theology did not just take the form of a fictitious trial, following the art of the jugde; it also adopted the language of the law to deal with what was difficult to tackle. This was the case, for instance, with the theological debate of the thirteenth and fourteenth centuries on the forced baptism of Jewish children, which adressed mainly the issue of parental rights (Marmursztejn 2016: 271-329). By using the concept of serfdom without referring to its theological origin, and by characterising the Jews as objects of law, the theologians – although they reached very different conclusions – really absorbed the law, which was used in that case as a language, as a technique, and as a strategy to limit Jews' freedom. Besides, this debate on forced baptisms shows that the theologians' legal culture was not solely expressed in the quodlibetal context. If the Quodlibets represented the most suited *locus* to tackle difficult or ambiguous cases, the theologians exerted their normative capacity in various scholastic genres (commentaries on the *Sentences*, summas, disputed questions, treatises), by implementing the same *quaestio* method. The links with the law could however be perceived more generally than through the sharing or the appropriation of techniques and references.

***Permanence and Mutation of the Norms of the Old Law***

By reactivating the tension between the old and the new Law, some theological questions show that the construction of Christian norms took place in a fundamentally "legal" framework, and was made in the continuity of the fulfillment of the old Law. The issues of Sabbatical observance or tithes bear witness to this (Marmursztejn 2011). To account for the continuity of those precepts, originating in the old Law, until the "age of grace", the theologians did not make a mere spiritual interpretation. They analyzed their structure: those "mixed" precepts pertained partly to *cerimonialia*, and partly to *moralia*. Substituted for the Sabbatical precept, that of Sunday rest was based "on an edict of natural law", which maintained "that all men, having the use of reason, should cease all business at certain moments and give themselves over to divine worship and the veneration of God". This "edict of natural law" had been determined through a statute of the Church, which had ordained "that the Lord's day would be that of Christ's resurrection as a new man" (Henry of Ghent 1979, I, 41: 230-231). The mixed nature of the precept had thus allowed its transfer from one legal regime to another. Insofar as it was a moral precept, based on natural law, it could lawfully be maintained; the time assigned to its observance had been determined by the

Church. Thus, the observance of Sunday rest under the new law had not succeeded that of Sabbath "by virtue of the strength of the precept of the Law", but "by virtue of a constitution of the Church and the custom of the Christian people" (Aquinas 1897, IIa IIae, q. 122, a. 4: 479). The permanence of the obligation to pay tithes – although it was not comprised in the Decalogue – was explained in a structurally analogous way: tithes had to be paid because a precept of natural law made it an obligation to remunerate the spiritual services of the priests; as far as the quota was concerned, tithes depended on "a new institution by the Church", which had decreed that the Old Testament taxation would also be observed in the New one, "so that there would be some consonance between the Old and the New Testaments" (Aquinas 1996b, II, 8: 226).

This brief picture gives an incomplete image, insofar as it seems to ignore the theological divergences and keeps the jurists away. However, the theologian Gerard of Abbeville [59] sounded a peculiar note, by arguing that the permanent obligation of tithes was based on a passage in Matthew's Gospel (23:23), whereas his colleagues generally denied that this passage could be a neo-testamentary confirmation of the precept. Gerard of Abbeville is then close to the position held by Hostiensis in his *Summa aurea*, completed circa 1253. This great canonist relied on authorities "both from the Old and the New Testaments", including the quotation from Matthew's Gospel, to assert the obligation to pay tithes "by virtue of precept" (Hostiensis 1556: 253va). The theologians also held opposing views on other issues, as in the case of a disjunction between the parish where the sacraments were received and the parish where land was cultivated, or also in the case concerning personal tithes. These divergences echoed the uncertainty of canon law itself. Beyond the theologians' different positions regarding legal sources, which they draw on a great deal, textual analysis reveals the specificity of theological solutions, which were elaborated in this case from the existence of gaps or hesitations in the law and divergences between its commentators (Marmursztejn 2012).

In all their diversity, medieval norms eventually appear as forms of the "fulfillment" of a first Law, which provided a model, but also a framework and some materials. The scholars who thought out the norms and contributed to produce them did not consider the codification as a substantial creation, but as an elucidation or an adaptation. Although their references and methods may have varied according to the circumstances, they reveal, in a general way, strong cultural interactions. At the heart of the Middle Ages, the closed corpus of Roman law, as a source – itself sacralized – of an extensive academic literature, has

indissoluble links with the canon law, which, from the twelfth century, was built as a science along with the twin discipline of theology, and started to be codified by using the same rational method of the contradictory inquiry. In this normative world of the *ius commune*, the heterogeneousness of theology refers to that of grace in the "legal" history of salvation. If scholastic theologians claimed a superior ability to "make clear" the divine or natural law, they still used the human language and instruments of the law to solve the difficult cases.

The early Italian humanism, as a "movement of cultural rupture", will precisely target those instruments. In the framework of a global critique of the academic methods and institutions, the deconsecration of legal science is accompanied by a return *ad fontes*, which mainly aims at bringing back "the purity of the Justinian monument", buried under the commentaries, and at applying to it new hermeneutical principles, in order not to reconcile, but to historicise the real divergences (Gilli 2009: 576, 577, 581). In the same way, the philological and historical critique expressed in 1440 by Lorenzo Valla to prove the unlikeliness of the Donation of Constantine spares Gratian by assigning the forgery to an addition made by one of his disciples. In his treatise *De iure* (1437), Leon Battista Alberti still recommended the enforcement of a juridical system without any normative text, where the moral principles founding the norms could work without any specific ecclesiastical law (Gilli 2012: 262-264). In the fifteenth century, however, "what was at stake was not really the codification, nor the reworking of the principles of law on the basis of humanism" (Gilli 2009: 584), but rather a reorganization of the political field, in which the position of the jurists was changing. The gradual closing of their space of doctrinal activity, particularly because of the gradual substitution, in the teaching of jurisprudence, of the sentences issued by the courts of appeal for their own expert judgments, represents a major evolution in the emergence of legal humanism, "which could not be interpreted, therefore, as a mere cultural phenomenon, but is also an answer to the crisis of the institutional orders" (Gilli 2009: 579).

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