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The Principle of the Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas

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THE PRINCIPLE OF THE PERSONALITY OF LAW IN THE EARLY MIDDLE AGES: A CHAPTER IN THE EVOLUTION OF WESTERN LEGAL INSTITUTIONS AND IDEAS

SIMEON L. GUTERMAN*

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FOREWORD**

Recent events in the world have heightened the importance of this study of the personality of law. Never before have conquering nations set about deliberately to destroy the language, the culture and the law of subject peoples on such a scale as we have witnessed in this present generation. In the past the acquisition of sovereignty over another people has usually stopped far short of this, subject peoples have generally retained their laws, and if in time these were replaced by those of the conquerors, this was the gradual result of long peaceful contact and interaction rather than of force. We have many modern illustrations of this in the principle of extra-territoriality and in the retention of their

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native law, for example, by the French in Canada or the Boers in South Africa under the sovereignty of Great Britain. However, such modern instances are for the most part the retention of a law that is itself territorial in character now that the principle of territoriality has become all but universal.

Dr. Guterman's study deals with an earlier formative period in the history of the law of the western world, before men's status had come to be determined generally by the feudal tenure of land or by their domicile as now. It is an obscure period in the cultural development of our race, "dark" so far at least as our knowledge of it goes, in which the contemporary materials are slight, scattered and difficult to evaluate. In his study Dr. Guterman has made a careful examination, not only of these surviving materials consisting mainly of the so-called *leges barbarorum* and the chronicles of the time, but also of the modern accounts contained in widely scattered papers and the histories of the laws of the various nations of Europe. From modern accounts roughly three main theories emerge as to the source of the principle of the personality of law: that it is a Germanic inheritance; that it is the practical result of the peculiar political conditions existing at the time; or that it is a conscious adoption of the old *jus gentium* of the Roman law sources. The author's preference, in agreement with Brunner, seems to be decidedly in favor of the second of these, and he gives convincing reasons for his choice.

On this obscure but important phase in the development of our public and private law, which precedes and makes clear the origins of feudalism, this study is of fundamental importance.

In his concluding chapter Dr. Guterman sums up another of his most important conclusions when he says, "The importance placed on legal practice rather than doctrine in linking the personal law and feudal periods has important implications for the theory of the survival of Roman law." The few blundering remnants of Roman jurisprudence arising from the period covered by this study indicate that it is not to medieval legal science that we must look as the preserver to our time of the law of Rome; rather, its survival is owing to this principle of personality under which Romans in certain parts of western Europe were allowed to live by their own law instead of the law of their conquerors.

The subject treated in this monograph has often attracted the attention of historians of the legal systems of Europe, but, so far as I know, this study is the first comprehensive account of this important early phase of the development of our western law and culture.

C. H. McILWAIN

I. INTRODUCTION¹

Territoriality is the dominant rule of the law courts today. It has been called a western conception differing from the non-European systems of the past in which personal status was determined by religion or nationality.² In reality modern territoriality, which has been pushed furthest in English law³ and has been modified everywhere by doctrines of private international law,⁴ only goes back to the feudal period and was preceded by a long era in which personal law was the rule, and territoriality the exception.⁵ This era followed the barbarian invasions of Western Europe and was marked by the existence of nations without territories and of laws without states.

The term personality, as applied to the early Middle Ages, covers several relations. From the point of view of municipal law, medieval systems bound members of a tribe or nation wherever they resided independently of domicile. As private international law they governed relations among members of diverse tribes. In the latter role state-enacted law represented by the capitularies played a more important part than in the former, represented by the *leges barbarorum* (barbarian laws). "Public" law, so far as it existed during the period, lay outside the scope of the personal law rule, but a good part of what we should today call criminal law, as well as private law, fell under the principle.

If we compare these arrangements with modern systems of private law, whether municipal or international, we may note that, though the latter distinguish among personal, real, and mixed "statutes," they are nonetheless largely governed by territorial principles. They are also entirely state-enacted or sanctioned. The term "international" used in rela-

1. For a general statement see this author's *The First Age of European Law: The Origin and Character of the Conflict of Laws in the Early Middle Ages*, *New York Law Forum*, VII, 2 (1961), 131-166.

The author would like to record his acknowledgment for aid received at various stages in the preparation of this study to Professor C. H. McIlwain and the late Dr. E. F. Bruck, both of Harvard University; and to Professor F. L. Ganshof, of the University of Ghent, Belgium.

2. T. E. Holland, *THE ELEMENTS OF JURISPRUDENCE*, 13th edition Oxford, 1924, p. 413; and S. S. Liu, *Extraterritoriality: Its Rise and Decline*, New York, 1925, p. 48 ff (Levant), p. 76 ff (Far East).

3. G. C. Cheshire, *Private International Law*, 6th edition, Oxford, 1961, pp. 22, 38-43; and ARTHUR NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW*, Oxford, 1943, p. 5.

4. Fredrich Carl von Savigny, *A TREATISE ON THE CONFLICT OF LAWS*, tr. William Guthrie, 2nd edition, 1880, p. 57 ff; and M. WOLFF, *Private International Law*, 2nd edition, Oxford, 1950, p. 19 ff.

5. L. Stoff, "Etude sur le principe de la personnalité des lois depuis les invasions barbares jusqu'au XII^e siècle," *Revue bourguignonne de l'enseignement supérieur*, IV, 1894, pp. 4-5; H. Brunner, *Deutsche Rechtsgeschichte*, 2nd edition, Leipzig, 1906, Vol. I, #35, p. 383 ff; E. Chenon, *HISTOIRE GÉNÉRALE DU DROIT FRANÇAIS PUBLIC ET PRIVÉ*, Paris, 1926, I, 122; and E. MEIJERS, "L'Histoire des principes fondamentaux de droit international privé à partir du Moyen Age," *Recueil des cours, Académie de Droit International*, Paris, 1934, III, vol. 49, p. 547 ff.

tion to such systems of private law is in fact a misnomer.⁶ The medieval scheme of justice was much more truly international, because it did not originate in state action. In modern private international law, to take an example from court proceedings, both the *forum* and the *lex fori* are determined largely on a territorial basis.⁷ Under the rule of personality only the *forum rei* (competent tribunal) depended on territoriality, while the *lex fori*—the basic rule in modern conflicts of laws⁸—was governed by race or nationality. As Klimrath put it, "The personal law not only regulated the civil status and the capacity of the parties but also everything which in territorial legislations belongs to real and mixed statutes."⁹ The closest modern analogy to, and perhaps the most direct link with, the medieval personality of private and penal law is extra-territoriality, as it was practiced recently in China and Turkey, and more remotely in Moslem Sicily, the Byzantine Empire and the Crusading states.¹⁰

The origin of the system is to be found in (a) the duality of legal culture resulting from the barbarian invasions and (b) the subjective right of members of specified races to live according to their traditional laws.¹¹

6. Martin Wolff, *op. cit. supra* note 4, at 11.

7. *Id.* at 70, 100, 229.

8. Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960).

9. H. Klimrath, *Travaux sur l'histoire du droit francais*, Paris 1843, Vol. I, p. 351.

10. The principle of personality was applied under different political regimes. C. D. Du Cange, *Glossarium Mediae et Infimae Latinitatis*, ed. L. Favre, Vol. V, Niort, 1885, p. 79 col. 1, article "Lex" ("legem suam componere"), gives examples:

Sed et expugnata a Christianis urbe Hierosolymitana, totaque Syria, cum ex variis ac procul diversis habitaretur nationibus, suas quique leges servavere. Will. ad Oldenburg in Itinerario Terrae Sanctae de Antiochia: Ipsa etiam civitas divites et plurimos habet inhabitatores, Francos et Surianos, Graecos et Judaeos, et quilibet eorum suas leges observant. Ita Franci nostri observabant, uti docemus in Historia nostra Franco Byzantina lib 8.n.9. Apud Byzantinos etiam ipsos Veneti, Pisani, et Genuenses, qui in hoc urbe primaria commercii causa sedes fixerant, suis quique legibus regebantur.

Frederigo Sclopis, *Storia della legislazione italiana*, Turin, 1863, Vol. I, p. 68 (and note 3) cites the application of personal law principle by Saracens in Sicily. The letter is given by V. Reinaud, *INVASIONS DES SARRASINS EN FRANCE ET DE FRANCE EN PIEMONT ET DANS LA SUISSE ETC.*, Paris, 1836, p. 272.

The Christians of Coimbra shall have their special count who shall govern them wisely and according to their own usages. The count shall judge their law suits. He shall be forbidden only to pronounce sentences of death, without the order of the Moslem magistrate. His shall be the duty to lead the accused before this magistrate, to read him the law of the Christians and if the magistrate consents the penalty shall be pronounced.

Conflicts of laws in federal courts arising from diversity of citizenship offer an instructive analogy to cases brought before Carolingian tribunals, so far as both *fora* governed subjects or citizens of the same country. Especially was this true after *Swift vs. Tyson*, 16 Pet. 1 (1842), in which Justice Story invoked the authority of a "general law" rather than state rules as an approach to the settlement of conflicts of law in federal courts. There was no "forum shopping" in the Carolingian era, for there was only one set of courts. See ERWIN N. GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES: THE COMMON LAW UNDER STRESS* 65-66, 68, 70-74 (1965).

11. Meijers, "*L'Histoire des principes*," p. 11.

A history of the development of the personal law principle would throw both of these factors into relief.¹² It includes the following stages: (1) There is first the period of origins in which, among the Germanic tribes, law was a tribal possession and therefore personal but in which the question of recognizing foreign law had not as yet arisen. This phase is marked by the absence of written law, the dominance of custom and the popular administration of justice. It coincides with the development of classical and post-classical Roman law, which even after the Edict of Caracalla, remained personal and acknowledged the existence and validity of provincial customs, native traditions and especially vulgar law side by side with official sources. It may be inferred that the undeveloped Germanic customs and the post-classical Roman law converged in this respect during the critical Age of Invasions in the fifth century. (2) The establishment of Germanic kingdoms in Italy, Gaul, Spain, and North Africa reduced the law of the Roman population to the status of a tolerated personal legislation. Among the Franks, Burgundians, Visigoths, and even Ostrogoths a dualistic system was established in which Romans retained the privilege of their own private law, but in which the Germanic law undoubtedly enjoyed territorial validity in disputes between Germans and Romans. (3) The expansion of the Frankish Kingdom and its transformation into a Carolingian empire led to the establishment of a system of private international law replacing the dualistic arrangement of an earlier period. This change occurred between the sixth and seventh centuries and reached its climax in the eighth century. (4) The final stage, which coincided with the decline of the Carolingian Empire, witnessed the transformation of the personal laws into territorial customs. Emergent feudalism took the place of the older national laws as the principal influence in legal development.

Evidence of the personal law principle abounds in documents from the fifth to the eleventh century and even later. Of the so-called *leges barbarorum*, some like the Ripuarian and Lombard codes attest the practice of the principle; others, like the Salic, Burgundian, and Visigothic collections suggest familiarity with it. The principle lies at the foundation of the Roman laws of the Visigoths and of the Burgundians, and it is implicit in the Edict of Theodoric. The *Formulae*, or legal instruments, and the Capitularies, or royal ordinances, show its operation from the seventh to the ninth century, as do the Court records. Letters, such as those of Agobard of Lyons and of Hincmar of Rheims, give us fleeting glimpses of the system in the ninth century. The treatise of Hincmar, the *De Ordine Palatii*, throws light on the relations of the personal laws to the territorial law in the ninth century. The *Exceptiones Petri*, a work

12. MCILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST 168-170 (1932); P. Van Wetter, *Le Droit Romain et le droit germanique dans la monarchie franque, Première Partie: La Famille*, Paris, 1899, pp. 9-19. The works of Stouff, Brunner, and Meijers are cited above.

of the eleventh century, describes the fate of the personality of law in France at that time, while the Cartularies and the *professiones*, or professions of national law, reveal its wide penetration of legal practice in Italy during the period of territoriality.¹³ Some of these sources, especially the *leges barbarorum*, are undergoing critical evaluation, and, until textual and other problems are resolved, these documents must be used with circumspection.

This study is an attempt to trace the origin, growth, and operation of the institutions associated with the personal law regime. Although it deals with aspects of the political thought of the early Middle Ages, it lies mainly on the border of two disciplines, history and law. This presents the investigator with a difficulty, as well as a challenge. If the jurist incurs the criticism of being the victim of excessive fixity of conception,¹⁴ the historian is open to the charge of proliferating facts and ignoring the mechanism of legal thought. The literature illustrates the dilemma. If Savigny's treatment, to begin with, systematizes excessively, it is at least historical to the extent that it seeks to trace origins and development.¹⁵ Stoff, whose study remains basic, examines the fate of legal rules of Roman and Germanic origin but hardly attempts to trace origins or identify the regions in which changes occurred. The same may be said of Brunner's classic account, which treats Germanic law *en masse* and does not distinguish sufficiently among the various laws. The most recent legal study, that of Meijers, has the virtue of focus, for it illuminates the links between the Italian Theory of Statutes and the personal

13. Brunner, *op. cit. supra* note 5, at 427. The standard survey of these materials remains Brunner, *ibid.* Brief but current is Buchner, *Die Rechtsquellen* forming part of Wattenbach-Levison, *Deutschlands Geschichtsquellen im Mittelalter, Vorzeit und Karolinger, Beiheft*, Weimar, (1953). For a brief bibliography concerning research on the *leges*, see L. Musset, *Les Invasions: Les Vagues Germaniques*, Paris, 1965, pp. 278-281.

The *leges barbarorum* and the *leges Romanae barbarorum* will be found in the *Monumenta Germaniae Historica*, except for the *Lex Romana Visigothorum* for which the edition of Haenel must be consulted (1849); and until the edition of the *Lex Salica* appears in that collection the editions of Hessels, Behrend, and others must be used. The Anglo-Saxon laws are edited by F. Liebermann, *Die Geste der Angelsachsen*, Halle, 1903-1916. The latest critical edition of the *Lex Ribuaria* is in the M. G. H., *Lex Ribuaria*, Legum Section I, *Legum Nationum Germanicarum, Tomi III Pars II*, ed. F. Beyerle and R. Buchner, Hanover, 1954. The older Sohm edition in the same series retains its utility, however, and the references in this study are to that edition, but they have been compared with the Beyerle-Buchner edition and in a few cases the numbering of that edition is included in parentheses. The *Formulae* exist in the editions of Zeumer arranged by collection in the *Monumenta*, and of Rozière, arranged by topic. The Capitularies are found in the *Monumenta*. The letters, treatises, and cartularies must be sought in scattered editions though the letter of Agobard to the Emperor Louis may be found in the *Monumenta (Epistolae)* and in Migne, *Patrologia Latina*. The most recent editions of all these works are listed in Buchner, *op. cit. supra* note 13, and in *REPERTORIUM FONTIUM HISTORIAE Medii Aevi, I Series Collectionum*, Rome, 1962; new edition of first part of A. Potthast, *Bibliotheca Historica Medii Aevi*.

14. L. Halphen, *Les Barbares* 59, 5th edition, Paris, 1948, expressing a view common among historians.

15. F. C. Savigny, *Geschichte des römischen Rechts im Mittelalter*, 7 vols., 2nd edition, Heidelberg, 1834-1851, especially Vols. I, II.

law principle of the earlier age and places the development of modern private international law in historical perspective.

What perhaps is most important in this study is the fixing of the frame of reference. For the historian it can be nothing else than the invasions, viewed as a broad movement of social and political change. He must not hesitate to utilize the juristic approach but he must never forget that the personal law system was historically conditioned.

It is obvious that the personality of law is the focus of much general institutional as well as legal history. Whether we view it from the point of view of its effect on the survival of Roman law or of its influence on the development of private international law, including the doctrines of nationality and territoriality, or consider it in its relation to the origins of feudalism or its links with constitutional development, we are dealing with a vital chapter of European cultural history.

II. ORIGIN AND GROWTH

A. *The Barbarian Invasions and their Effects*

Do the barbarian invasions constitute one of the decisive breaks in history? If we accept certain theories, the real break in continuity between the ancient world and the Middle Ages either occurred after the Arab invasions of the seventh century, or did not occur at all.¹ If such a view were accepted it would be difficult to understand the appearance of the personal law system which in great part was based on a duality of legal culture. The view that the Roman world did not perish led Fustel de Coulanges logically to reject the existence of this stage of legal development.² The assumption in all that follows is, in the words of Halphen, that the Germanic Barbarians and their institutions really did count in the process.³ The personal law regime is the "natural product" of the period of the invasions.⁴ The invasions must be studied, not in terms of an "ethnic dilemma," as Germanists and Romanists for a long time attempted to do, nor as a conflict of classes, as eighteenth-century authors conceived them, but rather as a meeting of peoples in differing stages of civilization.⁵

The Roman society with which the Germanic newcomers, friendly or otherwise, were thrown into contact, had itself, beginning with the

1. PIRENNE, MOHAMMED & CHARLEMAGNE (N.Y. 1939).

2. Fustel de Coulanges, *Nouvelles recherches sur quelques problèmes d'histoire*, Paris, 1891, p. 361 ff.

3. L. Halphen, "L'Importance historique des grandes invasions," *A Travers l'histoire du moyen age*, Paris, 1950, p. 22 ff.

4. Esmein, *Histoire du droit français*, p. 51, note 86.

5. M. Bloch, "Feudalism," *Encyclopedia of the Social Sciences*, New York, 1931, VI, 203; and Fustel de Coulanges, *Histoire des institutions politiques de l'ancienne France*, ed. C. Jullian, Vol. 2, *L'Invasion germanique*, Paris, 1904, p. 324.

third century, undergone great transformation. It had acquired some of the characteristics of a more primitive social order. Fustel de Coulanges points to the development of compositions for the settlement of crime.⁶ There is much to be said for the view that in Gaul old Celtic customs transformed into a sort of *lex loci* (local law) in many cases took the place of Roman law.⁷ Germanic influences resulted in the development of new forms of law.⁸ We must try to picture two societies in different stages of development existing side by side, but with many points of similarity between them. The consequence of this, in the words of Calmette, was, "two necessary and concomitant phenomena, the fusion of races and the organization of a new regime."⁹

Did the Roman population at any stage of the process lose their liberty or their law? Probably no more so than their language, their religion, or their land.¹⁰ The survival of the vulgar tongue and of the Catholic faith, in fact, promoted assimilation. Bilingualism among individuals may have done the same. As to land, the Visigothic and Burgundian partitions may not have been reenacted among the Franks, but the general process everywhere can hardly be called an expropriation. No doubt we must abandon the idea of a wide diffusion of conquerors and make more allowance for a Germanic peasantry on the villas, but in the main, demography over the greater part of Gaul remained stable. In regard to equality of legal status in the initial stages of the conquest, however, several questions have arisen.

With reference to the Franks, this question has led to the celebrated controversy between Boulainvilliers, *Histoire de l'ancien gouvernement de la France*, 1727, who believed that the Franks enslaved the Gallo-Roman population, and the Abbé Dubos, whose *Histoire critique de l'établissement de la monarchie française dans les Gaules*, 1734, insisted that there was no conquest but mainly an amicable settlement. The principal objection to the latter position is in the inequality of the *wergeld* (monetary composition for murder) of the Frank and the Roman in the

6. Fustel de Coulanges, *op. cit. supra*, Vol. III, *La Monarchie franque*, Paris, 1905, pp. 476-479; and Chénon, *Histoire du droit français*, I, 265. For a view that the Germanic tribes had a greater background of culture, owing partly to association with Rome, see A. Dopsch, *Economic and Social Foundations of European Civilization*, tr. Marshall & Beard, New York, 1937, pp. 15-19, 38, 43, 90.

7. Meijers, *loc. cit.*, p. 568.

8. P. Vinogradoff, *Roman Law in Medieval Europe*, ed. Zulueta, Oxford, 1929, pp. 2 ff.

9. Joseph Calmette, *Le Monde féodal*, (Ser. *Clio-Introduction aux études historiques*), Paris, n.d., p. 1.

10. Besides the classic work of Gaupp, *Die germanischen Ansiedlungen und Landteilungen in den Provinzen des römischen Westreiches*, Breslau, 1844; and Brunner, *Deutsche Rechtsgeschichte*, I, nos. 8-10; see Esmein, *Histoire*, p. 45 ff and the following articles of Marc Bloch: "Observations sur la conquête de la Gaule romaine par les rois francs," *Revue Historique*, CLIV (1927), 1, 161-178; "Reliquiae. Les Invasions, occupation du sol et peuplement," *Annales d'histoire sociale*, 1945, 13-28; and "Sur les grandes invasions: quelques positions de problèmes," *Revue de synthese historique*, t. LX (1940-45), 55-81.

Salic Law,¹¹ where the murder of a free Frank is assessed at 200 *solidi* (gold coins of Roman origin), and that of a Roman at 100 *solidi*. The attempt of Fustel de Coulanges to prove that *Romanus* (Roman) means "freedman" in this passage, the freedman's *wergeld* being only half that of a freeman's in the Salic Law, has often been refuted.¹² Brunner and others, however, have tried to show that the difference in *wergeld* was not based on social inequality, but simply on the fact that in the case of the Roman, the part of the composition due the *sippe* (kindred) did not have to be paid. The murderer paid only the part due the heirs.¹³ It is doubtful whether the difference in *wergeld* can be treated as an example of social inequality, nor is it clear that the provision in the *Lex Salica* was ever applied.¹⁴ The Germans and the Gallo-Roman population in the other kingdoms must have enjoyed similar political rights. The Burgundian law expresses this fact clearly.¹⁵ Among the Salian Franks, certainly, the natives had access to most offices. They enjoyed the position of *convivae*, or official intimates of the king.¹⁶ The list of the Dukes and Counts of Auvergne contains more Latin than German names.¹⁷

The establishment of the Lombards in Italy has also led to much controversy about the status of the native population. At the beginning it is generally admitted that the Lombard settlement had a violent character, and that the Italians were dispossessed of much land and goods. Savigny,¹⁸ however, refused to accept the common view expressed by

11. *Lex Salica*, XLI, 1, 5, 6, 7, ed. R. Behrend, 2nd edition, Weimar, 1897, pp. 79-81. For controversy see G. A. Prevost, *Revue des questions historiques*, July 1879, 1-54.

12. Fustel de Coulanges, *Nouvelles recherches sur quelques problèmes d'histoire*, ed. C. Jullian, Paris, 1891, pp. 361 ff; *Histoire des institutions politiques de l'ancienne France*, 1st edition, Paris, 1875) p. 482 ff; *contra*, J. J. Thonissen, *L'Organisation judiciaire, le droit pénal et la procédure pénale de la loi salique*, 2nd edition, Brussels and Paris, 1882, p. 557 ff. Chenon discusses Fustel's thesis, *Histoire du droit français*, I, pp. 347-348. He points out that the *Romanus* in *Lex Ribuaria*, XXXVI (Sohm edition) can only mean Roman: "3. Si quis Ripuarius advenam Romanum interfecerit, centum solidis multetur." Nor is it easy to see how *Romanus* in *Lex Salica* XIV, 2, 3 can be anything but Roman.

13. H. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, 2nd edition, pp. 326, 335; Vol. II, 2nd edition, ed. C. von Schwerin, Leipzig, 1928, p. 795 ff; R. Schröder, *Historische Zeitschrift*, new series Vol. XLII, p. 194. See also F. Lot, *Les Invasions germaniques*, Paris, 1935, pp. 195-198. For an excellent criticism of the Brunner-Schröder view see Maurice Kroell, "Etude sur l'institution des lites en droit franc," *Etudes d'histoire juridique offertes à P. F. Girard*, Vol. II, Paris, 1913, p. 199 ff; F. Vercauteren, "Le 'Romanus' des sources franques," *Revue belge de philologie et d'histoire*, XI, 1932, pp. 77-88. "Il faut voir simplement dans le *Romanus* des sources juridiques franques un Gallo-romain." The views of Stein in *Mitteilungen des Oesterreichischen Instituts für Geschichtsforschung*, XLIII, 1929, pp. 1-19, "Der *Romanus* in den frankischen Rechtsquellen." See also Marc Bloch, "Un pseudo-problème: le 'Romanus' des lois franques," pp. 1-11, *Revue Historique de droit français et étranger*, 1946-1947.

14. Lot, *Les Invasions germaniques*, p. 195 ff.

15. *Leges Burgundionum*, Const. X, ed. de Salis, MGH, *Leges*, T. II, pars I, Hanover, 1892: "Burgundio et Romanus una conditione teneatur."

16. *Lex Salica Emendata*, XVIII, 6, J. M. Pardessus, *Loi salique*, Paris, 1843, p. 395.

17. Fustel de Coulanges, *L'Invasion germanique*, p. 547.

18. F. C. v. Savigny, *Geschichte des römischen Rechts im Mittelalter*, Vol. I, 2nd edition, Heidelberg, 1834, pp. 118, 119; A. Pertile, *Storia del diritto italiano*, Vol. I, 2nd edition, Turin, 1896, pp. 114-116.

Troya¹⁹ and others concerning the fate of the Roman law in Italy during this period, but depicted the Italians as proprietors enjoying complete civil rights, regulated by Roman law, and in possession of their municipal regime.²⁰ The dispute hinges on two passages from Paul the Deacon's *History of the Lombards* in which he describes the Lombards as *hospites* (soldiers quartered on a private individual) and the Romans as *tributarii* (tribute or tax payers).²¹ But, as Lot points out, the *History* was written long after the events recorded, and when the author uses the word *hospites* in such an unprecedented sense, can we be sure that he understood the original meaning of the term?²²

The words of Paul should not be interpreted in any case to suggest any such complete expropriation of the Italians as some have suggested.²³ But whether the early Lombard invasions did have the harsh character ascribed to them by Paul the Deacon, there is little doubt that the relations of the Lombards with the native population were subsequently equalized. This new equality is attested by the statement in the laws of Liutprand that in the preparation of deeds only Roman and Lombard laws are to be recognized.²⁴

Both in France and Italy as well as in Spain, where the process of fusion was accelerated, foundations were thus laid for a dual stream of legal activity and an intermingling of legal institutions and ideas on terms of equality. Without these conditions it would have been impossible for the developments that we associate with the personality of law to have taken place. The Germanic people settled in the midst of a larger Roman population and faced with a superior system of jurisprudence had little alternative but to recognize existing legal conditions. This did not mean

19. *Della condizione dei Romani*, Milan, 1844, par. 288.

20. Controversy summarized in Hodgkin, *Italy and her Invaders*, Vol. VI, Oxford, 1895, pp. 587 ff. See especially Alfred von Halban, *Das römische Recht in den germanischen Volksstaaten. Ein Beitrag zur deutschen Rechtsgeschichte*, Breslau, II, 1901, p. 1 ff.

21. Paulus Diaconus, *De Gestis Langobardorum*, II, 32, Heinrich G. Gengler, *Germanische Rechtsdenkmäler*, Erlangen, 1875, p. 518 (selection VI). The standard edition of Paulus is *Historia Langobardorum*, ed. L. Bethmann and G. Waitz, MGH, *Scriptores Rerum Langobardorum*, Hanover, 1878.

His diebus multi nobilium Romanorum ob cupiditatem interfecti sunt. Reliqui vero per hospites divisi, ut terciam partem suarum frugum Langobardis persolverent, tributarii efficiuntur. . . . Populi tamen adgravati per Langobardos hospites partiuntur.

22. F. Lot, *Les Invasions germaniques*, Paris, 1935, p. 281.

23. Gabriele Pepe does not believe the Lombards acknowledged the existence of either the Italians or their law. This is an extreme position. He does admit that the Lombards adopted Roman private law formalities as revealed in charters containing formulae of the late Roman law. On the other hand the Roman criminal law ceased entirely to be observed. *Le Moyen Age Barbare en Italie*, tr., Paris, 1956, p. 237 ff. A. Pertile, *op. cit. supra* note 18, at 61; J. B. Bury, *The Invasion of Europe by the Barbarians*, 268-271, summarizes Vinogradoff's view expressed in a work published in Russia and containing a view similar to that in the text. See more recently Francisco Calasso, "Il Problema istituzionale dell' Ordinamento barbarico in Italia," *Il Passaggio dall' Antichità al Medioevo in Occidente*, Spoleto, 1962, pp. 57-90.

24. Liutprand, 91, VIII. *Leg. Lang.*, MGH, 80 series, p. 120. See *infra* note 128.

that the invaders were prepared to accept the Roman law for themselves, for potent influences originating in racial and tribal memories perpetuated differences between the races that long survived the invasions.²⁵ Not the least of these were legal notions such as that law is immemorial custom, a possession of the tribe not to be readily shared with strangers. But, added to the argument of expediency, the same line of reasoning involved the recognition of the right of the conquered Romans to their own law.

B. *Origins*

Ever since the problem first attracted attention the origins of the regime of the personality of law have been the subject of controversy. The literature on the question goes back to the seventeenth century and carries us up to recent times. It includes such names as Ducange, Baluze, Muratori, the Abbé Dubos, Montesquieu, Savigny, Waitz, Schröder and Brunner, to mention only a few. It would be idle to attempt an exhaustive repertory of all the literature on the subject for, in one way or another, it touches one of the most prolific subjects of historical study, that of the character and consequences of the Barbarian Invasions.

It is possible to trace three or four general answers to the question, how and where did the system of personal laws originate? The first answer, popular because of its simplicity and because it answered to a deep rooted sentiment in the nineteenth century, is that the principle was Germanic in origin. The principal exponent of this view, though without much of its subsequent nationalist adornment, was Montesquieu.²⁶ Of the same opinion were several German scholars, notably Waitz and Dahn, who found evidences of the existence of personality of law under Ariovistus and Ermanaric.²⁷ The theory was also upheld by Schröder in his popular manual of German law, though subsequent editions of the work seemed to modify the statements made in the earlier editions.²⁸

The second answer to the question of the origin of the principle is that it was a consequence of the invasion. This was the view of Savigny. Far from being governed by a principle at the beginning, the barbarian kings, according to Savigny, faced a condition which they solved in a practical way. They saw fit to grant personal law rights to the Romans, and to the Romans alone, at the beginning of their conquest. Savigny explains the origin of the system as follows:

25. A luminous general account of these contending influences is F. Lot, *Les Invasions germaniques*, Paris, 1945, *passim*, especially Chapters VI-X. Though originally published before the war and slightly dated in its approach, this still remains a prime synthesis. An admirable current manual, the first of several volumes dealing with the period of the barbarian invasion, is L. Musset, *Les Invasions*, cited above (Nouvelle Clio: L'Histoire et ses problèmes).

26. Montesquieu, *Spirit of Laws*, Bk. XXVIII, Chapter 2, tr. T. Nugent, London, 1878.

27. F. Dahn, *Die Könige der Germanen*, Munich, 1861-1911, Vol. VII, 3, p. 2.

28. R. Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, 5th ed., Leipzig, 1907, p. 242, n.12.

The truth is, that the want of such an institution, and the possibility of introducing it, could occur only after the nations were blended together in considerable masses. The internal condition of each kingdom would then produce what could never have been brought about by mere benevolence towards individual foreigners.²⁹

Savigny's view was accepted and modified by Brunner in his noteworthy *Deutsche Rechtsgeschichte*.³⁰ Not only did Brunner reject the Germanic origin of the personal law principle but, going beyond Savigny, he saw it develop out of the needs of the Frankish Empire. "This system is certainly not of old German origin. Neither in the Germanic nor the Frankish period did it apply to strangers from the point of view of public law."³¹ Brunner regarded the principle in its developed form as a creation of the Frankish monarchy. It was a means of assuring to the conquering Franks the full recognition of their own laws when they went amongst their subjects of the empire. In other words, it was really a system of private international law. Brunner describes the early growth of the system as follows:

If therefore the principle of the personality of law did not exist from the beginning in the Frankish Kingdom yet it is possible to surmise that its development proceeded from the needs and from the endeavor of the Salian Franks to secure themselves in the use of their tribal law in the various jurisdictions over which they had spread out. The resort to the birth law must then from the point of view of reciprocity have been extended over all the other tribes.³²

A third answer sometimes given to the question is that it was practiced in Rome before it was taken over by the barbarians for their own purposes.³³ The principal advocate of Roman continuity has been Fustel de Coulanges. For Fustel, however, the mixture of races began at once.³⁴ Where others recognized the influence of differences of nationality in the judicial system of the sixth century, Fustel acknowledged only differences based on social classes.³⁵ For him the Roman judicial machinery

29. F. C. von Savigny, *Geschichte des römischen Rechts im Mittelalter*, Vol. I, 2nd edition, Heidelberg, 1834, pp. 117-119, tr. E. Cathcart, from first edition, Edinburgh, 1829, pp. 101-102.

30. Vol. I, § 35, pp. 382-399.

31. Brunner, *D. R.*, I, 383-384. For similar views see A. Esmein, *Cours élémentaire d'histoire du droit français*, pp. 50-51; J. Brissaud, *Manuel d'histoire du droit français*, p. 55. See, for a modern statement, C. H. Mc ILWAIN, *GROWTH OF POLITICAL THOUGHT IN THE WEST* 168.

32. *Ibid.*

33. J. Declareuil, *Histoire générale du droit français*, Paris, 1925, p. 84: "Ce serait plutôt un fait romain."

34. *L'Invasion germanique*, pp. 546-548, and *La Monarchie franque*, *passim*.

35. Fustel de Coulanges, *Nouvelles recherches sur quelques problèmes d'histoire*, pp. 361 ff.

continued, but in the hands of barbarians and Romans instead of Romans only, as before the invasion.³⁶

The mixed Roman and Teutonic origin of the regime of the personality of law is advocated by Chenon.³⁷ Before examining the evidence on the question a few observations are necessary on the role of "race" or nationality in law.

Law belongs to the nation or the race and is part of the immemorial tradition of the group.³⁸ Law in this period deals with individuals only insofar as they are members of the established groups in society.³⁹

The popular character of the barbarian laws also, as Thévenin points out, had certain consequences. In the first place the law of the tribe was personal.⁴⁰ It followed the person wherever he traveled or resided. The king himself was subject to this law.⁴¹ Being personal the law under the Frankish Empire demanded the recognition and the respect of other national groups.⁴²

Since the laws of the barbarians were personal laws, it would have been difficult to apply them to the conquered people *en masse* without transforming the latter into Germans. Thus, the barbarians were obliged to recognize the personality of the Roman law, even though they did not extend this privilege to other barbarian nations. The relatively few cases in which the invading band found itself confronted with the problem of extending personality of the law to members of other Ger-

36. Fustel de Coulanges, *Recherches sur quelques problèmes d'histoire*, 2nd edition, Paris, 1894, p. 339 ff.; *Idem.*, *La Monarchie franque*, pp. 406 ff., 417-418.

37. E. Chenon, *Histoire générale du droit français public et privé des origines à 1815*, I, 123.

38. For a summary of modern views on the nature of the national laws or *Volksrechte* see Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 417 ff. An attempt to reconcile the Germanist and Romanist points of view is contained in Jean Pétrau-Gay, *La Notion de "Lex" dans la coutume salienne et ses transformations dans les capitulaires*, Grenoble, 1920, pp. 25, 35 ff. and *passim*. *Idem.*, *Revue Historique de droit français et étranger*, 4th Series, Vol. XIV, 1935, pp. 77-83.

39. Henri Klimrath, *Travaux sur l'histoire du droit français*, ed. Warnkoenig, Paris, 1843, Vol. I, p. 353.

40. M. Thévenin, *Lex et Capitula in Bibliothèque de l'Ecole des Hautes Etudes*, Paris, 1878, p. 146.

41. Fredegarius, *Epitome of Gregory of Torts*, 18 (ed. B. Krusch, MGH, *Scriptores*, Hanover, 1888) cited by Thévenin, *op. cit. supra* note 40, at 147. *Ordinatio Imperii* A. 817, c. 16 (*Capitularia Regum Francorum*, ed. A. Boretius, MGH, *Leges*, Sectio II, Vol. I); . . . nobis decedentibus ad annos legitimos iuxta Ribuariam legem nondum pervenisse. . . ."

42. Thévenin, *op. cit. supra* note 40, at 148. For what follows concerning possible incorporation of barbarians among the Franks see *Lex Salica Em.*, XLIII, § 1 cited elsewhere. For the Lombards see Paulus Diaconus, *De Gest. Lang.* I, 13 (*Historia Langobardorum*, ed. L. Bethmann and G. Waitz, MGH, *Scriptores*, Hanover, 1878):

Igitur Langobardi . . . ut bellatorum possent ampliare numerum, plures a se servile jugo eruptos, ad libertatis statum perducunt. Utque rata posset haberi libertos, sanciunt more solito per sagittam immurmurantes nihilominus ob rei firmitatem quaedam patria verba.

P. Villari, *The Barbarian Invasion of Italy*, tr., London, 1913, p. 284.

manic tribes were obviated by the incorporation of the latter in the conquering host and their consequent acceptance of the conqueror's law. The text of the *Lex Salica* noticed below which speaks of "a Frankish freeman or a barbarian man who lives by the Salic Law" hints at such a status. But this must have been exceptional. The case of the 20,000 Saxons to whom, according to Paul the Deacon, the Lombards refused permission to settle in Italy with their own law—"proprio jure"—probably illustrates the usual treatment of foreigners.

Law, like religion, was a personal possession. This attitude is found admirably expressed in the commentary of Carolus de Tocco on the *Lombarda*. Carolus in the thirteenth century recognizes the right of a person to obligate himself solely by his national law.⁴³

When the Teutonic laws speak of a man's *lex* they describe not merely the law under which he lives but also his whole social position.⁴⁴ The word law in the Teutonic laws has a much wider connotation than does the modern word. That is why, as explained elsewhere, Agobard was opposed to the Burgundian law. He opposed not merely its practice of the judicial duel, obnoxious to his refined moral sense, but also the Arian authorship of the law.⁴⁵ Thus the principle of the personality of law appears as a subjective idea (of the rights of the individual member of the tribe) rooted in religious conceptions. The tie of law and justice with religious conceptions is evident in the curious extension in meaning of the term *handgemal* to include the sacred meeting place of the domanial court as well as the judicial power therein exercised.

What precedents existed in Rome for the practice of the personal law? In a very important sense the Roman law remained a personal law to the last days of the Roman Empire.⁴⁶ The civil law of Rome

43. E. M. Meijers, "L'Histoire des principes fondamentaux du droit international privé à partir du Moyen Age," *Recueil des cours*, p. 554, quotes the gloss by Carolus, in *Lege, Tuum et iudices* (C. 2, 58, 2, f. 39 v.). See also Carolus, in *Lombarda* II, 34, 11, glossa *excludantur* (quoted by Meijers, p. 554): "ius suum cuique tribuere." *Leges Longobardorum cum argutissimis glosis D Caroli de Tocco*, Venice, 1537. On Carolus, see Savigny, *Geschichte des römischen Rechts im Mittelalter*, Vol. V. pp. 174-183. See also Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 563.

44. Examples in Capitularies: *Responsa de rebus Fiscalibus*, in Boretius, *Capitularia*, MGH, I, p. 297, line 5: "eadem lege defendant." *Cap. Miss. Spec.*, Boretius, *Cap.* MGH, I, p. 104, line 35: "secundum legem . . . componantur." Boretius, *Cap.* MGH, I, 201, line 5: "Contra quem culpavit secundum ipsius legem emendet," etc. For a further extension of the meaning of *lex* see the novel thesis of Joseph Balon, *Lex iurisdictio—Recherches sur les assemblées judiciaires et législatives, sur les droits et sur les obligations communautaires dans l'Europe des Francs*, 2 vols., Namur, 1960, I, 215, who concludes: *Lex* means assembly, deliberative and judicial, and is opposed to power of *rex*. Origin of dualism of medieval society is found here. See the index to the *Capitularies* under *lex*, and the article "*Lex*" in Ducange, *Glossarium*, in which some confusion between two senses of the word occurs; see especially "*Legem suam componere*."

45. *Epistolae Karolini Aevi*, t. III, MGH, Berlin, 1899, c. 6, p. 160. Balon, *op. cit.* *supra* note 44, at I, pp. 22-123; II, p. 537.

46. H. D. Hazeltine, *Cambridge Medieval History*, Vol. V. Cambridge, 1926, p. 699;

applied only to citizens and excluded foreigners or *peregrini* from its application. The Edict of Caracalla⁴⁷ was a tremendous effort to transform the personal law of Roman citizens into a universal law for the whole empire,⁴⁸ but its exact application is a matter of question. Though it eliminated many brackets from individuals and groups within the empire, it certainly did not put an end completely to distinctions between citizen and non-citizen.⁴⁹ The study of this edict by Bickermann has attempted to trace the link between the conditions in the third century and the later situation in the Roman Empire.⁵⁰ During the third and following centuries the empire was absorbing large numbers of barbarians into its military forces on the frontiers. These bands, especially the *laeti* (German military colonists), were obviously not treated as Roman citizen communities. They continued the distinction of *peregrini* or non-citizens. They were not subject to Roman law and presumably were allowed to abide by their own customs wherever they resided. Thus the first stage of the barbarian settlement marks the last stage of the development of Roman law. The Germans became in the fourth and fifth centuries the foreign communities which the failing empire failed to absorb.

It would be outside the purview of this part of the study to treat the history of the personality of law in the Roman Empire. Such institutions as the *ius gentium* (law of nations), *reciperatio* (reciprocal protection of citizens of two states),⁵¹ the *meddix tuticus* (a magistrate) in Capua,⁵² *autonomia* (autonomy) in Termessus,⁵³ the Jewish *privilegia*

Buckland and McNair, *Roman Law and Common Law*, 2nd edition, Cambridge, 1952, pp. 23-25.

47. Dio Cassius, *Roman History*, LXXVII, 9; *Hist. Aug., Sept. Sev.*, 1; St. Augustine, *De Civitate Dei* 5, 17; Ulpian, *Digest* 1, 5, 17 (ed. T. Mommsen, Stereotype edition of *Corpus Juris Civilis*, Berlin, 1884): "In orbe Romano qui sunt ex constitutione imperatoris Antonini cives Romani effecti sunt. . . ." The first two writers in the Loeb editions.

48. See note 64 *infra*.

49. L. Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*, Leipzig, 1891, p. 159 ff. For the more recent literature consult among others Sherwin-White, *The Roman Citizenship*, Oxford, 1939, p. 223 ff., where the views of Wilcken, Wilhelm, P. Meyer, and others on the controversial restoration of the Giessen Papyrus are discussed. The Giessen Papyrus 40 is thus rendered by Sherwin-White, *op. cit. supra* at 224: "So I gave to all foreigners in the world Roman citizenship, provided that the status of all communities remains unchanged, except the *dediticii*." See also J. Stroux, *Philologus*, LXXXVIII, p. 272 ff; and A. H. M. Jones, "The Dediticii and the Constitutio Antoniniana," pp. 127-140 of *Studies in Roman Government and Law*, New York, 1960.

50. E. Bickermann, *Das Edikt des Kaisers Caracalla*, Berlin, 1926, pp. 27-34, according to whom Caracalla proposed to give the citizenship to barbarians ready to serve in the army, the *foederati*, but not to the *laeti*, those settled forcibly on imperial soil.

51. H. F. Jolowicz, *Roman Foundations of Modern Law*, Oxford, 1957, p. 38; Paul F. Girard, *Histoire de l'organisation judiciaire des Romains*, Vol. I, Paris, 1901, p. 99; Polybius, *History*, III, 22 (Loeb); and Festus, s. v. "reciperatio," *Sexti Pompei Festi De Verborum Significatu*, ed. W. M. Lindsay, Leipzig, 1913.

52. A. H. J. Greenidge, *Roman Public Life*, London, 1922, p. 304; and Livy, *History*, VIII, 14 (Loeb).

53. *Lex Antonia de Termessibus*, I, tr. E. G. Hardy, *Six Roman Laws*, Oxford, 1911, p. 99. Text in C. G. Bruns, *Fontes Iuris Romani Antiqui*, 7th edition, by O. Gradenwitz, Tübingen, 1909, p. 93.

(privileges),⁵⁴ and the role of local usage in the provinces⁵⁵ all attest to some degree of recognition of the principle during the early and classical periods of legal development. So in a sense do the documents found in Cyrene some years ago.⁵⁶

Though the *ius gentium*, to select one of the leading institutions, had become a general law applicable to all free persons in "matters of commerce," the personal principle, more strictly speaking, "applied especially to matters of family law and inheritance."⁵⁷ Documents such as the *Lex Rubria* concerning the organization of Cisalpine Gaul,⁵⁸ the orations of Cicero for Balbus⁵⁹ and against Verres—the latter with its reference to the rule of the Rupilian law that if a Roman citizen "makes a claim on a Sicilian a Sicilian judge is assigned; if a Sicilian makes a claim on a Roman citizen, a Roman citizen is assigned as a judge"⁶⁰—certainly offer unmistakable evidence that "though Rome had no perfect system of private international law" she did have rules for limiting and regulating conflicts of law, "and this is the vital substance of private international law."⁶¹

It is true that the portion of the codes that might have been expected to deal with conflicts of laws arising from the application of the personal principle are missing. But considerable attention is given in these writings to conflicts of jurisdiction.⁶²

Curious evidence of the way in which the later Roman Empire allowed the practice of foreign laws within its borders is contained in the statement of Bishop Theodoret of Cyrus.⁶³ Theodoret in the fifth century lists some of the peoples who insisted on abiding by their own systems of law.⁶⁴ When the Germanic invaders settled in the empire they

54. Jean Juster, *Les Juifs dans L'empire romain, leur condition juridique, économique et sociale*, Paris, 1914, I, 213; S. L. Guterman, *Religious Toleration and Persecution in Ancient Rome*, London, 1951, p. 108 ff. See Josephus, *Antiquities*, XIV, X, 17.

55. J. Gilson, *L'Etude du droit romain comparé aux autres droits de l'antiquité*, Paris, 1899, p. 181; and F. Schulz, *Principles of Roman Law*, tr. M. Wolff, Oxford, 1936, pp. 14-16, for a recent statement.

56. G. Oliverio, *Notizzario archaeologico*, fasc. IV, 1927, pp. 13-67; A. N. Sherwin-White, *The Roman Citizenship*, p. 212; J. Anderson, "The Augustan Edicts from Cyrene," *Journal of Roman Studies*, 1927, Vol. 17, p. 39.

57. Jolowicz, *Roman Foundations*, pp. 38-39.

58. Greenidge, *op. cit. supra* note 52, at 314. Text in Bruns-Gradenwitz, *Fontes*, p. 97 ff.

59. *Pro Balbo* 8, 21 (Loeb); Greenidge, *op. cit. supra* note 52, at 308.

60. Cicero, *Actionis in C. Verrem Secundae Liber Secundus*, 13, *Opera*, eds. J. G. Barter and C. L. Kayser, Vol. III, Leipzig, 1861, p. 178.

61. Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, London, 1911, Vol. I, p. 301; Mitteis, *Reichsrecht und Volksrecht*, p. 123, denies the existence of such rules; Schönbauer, "Studien zum personalitäts prinzip in antiken Reschte," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, XLIX, pp. 345-403, admits the application of personal law principles within limits.

62. Jolowicz, *op. cit. supra* note 57, at 39.

63. Written in 437.

64. *Theodoret's Episcopi Cyrensis Graecarum Affectionum Curatio*, ed. T. Gaisford, Oxford, 1839, ninth discourse, p. 341. " . . . nor a great many other barbarian peoples,

may have been able to regulate their relations with the Roman provincials to a certain extent on the basis of similar arrangements. An example of such influence may be contained in an interesting, if anachronistic, account of the continuance of Roman law under the barbarians given by Procopius. The latter describes the fate of Roman auxiliaries who were cut off by the barbarian invaders from direct contact with the Roman government and who were able to secure from the barbarian leaders the right to practice their own laws.⁶⁵

In addition, the Roman vulgar law of the later empire marked a first step toward the accommodation with the barbarian custom.⁶⁶ Vulgar law is defined by Levy as "the generic term . . . which comprises all those rules or concepts appearing on Roman soil, especially in the intervening period, which differ from the classical system and yet cannot be traced to some positive enactment."⁶⁷ Vulgar law was governed by social and economic rather than merely legal considerations, and it penetrated legislation as well as practice.⁶⁸ Its influence is revealed especially in the *Interpretatio* (commentary) of the Breviary (Roman code of Alaric II, 506).⁶⁹ Its significance for an understanding of the law of the Germanic kingdoms is immense, for "the Roman law adopted in [these kingdoms] was at first everywhere the vulgar law. And such 'receptions' appear, though in different degrees, in the laws of the Goths and the Burgundians, the Franks as well as the Lombards."⁷⁰ The infusion of Germanic ideas in the vulgar law produced new rules in such areas as "the law of persons, domestic relations and succession. . . ."⁷¹

Under the Frankish Empire the only person who could enjoy the possession of his own national law was one who was socially free and belonged to one of the established national groups. The position of the stranger did not at first fit into this political and legal scheme.⁷² The

though the domination of the Romans has been accepted, use any Roman laws in their own compacts." See also JONES, *THE LATER ROMAN EMPIRE* 284-602, A SOCIAL, ECONOMIC AND ADMINISTRATIVE SURVEY, (1964). See especially Vol. I, pp. 470-522, chapter on "Justice."

65. Procopius, *History of the Wars*, Book V, corresponding with Book I of the *Gothic War*, ch. XII (Procopius, tr. H. B. Dewing, in Loeb Library, London, 1919, Vol. III, pp. 121, 123). See, however, F. Lot, "La conquête du pays d'entre Seine-et-Loire par les Francs:—La ligue Armoricaïne et les destinées du Duché du Maine," *Revue historique*, Vol. CLXV, 1930, pp. 241-253. Passage of Procopius is treated on pages 244-245. Whole text from which the passage is taken is unreliable in affirming presence of Roman troops defending extremities of Gaul in time of Clovis. See further, R. Latouche, *Les Grandes invasions et la crise de l'occident au V^e siècle*, Paris, 1946, pp. 154-157.

66. Jean Gaudemet, *La Formation du droit séculier et du droit de l'église aux IV^e et V^e siècles*, Paris, 1957; *Idem*, "A Propos du 'droit vulgaire,'" *Studi in onore di Biondo Biondi*, Vol. 1, Milan, 1963, p. 271-300.

67. E. Levy, *West Roman Vulgar Law—The Law of Property*, Philadelphia, 1951, p. 6.

68. *Id.* at 7.

69. *Ibid.*

70. *Id.* at 15.

71. *Ibid.*

72. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, pp. 399 ff.; Klimrath, *Travaux sur l'histoire du droit français*, Vol. I, p. 405.

society revealed in the early laws of the barbarians possessed no machinery such as the Roman praetorship for dealing with foreigners or strangers.⁷³ But as the power of kingship increased a new instrument of legal development began to operate, namely, the judicial power of the king. This extension of royal influence is revealed in the new status accorded to the stranger in Lombard law. The stranger, or *wargangus*, was very much like an outlaw unless he had placed himself under the protection of a patron who was in the enjoyment of full political and legal rights. As time went on, the king took the stranger under his protection if the newcomer had not chosen another patron. This process can be clearly seen in the law of Rothari:

All the Gargangi or Wargangi, that is strangers who come from afar to settle in our kingdom under the protection of the royal safeguard, ought to live according to the Lombard law unless they have obtained the royal permission to live according to their national laws. If they leave legitimate children, these shall inherit like the legitimate children of Lombards; if they do not have legitimate children they shall not be able without the royal permission to make a will in favor of anyone they wish, nor to alienate their goods under any title whatsoever.⁷⁴

Because of the protection accorded the stranger the former's composition was paid to his patron or sometimes to the treasury of the king.⁷⁵ Royal ordinances make a duty of the practice of hospitality. The law of the Burgundians, for example, assesses damages against anyone who has refused shelter to the stranger.⁷⁶

The Jews in the Frankish Empire were also in the position of strangers enjoying limited rights by the consent of the king in whose protection they were. They were under the control of a special functionary called the *magister iudaeorum* (magistrate for Jews) from the time of Louis the Pious.⁷⁷

73. Were foreigners "rechtlos"? (Brunner, *Deutsche Rechtsgeschichte*, I, p. 399). In theory perhaps, but in actual practice, as a study of all the references reveals, no. See Eduard Meyer, *Geschichte des Altertums*, Vol. I, 5th edition, Stuttgart and Berlin, 1925, sections 33, 34. The major references are collected by G. A. Davoud-Oghlou, *Histoire de la legislation des anciens Germains*, Berlin, 1845, vol. I, p. CVI, and section "U" for each of the barbarian laws examined, vols. I and II.

74. *Edictus Rothari*, 367, *Leges Langobardorum*, MGH, edition in 80 by Bluhme, p. 68: "... legibus nostris langobardorum vivere debeant, nisi si aliam legem ad pietatem nostram meruerint. . . ."

75. Examples in the laws of the Bavarians and Alamanni: *Lex Baiwariorum*, IV, XXXII, ed. Heymann, MGH, pp. 336-337; *Leges Alamannorum*, VCVII, 2 (E. Codd. A), XCIX, 25 (E. Codd. B), ed. Karl Lehmann, MGH, Hanover, 1888, p. 156.

76. *Leg. Burg.*, XXXVIII, 1, ed. de Salis, MGH, p. 69.

77. SOLOMON KATZ, *THE JEWS IN THE VISIGOTHIC AND FRANKISH KINGDOMS OF SPAIN AND GAUL* 83-84. The position of the Jews under the personal law system will be examined more fully in a note in the chapter dealing with the determination of a person's national law. For what follows see Balon, *Lex Jurisdiction*, II, notes 78, 198, 397, 623, 857.

In our examination of the provisions of the various *leges barbarorum* in regard to strangers, we must realize that we are dealing with privileges. The notion of a legal privilege existed among the barbarian peoples as well as among the Romans and it is by way of such legal privileges that precedents were often set for later extensions of legal rights. What was originally a grant to an individual could eventually become the basis of a national right.

C. Dualistic Systems

Though the principle of the personality of law existed inchoately among the early Germans in the sense in which we have just defined it, it would have been difficult for any system of private international law to develop in this period. If we take the example of Rome, we find that the distinction between civil law and the law of nations was applied by regular magistrates with some legal training. Among the barbarian kingdoms, the only machinery that might have carried out a policy based upon principles of private international law was the possession of the conquered population. We know that the notarial practice among barbarians and Romans from the fifth to the eighth centuries was dominated by Romans or persons who had some training in the forms of Roman law.⁷⁸ One of the best examples of this type of Roman influence on Germanic law is the formulary of Marculf prepared in the region of Paris probably in the seventh century.⁷⁹

At the outset there was only one personal law, that of the Romans. The first evidence exists in the preface to the Roman Law of the Visigoths which expressly recognizes the legal rights of the Roman subjects in the Visigothic realm.⁸⁰ How extensive a jurisdiction did the Romans enjoy under the Visigoths? The Breviary and its *Interpretatio* are the only documents that can enlighten us on this question and much is disputed as to their application. The *Interpretatio* does not appear to have been the work of the commissioners of Alaric, as Savigny believed, and, therefore, could not incorporate modifications of the Roman municipal and judicial organization introduced by the Goths in the early sixth century.⁸¹ Nevertheless, when due allowance is made for antiquarian

78. L. Stouff, "Etude sur le principe de la personnalité des lois depuis les invasions barbares jusqu'au XII^e siècle," *Revue bourguignonne de l'enseignement supérieur*, IV, 1894, 8-10.

79. H. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 579. The formulary is strongly Germanic but shows Roman influence. See below.

80. *Commonitorium, Lex Romana Visigothorum*, ed. G. Haenel, Leipzig, 1849, p. 3. "Providere ergo te convenit, ut in foro tuo nulla alia lex neque iuris formula proferri vel recipi praesumatur."

81. F. von Savigny, *Geschichte des römischen Rechts im Mittelalter*, Vol. I, p. 301 ff.; followed by T. Mommsen, Preface to *Codex Theodosianus*, Berlin, 1905; by M. Conrat, *Die Entstehung des westgotischen Gaius*, Amsterdam, 1905, Sec. 12; idem, *Der Westgotische Paulus*, Amsterdam, 1907, Sec. 14. The view of the text is based on Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 514, and Brissaud, *Manuel d'histoire du droit français*, pp. 69-70. For a more recent summation see Chenon, *Histoire du droit français*, I, pp. 224-226.

elements in the code it seems safe to agree with Savigny that in matters of public law the code contains less that is obsolescent than in matters of private law.⁸² Even if we do not grant Savigny's view that the decurions of the cities exercised greater power under the Visigoths than under the empire,⁸³ it appears that the Roman municipal and judicial machinery continued to operate in the cities.

How much actual Roman jurisdiction do these continuing institutions denote? They signify a more extensive application of Roman law doctrines to Romans than in any other barbarian kingdom. The term *iudex* (judge), for example, when used of a city, according to Savigny, refers to the *duumvir* (a magistrate) or *defensor*.⁸⁴ Petty crimes are inferentially left to their jurisdiction.⁸⁵ Civil suits may be tried before the governor of the province or any court of record, the latter including the *defensor*.⁸⁶ The old *restitutio integri* (reinstatement in former legal position) of the praetor continues but is now vested in the municipal *iudices* (judges).⁸⁷ Adoption,⁸⁸ the making of wills⁸⁹ and donations⁹⁰ fall within the competence of *curia* (municipal council) and *decurions* (members of council). Appellate rights of the Romans are retained.⁹¹ Finally the text of the code decreeing that criminal charges against a senator must be heard before five other senators is transformed in the *Interpretatio* into a similar grant of trial by *nobiles* (members of the ruling class).⁹² In all these cases jurisdiction is exercised jointly by governor and by municipal officials. The judicial organization is thus partly Gothic and partly Roman, but how far Gothic and how far Roman remains a problem.

In brief, under the Visigoths the Romans enjoyed the benefit of Roman law among themselves in civil cases and to a limited extent in criminal matters. In lawsuits between Romans and Goths, as well as in cases of homicide, it appears that Gothic law was employed.⁹³

82. Savigny, *op. cit. supra* note 81, at Vol. I, pp. 301-302.

83. *Id.* at 303-305.

84. Savigny, *op. cit. supra* note 81, at Vol. I, p. 303. See the *Interpretatio to Paul I*, 7, 2 (*Lex Romana Visigothorum*, ed. Haenel).

85. *Inter. Cod. Th.*, II, 1, 8 (Haenel, pp. 32-34); ". . . ad mediocres iudices . . . id est, aut defensores aut assertores pacis."

86. *Inter. Cod. Th.*, II, 4, 2 (Haenel, p. 36).

87. *Inter Paul*, I, 7, sec. 2 (cited *supra*).

88. *Inter Cod. Th.*, V, 1, 2 (Haenel, p. 136): ". . . adoptivum id est gestis ante curiam affiliatum."

89. *Inter. Cod. Th.*, IV, 4, 4 (Haenel, p. 106): "Testamenta omnia . . . apud curiae viros."

90. *Cod. Th.*, VIII, V, i (Haenel, p. 156): "Apud Iudicem vel Magistratus." *Inter. Cod. Th.*, VIII, V, 1 (Haenel, p. 156): "Aut apud iudicem, aut apud curiam."

91. *Inter Cod. Th.*, II, 1, 6 (Haenel, p. 32).

92. *Cod. Th.*, II, 1, 12 (*L. Rom. Vis.*, Haenel, p. 34).

93. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 384; M. A. v. Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts in geschichtlichen Entwicklung*, Bonn, 1864-1874, Vol. IV, pp. 194, 332; K. Zeumer, *Neues Archiv der Gesellschaft für ältere deutsche Geschichtskunde*, Hanover, Vol. XXIII, p. 471.

A second document is the introduction to the Burgundian law of the year 500, which recognizes two categories of legal subjects, Romans and Burgundians.⁹⁴

Of special interest to the student is the Roman law of the Burgundians known through the error of a copyist as the *Papian*.⁹⁵ The first thirty-six titles follow the order of the *Lex Gundobada*, the rest do not. Many titles of the Burgundian code are therefore not found in the *Papian*.⁹⁶ On a few matters on which the Roman law is silent the *Papian* invokes the authority of the Germanic law, as in the case of composition of a Roman: "Quia de pretio occisorum nihil evidenter lex Romana constituit" (Because the Roman law makes no provision for payments in satisfaction of homicide).⁹⁷ The existence of the *Papian* proves in a marked way the acceptance of the dual personal law system among the Burgundians while also suggesting limits to the application of the Roman law to Romans.

Did the Romans enjoy a separate court system under the Burgundians? It seems not, although there is a hint in the *Papian* that certain provisions of the Roman criminal law were applied to Romans. The Burgundian law was also enforced in cases arising between Romans and Burgundians, but with assessors of both nationalities on the tribunal.⁹⁸

94. For the date of the code see Brunner, *Deutsche Rechtsgeschichte*, Vol. I, pp. 497 ff. and Brissaud, *Manuel*, pp. 82-83. Though much question is raised by the occurrence of the name of Sigismund in the code, the major part of the code belongs to Gundobad. The two prefaces, as Brissaud points out (*Manuel*, p. 82, n. 4) really form one with later interpolations by Sigismund. See especially A. Coville, *Recherches sur l'histoire de Lyon du V^{me} siècle au IX^{me} siècle (450-800)*, Paris, 1928, p. 193; *Leges Burgundionum, Prima Constitutio*, 3, ed. L. De Salis, MGH, Hanover, 1892, p. 31; *L. Burg., Prim. Const.*, 5, MGH, pp. 31-32; *L. Burg., Prim. Const.*, 8, MGH, p. 32. The other references to Romans in the *Prima Constitutio* are No. 11, MGH, p. 33: "Si quis sane iudicum, tam barbarus quam Romanus . . ."; and *L. Burg., Prim. Const.*, 13, MGH, p. 33: ". . . vel Romanus comes vel Burgundio. . ."

95. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 506; Coville, *op. cit.*, pp. 198-199. It is not a collection of constitutions. The best critical account is now, W. Roels, *Onderzoek naar het gebruik van de aangehaalde bronnen van Romeins Recht in de Lex romana Burgundionum*, Antwerp, 1958. See note 98 below.

96. *Ibid.*

97. *Lex Romana Burgundionum*, II, 2, 3, ed. De Salis, MGH.

98. These conclusions will emerge from the following provisions in the *Leges Burgundionum*; *Const.*, VIII, 1, ed. De Salis, MGH, p. 49; *Const.*, XXXVIII, 5, ed. De Salis, MGH, p. 70; *Const.*, XXVIII, 1, ed. De Salis, MGH, p. 65; *Const.*, XV, 1, ed. De Salis, MGH, p. 54; *Const.*, XIII, ed. De Salis, MGH, p. 52; *Const.*, X, 1, ed. De Salis, MGH, p. 50; and *Const.*, IX, ed. De Salis, MGH, p. 50. In matters of private law involving Romans, Roman law was applied. Was Roman law also applied in criminal questions? Probably not. Delicts or torts may very well, however, have been settled by Roman law. In all cases between Burgundians and Romans there seems little doubt that the Roman law gave way to Burgundian law. See also Brunner, *Deutsche Rechtsgeschichte*, Vol. I, pp. 383-384. Nevertheless, the Roman law became the valid territorial law in cases involving lands held by Burgundians *iure hospitalitatis*. See *Const.* LV of the Burgundian code and the comment on it by E. T. Gaupp, *Die germanische Ansiedlungen und Landtheilungen in den Provinzen des römischen Westreiches*, Breslau, 1844, p. 360 ff. Were there separate judges for Romans and Burgundians? Coville, *Recherches*, pp. 216-217 seems to believe so, at least in Lyon.

Recent attempts to deny the existence of personality or to antedate the advent of territoriality among Burgundians and Visigoths, by throwing into question accepted views concerning the barbarian and Roman codes in these kingdoms, must be regarded as challenging but as yet unproved theories.

Whatever the relations of the Franks originally to the Roman Empire, when they began their conquest of southern Gaul under Clovis, they did so as representatives of Catholic Christianity and as enemies of the Arian kingdoms. They recognized the legal rights of their Roman subjects at least in the south, though they never issued a separate code for them, as did the Visigothic and Burgundian rulers. In its treatment of persons and the orders of society the Salic law⁹⁹ shows the influence of the Roman environment and the acceptance of the principle of the personal law in its dualistic form.¹⁰⁰ The composition of the Roman is stated and the amount determined as a fraction of that of the Frank.¹⁰¹ A number of the provisions of the code deal with social classes among the Roman as well as Frank population.

One of the provisions of the Salic law bearing on the status of persons is the one which speaks of a "Salian Frank or a barbarian who lives by the Salic law."¹⁰² A host of conflicting deductions and constructions have appeared based on this portion of the text. Does the text mean to include under the head of those who lived by the Salic law other

For what follows see MUSSET, *LES INVASIONS*, p. 280. A García Gallo, "Nacionalidad y territorialidad del derecho" *Anuario de historia del derecho español*, XIII, 1936-41, pp. 168-264, argues for territoriality under Leovigild (570-580). Alvaro d'Ours, *Estudios visigóticos: II. El código de Eurico*, Madrid, 1960, regards the Code of Euric (if there was one) as territorial and also as an example of Roman vulgar law later Germanized. Similar attempts, notably by Roels, *op. cit. supra* note 95, to transform the Papian into a privately issued work, and to emphasize more strongly than heretofore the territorial character of the *Lex Burgundionum* are examined in a review by G. Chevrier, *Bibliothèque de l'Ecole des Chartes*, Paris, 1960, pp. 206-209. The radical views of Simon Stein with regard to *Lex Salica* were introduced to American readers in an article, "Lex Salica," in *Speculum*, XXII, nos. 2, 3 (1947), pp. 113-134, 395-418. Stein's conclusion that the *Lex Salica* (as we have it) is a forgery of the ninth century has not gained adherents. Stein's work and, for that matter the critical handling of the Visigothic and Burgundian codes noted above, underline, it seems to the author, the need to distinguish more strongly between the oral tradition that really constitutes each of the barbarian laws and the written compilations that bear the names of these national customs. The latter depend on a more or less fallible manuscript tradition, the former must be reconstructed with the help of charters, *formulae* and other documents, as well as critically acceptable texts of the *leges barbarorum*.

99. J. H. Hessels, *Lex Salica, the Ten Texts with the Glosses and the Lex Emendata*, London, 1880, col. XIV ff.

100. Buchner, *Rechtsquellen*, pp. 15-21 for a recent statement; Savigny, *Rom. Recht in Mittelalter*, Vol. I, p. 122.

101. *Lex Salica*, XIV, 1, 2, 3 (ed. Behrend, 2nd edition, Weimar, 1897, pp. 26-27); XXXIX, 2, 3 (ed. Behrend, pp. 72-73); XLI, 1, 5, 6, 7 (ed. Behrend, pp. 79-81); XLII, 3, 4 (ed. Behrend, pp. 84-85). J. J. Thonissen, *L'Organisation judiciaire, le droit pénal et la procédure pénal de la loi salique*, 2nd edition, Brussels and Paris, 1882, p. 91.

102. *Lex Salica* XLI, 1, (ed. Behrend, p. 79), Hessels, *Lex Salica*, Cod. I, col. 244: "Si quis ingenuo Franco aut barbarum qui legem Salicam vivit occiderit, cui fuerit adprobatum 8000 dinarios qui faciunt solidos 200, culpabilis iudicetur."

Germans who were settled in the Frankish dominion? The explanation given by Sohm and Thonissen, that the conjunction "or," the Latin *aut*, is a tautology characteristic of the style of the Salic law and its continuations, resolves this question, but hardly in a manner that will satisfy all inquirers.¹⁰³ The Herold text adds to the perplexities of the Salic text.¹⁰⁴ One manuscript reading of the same provision speaks of "a Frank, a barbarian or one who lives under the Salic law."¹⁰⁵ In this passage an additional *aut* appears to complicate the interpretation of the text. The inference drawn from this text by Montesquieu and others was that Romans were allowed to assume the Salic law if they wished and that consequently not two but several groups enjoyed personal law rights.¹⁰⁶ The manuscript reading in this case must be regarded as an aberration. Pardessus attributed the extra conjunction in this text to the slip of a copyist's pen.¹⁰⁷

Consequently, it is safe to say that the Salic law recognizes only two groups for purpose of determination of the *wergeld* or composition, the Franks and the Romans.¹⁰⁸

Another confirmation of the dual system in which the Romans alone enjoyed personal law rights is the constitution of Clothar II (584-629) which contains express provision for the settlement of legal cases among the Romans by Roman law.¹⁰⁹ "Inter Romanos negotia causarum romanis legibus praecepemus terminari" (We decree that litigation among Romans be settled by the Roman laws).¹¹⁰

103 R. Sohm, *Die altdeutsche Reichs- und Gerichtsverfassung*, Vol. I, *Die fränkische Reichs- und Gerichtsverfassung*, Weimar, 1871, p. 570 ff.; Thonissen, *op. cit. supra* note 101, at 134-138. Professor Ganshof, in a comment on this passage, does not regard it as a tautology.

104. Herold, *Originum ac Germanicarum Antiquitatum libri*, Basel, 1557, gives a text of *Lex Salica* which forms the third appendix of Pardessus, *Loi salique* and the tenth text of Hessels. The MS or MSS from which Herold worked are lost. See cols. XXI-XXII of Hessels' work.

105. Text in Pardessus, *Loi salique*, p. 249; Hessels, *Lex Salica*, col. 250; *Pactus Legis Salicae*, XLIV, *De Homicidiis Ingenuorum*, "Si quis ingenuus Franco, aut Barbarum, aut hominem qui Salica lege vivit, occiderit, Malb. leudi, VIII M Denarios qui faciunt solidos CC culpabilis iudicetur."

106. Montesquieu, *Spirit of the Laws*, XXVIII, ch. IV.

107. Pardessus, *op. cit. supra* note 105, at 444.

108. Professor Ganshof comments on this passage: "Conclusion is right but this does not permit one to conclude that only *romani* enjoyed personal law rights. The *Lex Salica* is not a complete code. The Constitution of Clothar deals with definite cases."

109. The *praeceptio* is put in the reign of Clothar II rather than Clothar I by Boretius, *Capitularia Regum Francorum*, MGH, Vol. I, p. 18; G. Waitz, *Deutsche Verfassungsgeschichte*, Kiel and Berlin, 1880 ff., Vol. II, 2nd edition, p. 683, and E. Loening, *Geschichte des deutschen Kirchenrechts*, Vol. II, Strassburg, 1878, p. 269. The authorship of Clothar I is maintained by P. Roth, *Geschichte des Benefizialwesens von den ältesten Zeiten bis ins zehnte Jahrhundert*, Erlangen, 1850, p. 224; and by M. Bloch, "Observations sur la conquête de la Gaule romaine pas les rois francs," *Revue Historique*, CLIV (1927), 166 ff.

110. *Chlotharii II Praeceptio*, Boretius, *Capitularia Regum Francorum*, MGH, Vol. I, p. 19, c. 4. Before the subject is dismissed mention should also be made of *Lex Salica*, XLVII which in a rubric, "De Filtortis Qui Lege Salica Vivunt," Hessels, *Lex Salica*, London, 1880, cod. 4, col. 301, suggests that some persons, presumably Romans, did not live by the Salic

What type of legal questions could thus be settled by Roman law? The edict as well as the Salic Law itself do not indicate whether the Romans enjoyed a criminal in addition to a civil jurisdiction among themselves. I am inclined to agree with Pardessus that the "negotia causarum" included only civil cases and that criminal matters along with all cases arising between Franks and Romans were settled by Frankish law.¹¹¹ The robbery of a Frank even by a Roman, for example, was punished in the Frankish law according to Salic law.¹¹² The Frank, however, who robbed a Roman did not pay as large a sum as the Roman who robbed a Frank.¹¹³ Thus, the Romans were subjected, for certain purposes, to the Salic law.

The Edict of Theodoric in Italy, issued around the year 500, applied to Goths and Romans.¹¹⁴ The Edict has given rise to many questions con-

law, van Wetter, *Droit roman et droit germanique dans la monarchie franque*, Paris, 1899, part I, p. 10, note.

111. Pardessus, *Loi Salique*, p. 446 cites titles XV (*De homicidiis vel si quis uxorem alienam tulerit*) and XLII (*De Homicidio in contubernio facto*) and XLIII (*De homicidio in contubernio . . . facto*) to prove the application of Salic law to Romans in matters of composition.—*Lex Sal.*, XV (Pardessus, p. 10; Hessels, col. 91): "Si quis hominem ingenuum occiderit aut uxorem alienam tulerit a vivo marito, mal. leudardi, hoc est VIII M din., qui faciunt Solidos CC culpabilis iudicetur."—*Lex Sal.*, XLII, 4 (Pardessus, p. 23; Hessels, col. 262): "De Romanis vero vel letis et pueris haec lex superius comprahensa ex medietate solvantur."

How about a crime committed by a Roman against a Roman? Pardessus, p. 447, cites the MS. Wolfenbüttel, title XVI, 3, which imposes on the Roman defendant non-Roman procedure, i.e., justification by oath-helpers or by proof of boiling water and, if guilty, prescribes a composition of XXXX solidi; *Lex Salica* (Wolf. MS.), XVI, 3 (Pardessus, p. 167, Hessels, col. 2, col. 92): "Si Romanus hoc Romanum admiserit et certa probacio non fuerit per XX se iuratores exsolbat medius tamen electus; se iuratoris invenire non potuerit tunc ad inium ambulit, hoc dicunt Malb. leodecal, sunt dinarius MCC, faciunt solidos XXX culpabilis iudicetur." Cf. *Lex Sal.* (Wolf. MS), XIV, 2 (Pardessus, p. 166; Hessels, col. 2, col. 83): "Si vero romanum franco saligo expoliaverit, et certa non fuerit per XXV se iuratores exsolbat, medius tamen electus; se iuratores non potuerit invenire, Malb. murdo, aut ad inium ambulat, aut MMD dinarius, qui faciunt solidos LXII, culpabilis iudicetur." See Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 384, and note 7. In the light of this evidence it is difficult to agree with the view that, in the sixth century at least, the Romans enjoyed a separate criminal jurisdiction under the Franks or indeed that Roman law was ever applied in relations between Franks and Romans, as Schröder has tried to argue, *Historische Zeitschrift*, XLII, pp. 194, 195.

Pardessus, pp. 447-448 also compares title VII, 2 with title XI, 9 of *Capita extravagantia* to prove that outside the field of civil law proper the Romans were subject to Salic law; *Cap. Ex.*, VII, 2 *De muliere vidua qui se ad alium maritum donare voluerit* (Pardessus, p. 331): "De puellas militarias vel litas haec lex medietate servetur." Question of civil law; therefore, no mention of Romans. *Cap. Ex.*, XI, 9, *De muliere cesa vel excapitata* (Pardessus, p. 334): "Haec lex de militunias vel letas Romanas in medietate convenit observare." Question of composition, i.e., criminal law; therefore, mention of Romans.

112. *Lex Sal.*, XLI (Behrend, p. 79; Hessels, col. 244): "Si quis ingenuo franco . . . occiderit . . . solidos CC culpabilis iudicetur."

113. *Lex Sal.*, XLI, 6 (Behrend, pp. 80-81; Hessels, col. 253): "Si vero Romano possessorem . . . qui eum occiderit . . . solidos C culpabilis iudicetur."

114. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, pp. 526 ff. For the date, p. 527. On the Ostrogothic king's *ius edicendi* as opposed to the legislative power of the emperor, see T. Mommsen, *Ostgothische Studien*, (*Ges. Schriften*, VI, 457 ff. 459, 476 ff.)

cerning its sphere of operation.¹¹⁵ Some authors have been unable to believe that the Goths gave up their national customs in order to accept the Roman law. Others have tried to interpret the code in such a way as to make it apply only in litigation between Italians and Goths. Yet the text of the code itself says, "Quae barbari Romanique sequi debeant" (which barbarians and Romans should follow).¹¹⁶ Did the Goths remain subject to their own customs in matters that the Edict did not regulate? "The code, however, touches on all branches of law. How can one suppose under this arrangement the contradictory authority of Roman law and of Gothic customs?"¹¹⁷ The *Variae* of Cassiodorus as well as the code itself furnish evidence on this question.

The prologue of the *Edictum Theoderici*, after speaking of complaints brought to the ears of the government that the "precepts of the laws were trampled under foot," ordains "what course Barbarians and Romans ought to pursue in respect of the several articles here set forth."¹¹⁸ The "edicts" mentioned in this passage are designed to settle disputes arising between Romans and barbarians; the law in such cases is common to both peoples. But other laws already existing, *i.e.*, Roman and Gothic, are inferentially not barred if they do not invalidate the provisions of the Edict. The epilogue of the *Edictum* supports this inference by affirming that "those cases which either the brevity of the Edict or our public cares have not allowed us to comprehend in the foregoing must be terminated when they arise by the regular course of the laws."¹¹⁹ If any confirmation were necessary of the dualistic nature of the Gothic legal provisions found in the code of Theodoric, it can be found in several letters of Cassiodorus. In one of them Cassiodorus asserts the existence of a law "common to Goths and Roman";—"Gothis Romanisque apud nos ius esse commune."¹²⁰

Another letter of Cassiodorus containing the *formula* of investment of the Gothic count prescribes that in "contests between two Goths" the edicts are to be invoked, but that "if any matter should arise between a Goth and a born Roman, he (the count) may, after associating with himself a Roman jurisconsult, decide the strife by fair reason. As between two Romans the decision is to rest with Roman examiners (*cognitores*)."

115. On the *Edictum Theoderici* and the various theories as to its application see Pertile, *Storia del diritto italiano*, Vol. I, 2nd edition, pp. 122-123; Savigny, *Rom. Recht im Mittelalter*, Vol. I, 2nd edition, p. 336 ff.; Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 525 ff., and Calisse, in *General Survey of Events, Sources, Persons and Movements in Continental Legal History*, p. 10 ff.

116. *Edictum Theoderici*, Prologus, ed. F. Bluhme, MGH, p. 152.

117. L. De Valroger, "Les Barbares et leurs lois," *Revue critique de législation et de jurisprudence*, XXIX, 1866, p. 440.

118. *Edictum Theoderici*, Prologus, ed. Bluhme, MGH, p. 152.

119. *Ed. Theod.*, 155 (*Epilogus*), MGH, p. 168.

120. Cassiodorus, *Variae*, VIII, 3; *Cassiodori Senatoris Variae*, ed. T. Mommsen, MGH, *Auctores Antiquissimi*, tomus XII, Berlin, 1894, p. 234 (*Patrologia Latina*, LXIX, col. 736).

The letter then concludes with the wish "that each [people] may keep its own laws and with various judges one justice may embrace the whole realm—una justicia complectatur universos."¹²¹ Still another letter sent in the name of King Athalaric to the Count of Syracuse warns the latter against citing "causes between two Romans" before his tribunal against their will.¹²²

The following conclusions concerning the Ostrogothic legal system appear to me to emerge from a study of these documents: (1) Only two nationalities, the Roman and the Gothic, receive legal recognition. (2) The personnel of the court varies, depending on whether the lawsuit is between two Goths, two Romans, or between a Goth and a Roman. Presumably different legal principles would be applied in cases where Roman assessors, or *cognitores*, sat. (3) The *Edictum Theoderici* in its 154 titles covers *every phase* of law; a division of competence between Gothic and Roman Laws on the basis of separate branches of law (as of persons, contracts, etc.) is therefore not apparent. (4) The *Edictum* nevertheless binds Goths and Romans on all matters covered by its titles. This is not incompatible with the existence of separate Gothic and Roman laws. The epilogue of the *Edictum* attests this fact.

In brief, the common law of Goths and Romans is Roman law incorporated in the Edict of Theodoric and perhaps other enactments. However, as in England local customs existed side by side with the common law,¹²³ so in parts of Italy it is probable that Gothic legal ideas survived throughout the early Middle Ages.¹²⁴

The Lombard legislation gives little information in its earlier stages on the all-important question of the relations of Lombards and Romans.¹²⁵ There is no definite trace of the principle of the personality of law in the early Lombard codes except a reference noticed elsewhere in the laws of Rothari to the *Gargangi* (strangers) in which a privilege of a personal law is mentioned as a special dispensation from the king.¹²⁶ The recognition of Roman law has been inferred, inconclusively however, from the following extract which mentions "a free woman living according to the

121. Cassiodorus, *Variae*, VII, 3, MGH, p. 203 (*Pat. Lat. LXIX*, col. 709).

122. Cassiodorus, *Variae*, IX, 14, MGH, p. 279 (*Pat. Lat. LXIX*, col. 778).

123. I POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD 184-187* (2d ed. 1898).

124. Is there any evidence of the survival of Ostrogothic law? A deed drawn up at Brescia in 769 by a Goth named Stavila has given rise to some controversy. In this document (*Codex Diplomaticus Langobardiae in Historiae Patriae Monumenta*, XIII, Turin, 1873, no. 38, col. 72) Stavila disposing of land and property professes to be *vivens legem Gothorum*. Brunner sums up the case for Stavila's being an East Goth, *Deutsche Rechtsgeschichte*, Vol. I, p. 396, note 65. J. Ficker, *Untersuchungen zur Erbfolge der ost germanischen Rechte*, Innsbruck, 1891-1904, Vol. IV, pp. 330 ff., has shown the continuance of East Gothic law in Istria and Friuli especially in matters relating to family law.

125. Pertile, *Storia del diritto italiano*, Vol. I, 2nd edition, pp. 55 ff.

126. *Edictus Rothari*, 367, MGH in 80, pp. 68-69 (MGH 4, p. 85). On Lombard Laws see Brunner, *Deutsche Rechtsgeschichte*, Vol. I, pp. 529 ff.

law of the Lombards-Nulli mulieri sub regni nostri ditionem Legis Langobardorum viventem."¹²⁷

Liutprand's laws first introduce us to the principle of the personality of law. In the writing of deeds a provision specifically acknowledges the authority of the Roman law beside that of the Lombard law but gives no indication how it was applied by the courts, or whether it was limited to private law. Liutprand's actual words on this point are interesting:

We have ordained that they who write deeds, whether according to the law of the Lombards (since that is most open and known by nearly all men), or according to the law of the Romans, shall not prepare them otherwise than according to the contents of those laws themselves. For let them not write contrary to the law of the Lombards or the Romans. If they do not know the provisions of those laws, let them ask others who do, and if they cannot fully learn the laws, let them not write the deeds.¹²⁸

According to another law of Liutprand a Lombard woman who married a Roman lost her Lombard nationality and became a Roman. The children of such a marriage were Romans.¹²⁹

In the eighth century in Italy there is further evidence of a negative character of the practice of the dual system in a plea or *placitum* of the crown in which, though the case was heard according to Lombard law, a number of the judges are Alamans.¹³⁰

Under the Lombards as under the other Germanic peoples the Romans alone enjoyed personal law rights. Unlike the situation in the other kingdoms, however, the Lombards limited the application of Roman law from the start even in the field of private law. Furthermore, in Italy as elsewhere the Roman law was not valid for Romans as a criminal code. More so than other systems the Lombard law was "territorial."¹³¹

Acts of sale in North Africa under Vandal domination show little effect of the barbarian occupation, and disclose the continuance of local and Roman legal practices.¹³²

127. Edictus Rothari, 204, MGH, in 8°, p. 43. See also *Ed. Roth*, 194, MGH, in 8, p. 40: "Si quis cum *ancilla gentili* fornicatus fuerit, componat domino eius solidos XX." Neither passage appears to me to be decisive on the question.

128. *Liutprandi Leges*, 91 (VIII) anno 727, *Leges Langobardorum*, ed. F. Bluhme, MGH in 8°, p. 120 (MGH, 4, p. 144): "*nam contra legem Langobardorum aut Romanorum non scribant.*"

129. *Liut. Leg.*, 127, MGH in 8°, p. 134 (MGH, 4, p. 160). Cf. *Liut. Leg.*, 153, anno 735.

130. Savigny, *Röm. Recht in Mittelalter*, Vol. I, pp. 123-24, citing Fumagalli, *Codex Diplomaticus*, p. 18.

131. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 384; Karl Neumeyer, *Die gemeinrechtliche Entwicklung des internationalen privat und Strafrechts bis Bartolus*, Vol. I, *Die Geltung der Stammesrechte in Italien*, Munich, 1901, pp. 22 ff., 80 ff.

132. E. Albertini, "Actes de vente du V^e siècle trouvées dans la région de Tébessa," *Journal des Savants*, 1930, 23-30.

The Anglo-Saxons who effected the conquest of England in the fifth century do not appear to have developed a principle of personality of law even on the limited scale practiced in the other kingdoms.¹³³

D. *Growth of the Frankish Régime of Personal Laws*

For reasons which may only be surmised these more primitive barbarian arrangements for regulating the legal relations among members of the national groups received a significant extension in the Frankish kingdom. Instructions issued to Frank officials at a date long after the *Lex Salica* and included in one of the *formulae* of the period, list among their duties:

et omnis populus ibiden commanentes, tam Franci, Romani, Burgundiones, quam reliquas nationes sub tuo regimine et gubernatione degant et moderentur, et eos recto tramite secundum legem et consuetudinem eorum regas (and the entire population there residing, Franks, Romans, Burgundians as well as other nations, should live and conduct themselves well under your rule and government, and may you direct them in the right path according to their law and custom).¹³⁴

The date of composition of the formulary of Marculf has been in dispute. On the whole it appears to be a seventh-century product,¹³⁵ though some of the *formulae* were added in the eighth century. Between the constitution of Clothar at the end of the sixth century and the statement in Marculf a century or more later, an important extension of the principle of the personality of law had taken place. In the Constitution of Clothar we still observe the dualistic system based on the recognition of Roman and Frankish law; in Marculf the privilege has been extended to Burgundians and "other nations living under the Frankish régime." No document, however, in the intervening period enlightens us on the exact method or time in which this transition took place.

The Ripuarian law signalizes a noteworthy advance in the growth of the personal law system by decreeing "that if a Frank, a Burgundian, an Alaman or a member of any nation established in the country occupied by the Ripuarians, be summoned in judgment, that he be judged according

133. F. W. Maitland, *English Law*, 8 *ENCYCLOPEDIA BRITANNICA* 564 (14th ed.); *Materials for the History of English Law*, 2 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY*, 67 (1908).

134. Marculf, I, 8, *Formulae*, ed. K. Zeumer, MGH, p. 48.

135. A. Tardif, *Histoire des sources de droit français, origines romaines*, Paris, 1890, p. 172, and "Etude sur la date du formulaire de Marculf," *Nouvelle revue historique de droit français et historique*, Vol. XIII, 1884, pp. 557 ff. places it between 650 and 656; K. Zeumer, ed. *Formulae*, MGH, pp. 32-36 places it at the end of the seventh or beginning of the eighth century. The formulary was revised in the eighth century. See also Brunner, *Deutsche Rechtsgeschichte*, Vol. I, pp. 579-580. Levillain puts the date around 650 and favors the region of Paris as the place of origin, Leon Levillain, "Le formulaire de Marculf et la critique modern," *Bibliothèque de l'Ecole des Chartes*, LXXXIV, 1923, pp. 21-91.

to the law of the country in which he was born," and that "If he is condemned he shall suffer the penalty which is indicated in the law of his country and not what is prescribed by the law of the Ripuarians."

Hoc autem constituemus, ut infra pago Ribuario tam Franci, Burgundionis, Alamanni, sue de quacumque natione commoratus fuerit, in iudicio interpellatus, sicut lex loci contenit, ubi natus fuit, sic respondeat.¹³⁶

Quod si damnatus fuerit, secundum legem propriam, non secundum Ribuariam, damnum susteneat.¹³⁷

The Ripuarian law thus affirms that the law applied to an individual is not that of the judge or region in which the crime was committed but that of the place of origin or race of the defendant.¹³⁸

Why the Ripuarian law should be the first of the barbarian codes to contain express confirmation of the principle of the personality of law is a difficult question to answer. If it is argued that the Ripuarian law represents more completely in this case the old Germanic tradition preserved on the right bank of the Rhine the question may be asked why the earlier codes such as the Salic law and the fragments of the code of Euric do not contain similar recognition of the personal law régime. If it is claimed on the other hand that these provisions of the Ripuarian law belong to the traditions of the independent Ripuarian tribe, the answer is that the codification of the law was probably undertaken when

136. *Lex Ribuaria*, XXXI, 3, ed. Sohm, MGH, p. 224. (*Lex Ribuaria, Legum Sectio I, Legum Nationum Germanicarum, Tomi III, Pars II*, ed. Franz Beyerle, Rudolf Buchner, Hanover, 1954, p. 87, No. 35, 3).

137. *Lex Rib.*, XXXI, 4, MGH, p. 224. (35, 4, p. 87 of Buchner-Beyerle ed.) Other passages of the same law regulating the relations of persons of different nationalities are: *Lex Rib.*, XXXVI, 1, MGH, p. 229: "Si quis Ribuarus advenam Francum interfecerit, 200 solidos culpabilis iudicetur;" *Lex Rib.*, XXXVI, 2, MGH, p. 229: "Si quis Ribuarus advenam Burgundionem interfecerit, bis 80 solidis multetur;" *Lex Rib.*, XXXVI, 3, MGH, p. 229: "Si quis Ribuarus advenam Romanum interfecerit, bis quinquagenus solidus multetur;" *Lex Rib.*, XXXVI, 4, MGH, p. 229: "Si quis Ribuarus advenam Alamannum seu Fresionem vel Bogium, Saxonem interempserit, bis octuagenus solidus culpabilis iudicetur." Above references are to numbers of the Sohm edition.

138. Are the terms "*pago . . . loci . . . provincia*" consistent with "race" or "nationality"? Fustel de Coulanges, *Nouvelles recherches*, p. 379 and note 1, has raised some interesting questions as to the meaning of the terms used in the Salic and Ripuarian codes: *Francus*, *Ribuarus*, *Romanus*. According to Fustel these terms denote regions and social classes as well as races. The term "*advenam Romanum*" (*Lex Rib.*, XXXVI, 3, MGH, p. 229) for example refers to a resident of Aquitaine. Reason: Aquitaine is the only region omitted from the list. This is based on the assumption that "Ribuarus . . . Francus . . . Burgundio . . . Alamannus . . . Romanus . . . Fresionem . . . Bogium . . . Saxonem" refer to regions. The difficulty does not arise if we assume that these terms designate races or nationalities. The differing compositions in *Lex Rib.*, XXXVI, for members of different groups give Fustel de Coulanges some trouble and he tries to explain them by assuming that they correspond with the tables of composition in their respective national laws. No such correspondence exists between the table in the *Lex Rib.* and the scale in the Burgundian code, as he admits. Nevertheless, Fustel de Coulanges has directed useful attention to the difficulty of distinguishing "race" from "region" in these documents. The words Frank, Ripuarian, etc. are probably used in both senses. Needless to say, this does not affect the question of the existence of the personal law principle which is compatible with the existence of either "races" or "regions."

the Ripuarian state, if there ever was one, was already merged with the Salian state and that many provisions in the code are really due to the initiative of the Salian rulers.¹³⁹

Certainly the Aquitanian capitulary of 768 which restored the personal law system in this Romanized region is unmistakable in the definiteness with which the personal law principle is affirmed.¹⁴⁰ The Roman Constitution of the Emperor Lothar issued in 824 in a real sense marks a high point in the development of the system.¹⁴¹ It extended to the residents of Rome the privilege of personal law option. In what was once the legal and administrative center of the empire, personality replaced uniformity of law. The Constitution did not, as later commentators would have had it, establish an election of territoriality in Rome.¹⁴²

139. Heinrich Mitteis, *Deutsche Rechtsgeschichte*, Munich and Berlin, 1958, p. 61: "Die Lex Ribuaria (*Pactus legis Ribuariae*) ist weniger ein Stammesrecht der Ribwaren als ein Landesgesetz für Austrasien." Titles 1-31 (1-35 in new edition) probably date from about 630-650. For literature on text and on the problem of the Ripuarian folk see R. Buchner, *Deutschlands Geschichtsquellen im Mittelalter, Vorzeit und Karolinger, Beiheft: Die Rechtsquellen* (Wattenbach-Levison), Weimar, 1953, pp. 21-26. For older literature see Sohm, Introduction to the *Lex Ribuaria*, MGH; Brunner, *Deutsche Rechtsgeschichte*, Vol. I, pp. 442 ff. A valuable analysis of the differences between the Salic and Ripuarian law is given by E. Mayer-Homburg, *Die fränkischen Volksrechte im Mittelalter*, Vol. I, *Die fränkischen und das Reichsrecht*, Weimar, 1912, pp. 55, 100, 374, and *passim*. Cf., Musset, *Les Invasions*, 297.

140. *Pippini Capitulare Aquitanicum*, c. 10, *Capitularia Regum Francorum*, Vol. I, ed. A. Boretius, MGH, *Leges, Sectio II*, Hanover, 1883, p. 43: "Ut omnes homines eorum legis habeant, tam Romani quam et Salici, et si de alia provincia advenierit, secundum legem ipsius patriae vivat." A. Longnon, *Atlas historique de la France, texte explicatif des planches*, Paris, 1912, pp. 40 ff. traces the geographical expansion. Gustav Richter, *Annalen des fränkischen Reichs im Zeitalter Der Merovinger* (part one of *Annalen Der Deutschen Geschichte im Mittelalter*) Halle, 1873, pp. 38 ff.; and Gustav Richter and Horst Kohl, *Annalen des fränkischen Reichs im Zeitalter der Karolinger* (II Abteilung, Erste Hälfte of *Annalen der deutschen Geschichte im Mittelalter*), Halle, 1885, p. 1, ff. trace the events. The texts dealing with the personal law system are given in chronological order by van Wetter, *Droit romain et droit germanique*, Part I, pp. 9-20. Such of them as are not discussed in this chapter will, so far as they are relevant, be cited in the topical chapters that follow. The principal references are (the dates given are those of Boretius-Krause; they are critically examined by F. Ganshof, *Recherches sur les capitulaires*, Paris, 1958, p. 109 ff): *Capitulare Missorum*, 786, 792, vel 793, 25, *Cap.*, Vol. I, MGH, p. 67; *Capitulare Aquisgranense*, 813, *Cap.*, Vol. I, MGH, p. 170; *Constitutio de Hispanis in Francorum Regnum Profugis Prima*, 815, c. 2, *Cap.*, Vol. I, MGH, p. 262; *Ordinatio Imperii*, 817, c. 9, *Cap.*, Vol. I, MGH, p. 272; *Capitula Legibus Addenda*, 818, 819, c. 6, *Cap.*, Vol. I, MGH, p. 282; *Caroli Calvi Praeceptio Confirmationis*, 844, c. 3, *Capitularia Regum Francorum*, Vol. II, ed. A. Boretius and V. Krause, MGH, *Leges, Sectio II*, Hanover, 1897, p. 260. Other capitularies of Charlemagne and of Louis the Pious dealing with Spaniards but without specific mention of the personal law principle are: *Praeceptum Pro Hispanis*, 812, *Cap.*, I, MGH, p. 169; *Constitutio Hludowici De Hispanis Secunda*, 816, *Cap. I*, MGH, pp. 263-264; *Sacramenta Carisiaci Praestita*, 858, *Cap.*, Vol. II, MGH, p. 296.

141. Savigny, *Röm. Recht im Mittelalter*, Vol. I, pp. 158 ff.; *Constitutio Romana*, 824, c. 5, *Cap.*, Vol. I, MGH, p. 323:

Volumus ut cunctus populus Romanus interrogetur, qua lege vult vivere, ut tali qua se professi fuerint vivere velle vivant, illisque denuntietur, quod hoc unusquisque sciat, tam duces quam et iudices vel reliquos populus, quod si in offensione sua contra candem legem fecerint, eidem legi quam profitentur per dispositionem pontificis ac nostram subiacebunt.

142. Meijers, "Principes Fondamentaux," *Recueil des Cours*, p. 559.

The next stage in the development is a long and obscure one and it is marked by the transition to territoriality. This transition is clearly if broadly disclosed in one of the longer capitularies. This is the *Edictum Pistense* of 864, which distinguishes between the territories in which certain criminal provisions prescribed by the capitulary are valid and those regions in which the Roman law is valid. "For neither we nor our predecessors have ever ruled in supererogation or in derogation of that law."¹⁴³ Here we see a law which is still personal but which is on the way to becoming territorial. These words also record the earliest formation of the distinction between the country of written law in the south and the country of customary law in the north. The distinction is a matter of fact in the eleventh century when a document, probably of southern French origin, the *Exceptiones Petri*, discusses its incidents.¹⁴⁴

With the expansion of the Frankish state came the recognition of new legal systems. The documents vary in their enumeration, but in a large number of cases the same nationalities appear. The most complete list I have found is contained in a capitulary of Charlemagne cited by Benedict Levita¹⁴⁵ in which Charlemagne lists "Romans as well as Franks, Alamans, Bavarians, Saxons, Thuringians, Frisians, Gauls, Burgundians, Bretons, Lombards, Gascons, Beneventans, Goths and Spaniards. . . ."¹⁴⁶

The condition of the Visigothic law is of interest in this respect. Though there is abundant evidence of its inclusion among the established law systems after the conquest of Septimania in 759, there is no record of its recognition in the domain of Aquitaine taken from the Visigoths as a result of the earlier conquests of Clovis.¹⁴⁷ It is possible that the Gothic law was not recognized after the first conquest because of the small

143. *Capitularia*, MGH, ed. Boretius and Krause, Vol. II, c. 20, p. 319.

144. Chénon, *Histoire du droit français*, I, p. 549.

145. On Benedict Levita and the false capitularies see Brunner, *Deutsche Rechtsgeschichte*, Vol. I, pp. 553 ff. Though much of the material included in the *Capitularium* is of doubtful authority there is no doubt that some of the contents are authentic. Buchner, *Rechtsquellen*, p. 44 ff.

146. *Capitularium, Liber Sextus*, CCCLXVI (MGH, ed. Pertz): "Volumus atque praecipimus ut omnes ditioni nostrae, Deo auxiliante, subiecti, tam Romani, quam Franci, Alamanni, Baiuvarii, Saxones, Turingii, Fresones, Galli, Burgundiones, Britones, Longobardi, Vuascones, Beneventani, Gothi, et Hispani, caeterique nobis subiecti omnes. . . ." Who are the Gauls in this list? Some of these names are obviously geographical. In such an enumeration the Aquitanians ought to appear. See the *Divisio Regnorum*, 806, *Capitularia Regum Francorum*, Vol. I, ed. A. Boretius, MGH, *Leges, Sectio II*, Hanover, 1883, p. 127, and the note *infra*.

147. Henri Klimrath, *Travaux sur l'histoire due droit français*, Paris, 1843, Vol. I, p. 348, note 1. Besides the capitularies in favor of the fugitive Spaniards, (*Cap. I*, MGH, Vol. I, p. 262; Vol. II, p. 260; Vol. I, p. 169; Vol. I, pp. 263-264) see the *Chronicon Moissiacense, Anno 759* (ed. G. H. Pertz, MGH, *Scriptores*, Vol. I, p. 294; M. Bouquet, *Recueil des historiens des Gaules et de la France*, ed. L. Delisle, Paris, 1869, Vol. V, p. 69): "Franci Narbonum obsident, datoque sacramento Gothi qui ibi erant, ut si civitatem partibus traderent Pipini regis Francorum, permitterunt eos legem suam habere, . . . ipsi . . . civitatem partibus Francorum tradunt."

number of individuals affected by it in the region north of Septimania, but the evidence is too meager to justify any conclusion.

In Visigothic Spain, the personal law régime came to an end at the very time that the Frankish system was being built up. Recceswinth (c. 654) forbade the use of laws other than the official Visigothic code.¹⁴⁸ Marriages between Romans and Visigoths were now permitted and the old interdict of the Roman law against such marriages was "abrogated."¹⁴⁹

The conquest of the Lombard kingdom added another to the numerous laws of the Frankish Empire. The Lombards in Italy were obliged to recognize the full standing of the national laws professed in the Frank Empire. Was the same privilege accorded to the Lombard law in the Frankish realm proper? I have been unable with one possible exception to find any declaration of Lombard law in the trans-alpine Frankish Empire.¹⁵⁰ This is an argument *ex silentio*, but it squares with the fact that the Lombard kingdom was regarded as a separate entity and not subject to the direct administrative control of the empire in the same way as the other conquests of the Franks.¹⁵¹ The ruler of the Lombard kingdom, the Wearer of the Iron Crown, was the Frankish king. Nevertheless, the application of Lombard law outside Italy may have occurred occasionally.

All this reveals what we have already suggested as the clue to the understanding of the personal law system in the empire, namely, that practice of a personal law depended upon membership in one of the recognized nations of the empire.

148. *Lex Visigothorum Recessvindiana*, II, I, VIII; *Leges Visigothorum Antiquiores*, ed. K. Zeumer, MGH in 8°, Hanover and Leipzig, 1894, p. 44; *De remotis alienarum gentium legibus*; *Lex Visigothorum Recessvindiana*, II, I, IX. MGH in 8°, p. 44. The change may go back to Leovigild (568-586) and, according to some recent authors, even earlier. See note 98 above.

149. *Lex Visigothorum Recessvindiana*, III, I, I, *Antiqua*, MGH in 8°, pp. 86-87, *Ut tam Goto Romanam, quam Romano Gotam matrimonio liceat sociari*.

150. Savigny, *Röm. Recht im Mittelalter*, Vol. I, p. 120 accepts the application of Lombard law north of the Alps. This view is defended by Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 384 and note 10, against G. Waitz, *Deutsche Verfassungsgeschichte*, 3rd edition, Vol. III, p. 347. Brunner cites, in defense of his view a document of 1058 contained in Johann F. Kleimayr, *Nachrichten vom Zustände der Gegenden und Stadt Juvavia*, Salzburg, 1784, p. 287, in which Fridaricus gives to the canons of the church of St. Peter and Ruodbert a "villa sancti Oudalrici . . . reliquit earum rerum vestituram cartamque ipse Fridaricus ipsis canonicis presens presentibus dedit scriptam et confirmatam secundum legem Langobardorum et Baioariorum." This is the only instance of the application of Lombard law north of the Alps that has been found, and can hardly be regarded as conclusive for the question as a whole. Charlemagne entitled himself *Rex Francorum et Langobardorum*, not *Rex Saxonum* or *Rex Hispanorum*, as Fustel de Coulanges, *Les Transformations de la royauté pendant l'époque carolingienne*, 2nd edition by C. Jullian, Paris, 1907, p. 413, note 1, points out. The term *Francia* is employed by the historian Nithard to include all the lands outside Italy (Fustel de Coulanges, *ibid.*, note 2). For these reasons I cannot follow Brunner's view on this question.

151. KLIMRATH, *op. cit. supra* note 147, at 349.

One of the most important developments associated with the personality of law was the "codification" of the national laws undertaken in the Frankish realms. The Visigoths and the Burgundians had already reduced their law to writing when the Frankish monarchs undertook a similar task for their own subjects. The principal document dealing with this work undertaken in the Merovingian period is a prologue found in the manuscripts of several laws.¹⁵² The prologue relates that Theodoric caused the compilation of the laws of the Franks, of the Alamans, and of the Bavarians, and that modifications were introduced into these laws by Childebert and Clothar and finally by Dagobert. Each people, according to the prologue, received from this ruler laws which still guide them. Other revisions and publications occurred in the Carolingian period. The exact character of this work, however, is a matter of question. According to Einhard, Charlemagne never succeeded in accomplishing more than an incomplete revision of the national laws by means of capitularies.¹⁵³ The *Chronicon Moissiacense* and the titles of some of these national laws which are described as *leges emendatae* (corrected or amended laws), raise some question about Einhard's accuracy.¹⁵⁴ There is no inconsistency between these sources, however, if we assume that all that Charlemagne attempted was a revision of the form of some of the major laws rather than a fundamental change in their contents.¹⁵⁵ At any rate every extension of the Frankish Empire was accompanied either by the confirmation of the law of the conquered as in the cases of Aquitaine and of Lombardy,¹⁵⁶ by their amendment as in the *capitula legi (and legibus) addenda* (capitularies to be incorporated in the national law or laws), or by the publication of a new code as in the cases of the Chamavian

152. *Lex Baiwariorum*, ed. Heymann, MGH, pp. 201-203.

153. *Eginharti Vita Caroli Magni*, c. 29, ed. O. Holder-Egger, MGH. The passage "nam Franci duas habent leges" etc. does not refer to Roman law, but to the Salic and Ripuarian laws, Savigny, *Röm. Recht im Mittelalter*, Vol. I, p. 129. Einhard exaggerates the differences between the Salic and Ripuarian laws. See especially Ganshof, *Recherches*, p. 96 ff.

154. *Chronicon Moissiacense, Anno 802*, ed. G. H. Pertz, MGH, *Scriptores*, Vol. I, p. 307. For the designation *lex emendata*, Buchner, *Rechtsquellen*, 16, 17, 21, 24 ff.

155. Thirteen Carolingian capitularies appear to be additional to single laws (*legi addita*): *Lex Salica* (816: *Cap.* MGH, nos. 134, 135; 819: *Cap.* no. 142), *Lex Ribuariorum* (803: *Cap.* no. 41), *Lex Saxonum* (775-790, 797: *Cap.* 26, 27), *Lex Baiwariorum* (801-813: *Cap.* no. 68), Italy (six: *Cap.* nos. 90-98, 201, 214, 219, 215). In addition to these thirteen, five capitularies are attached to several national laws (*legibus addita*): *Cap. nos.* 39, 45, 136, 193. The Merovingian rulers were responsible for six capitularies added to individual laws. I am indebted to the careful classification of the capitularies by Jean Petru-Gay, "La 'Lagsaga' salienne," *Rev. histor. de droit français et étranger*, 14, 1935, pp. 278, 297-300. Cf. Ganshof, *Recherches*, p. 76 ff.

156. Aquitaine: *Capitulare Aquitanicum*, c. 10, *Cap.*, MGH, Vol. I, p. 43; Italy: *Karoli Magni Notitia Italica*, *Cap.*, I, MGH, p. 188, c. 4: "Juxta legem ipsorum exinde procedat iudicium. Tantum sic faciant, sicut eorum lex fuit." *Pippini Italiae regis capitulare*, 782-786, *Cap.*, MGH, Vol. I, p. 192, c. 7; p. 196, c. 8; *Pippini capitulare, circa 790*, *Cap.* No. 95, Vol. I, p. 201, c. 4; *Capitulare Italicum*, 801, *Cap.*, MGH, no. 98, p. 205, cc. 2, 6; p. 206, c. 8; *Memoria Olonnae comitibus data*, 822-823, *Cap.*, MGH, no. 158, Vol. I, p. 319, cc. 13, 14, 16.

Franks¹⁵⁷ the Saxons,¹⁵⁸ the Thuringians,¹⁵⁹ and the Frisians.¹⁶⁰ All this legislative activity, if it may be called such, is an integral part of the system of the personal law. Without it the knowledge of the national laws would often have been in jeopardy.

The geographical sphere of application of the capitularies as indicated above was circumscribed. In Frankish lands proper, the regular capitularies were applied. In the Lombard kingdom and in Rome other ordinances were issued directed specifically to the needs of these regions.¹⁶¹ In other divisions the distinction is not so clear. What was the position of Burgundy at different times?¹⁶² What was the position of Aquitaine? What part of its national organization was preserved under the Franks?¹⁶³ What was the status of Provence,¹⁶⁴ of Septimania?¹⁶⁵ In all these regions the general capitularies circulated in spite of any autonomy otherwise granted to them.¹⁶⁶

An important feature of the personal law system lay in the use of

157. H. Froidevaux, *Etude sur la Lex Dicta Francorum Chamavorum et sur les Francs du pays d'Amor*, Paris, 1891. Against the view that the *Ewa Chamavorum* is a bona fide code see N. D. Fustel de Coulanges, "Quelques remarques sur la loi dite des Francs Chamaves," pp. 398-414 of *Nouvelles recherches*. See Brunner, *Deutsche Rechtsgeschichte*, Vol. I, sec. 46; and Buchner, *Rechtsquellen*, 42.

158. *Leges Saxonum*, ed. K. von Richtofen, MGH, *Leges*, V; also ed. Cl. von Schwerin, 8° series, MGH, Hanover, 1918. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, pp. 465 ff; Buchner, *op. cit. supra* note 157, at 39 ff.

159. *Lex Angliorum et Werinorum (Thuringorum)*, ed. v. Richtofen, MGH, *Leges*, V; also ed. von Schwerin, 8° series, MGH, Hanover, 1918; Brunner, *op. cit. supra* note 157, at Vol. I, pp. 469 ff; Buchner, *op. cit. supra* note 157, at 41 ff.

160. *Lex Frisionum*, ed. Karl v. Richtofen, MGH, *Leges*, III. Brunner, *op. cit.*, Vol. I, pp. 475 ff.; Buchner, *op. cit. supra* note 157, at 42 ff., 58.

161. On the three spheres of application see Savigny, *Röm. Recht. im Mittelalter*, Vol. I, pp. 172-173.

162. A. Kleinclausz, *Histoire de Bourgogne*, Paris, 1909, p. 96: "Ils (Franks) ne prièrent pas les Burgondes de leurs droits. . . La Bourgogne . . . continue de s'appeler, dans la langue officielle et courante, le royaume de Bourgogne (regnum Burgundiae)." See also H. Drouot and J. Calmette, *Histoire de Bourgogne*, Paris, 1927, p. 65. See also Auguste Longnon, *Atlas historique de la France, Texte explicatif des planches*, Paris, 1912, p. 47. The *Majordomus* of Burgundy was discontinued after 642. But see Coville, *Recherches*, p. 236 for qualifications on older views.

163. Jacques Flach, *Les Origines de l'ancienne France*, Paris, 1917, Vol. IV (*Les Nationalités regionales*), pp. 465 ff. emphasizes the maintenance of national traditions in Aquitaine.

164. *Id.* at 317, 383. For the historical geography of Provence see Longnon, *op. cit. supra* note 162, at 46, *Planches* III, IV, V of *Atlas*.

165. For Septimania see Longnon, *op. cit. supra* note 162, at 46-47, and in general Flach, *op. cit. supra* note 163 at 462.

166. The *Diviso Regnorum* of 806, c. 1, 2, 3 (*Cap.*, Vol. I, MGH, p. 127) lists the states to be divided: Bavaria, Alamannia, Thuringia, Saxony, Frisia, Aquitaine, Gascony, part of Burgundy, Provence, Septimania or Gothia, and Francia. This is an official enumeration but it tells us nothing of the status, legal or political, of these regions. The *Annales Bertiniani* for the year 858 (ed. Bouquet and Delisle, *Recueil des historiens des Gaules*) distinguish Aquitaine, Neustria and Burgundy. "Francia, Burgundy, Aquitaine and Germania" are also distinguished in the *Astronomer*, c. 49 (ed. Bouquet and Delisle, *Recueil des historiens*). See Fustel de Coulanges, *Les Transformations de la royauté*, pp. 414, 415 and notes.

professiones (professions of law) which became widespread in the Carolingian period, especially in the ninth century.¹⁶⁷ The first *professiones* in Italy may go back to the eighth century. Savigny put the earliest *professio* in the year 807,¹⁶⁸ Brunner in 767.¹⁶⁹ The last is placed by Lupi in the year 1388.¹⁷⁰ The *professiones* are much more abundant in Italy than in France, for in northern Italy there appeared to be a greater mixture of nationalities. Many documents, it is true, lack *professiones*. This may be due to the fact that the two parties belong to the same nationality. Another possible explanation lies in the frequent use of forms and documents based on Roman law and common to barbarians and Romans.¹⁷¹

A distinction often merely verbal exists in the *professiones* between *lex* and *natio*. The latter term referred to the birth law, the former to the law by which one lived.¹⁷² Generally the two relations thus indicated were identical but, as in the cases of men entering the clergy and married women, the birth law might give way to a new law assumed with the change of status. The distinction is clearly shown in a deed of the Countess Matilda, who was a Salian by birth but had assumed the Lombard law by marriage. For alienating property, however, the Countess employed the Salic law. The distinction is brought out in the following words: "Qui professa sum ex natione mea, lege vivere Salicha."¹⁷³ In another case the expression employed is:

qui professa sum ego ipsa Ferlinda natione mea legem vivere
Langobardorum, sed nunc pro ipso viro meo legem vivere videor
Salicam.¹⁷⁴

The history of the *professiones* between the eighth and ninth centuries reveals changes of practice in these respects. At first the national law of one party was indicated, and then only in transactions between

167. For extensive literature on the *professiones* see L. Stouff, "Étude sur le principe de la personnalité des lois," *Rev. Bourg.*, IV, 1894, p. 7, note 1, and Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 398 and notes 71, 73. For early *professiones* in France and Italy, see *Historiae Patriae Monumenta*, Vol. XIII, 8 (anno 737), 14 (anno 754). For Luxemburg and Tyrol, Viollet, *Histoire du droit civil français*, p. 104. For Germany, G. Blondel, *Étude sur la politique de l'empereur, Frederic II en Allemagne*, Paris, 1892, p. 48. In general, see Gaupp, *Germanische Ansiedlungen*, pp. 257 ff.

168. Savigny, *Röm Recht im Mittelalter*, Vol. I, p. 150, citing the Milan deeds of Fumagalli: "... accepi ad te Verohacheri ex Alamannorum genere. . ."

169. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 396 citing Carol Troya, *Codice Diplomatico Longobardo*, Naples, 1852 ff., Vol. V, p. 430, no. 880 (anno 767): "Signa manus B. qui hanc cartola donationis fieri rogavit, qui iuxta lege sua Langobardorum recepit launechilt." Brunner, *ibid.*, points out that the term *professio* never acquired a technical meaning. Hence the difficulty of deciding on the earliest examples.

170. SAVIGNY, *op. cit. supra* note 168, at 150; Mario Lupi, *Codex Diplomaticus Civitatis et Ecclesiae Bergomatis*, Bergamo, 1784, cols. 230, 231.

171. Stouff, "Étude," *Rev. bourg.*, 1894, pp. 294, 298.

172. Savigny, *op. cit. supra* note 168, at 145-146.

173. *Id.* at 147, and note C; Fiorentini, *Memorie della Gran Contessa Matilda*, 2nd edition, Lucca, 1756, Vol. IV, *Documenti*, pp. 7, 10.

174. Savigny, *op. cit. supra* note 168, at 147.

members of nationalities other than Lombard and Roman. Later on the *professiones* appear in relations of Lombards and Romans.¹⁷⁵ The other change has already been indicated. In the earlier period the nation or the national descent included also the national law. Thus the expression "*G. Salicus*." As time went on more *professiones* appear with the double designation of law and race, as "*qui professi sumus ex natione nostra legem vivere Langobardorum*."¹⁷⁶ This development coincides with a change in the signification of names that takes place in the ninth century. German names no longer denote German nationality, though Roman names are still indications of Roman nationality.¹⁷⁷

The dispersion of members of the various nationalities over the Frankish Empire is attested in the documents of the period. Salian and Ripuarian Franks are found in France,¹⁷⁸ Alamannia,¹⁷⁹ and Italy.¹⁸⁰ Romans profess their own law in the south of France¹⁸¹ and in Italy.¹⁸² Goths are found in Septimania,¹⁸³ and Italy.¹⁸⁴ Burgundians are found in Burgundy¹⁸⁵ and northern Italy.¹⁸⁶ Alamans are found in Italy.¹⁸⁷

Thus by the ninth century an elaborate system of personal law relations had been worked out which was a great advance on the simpler dualistic arrangement of earlier times.¹⁸⁸ A few conclusions emerge from the foregoing discussion which may be stated with some assurance even though there is not so much evidence as one would like on the general question of the origins of the régime.

The principle of the personality of law in the sense of a system of private international law did not exist among the Teutonic tribes before their settlement in the Roman Empire. The principle of the personality of law in the sense of law as a personal possession based upon membership in the nation, or rather the tribe, did exist among the early Teutons and was brought with them into the domains of the Empire and there subsequently developed, as we have seen, into the later Frankish system.¹⁸⁹

175. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 397.

176. Savigny, *op. cit. supra* note 168, at 145-146.

177. Stoff, "Étude," *Rev. bourg.*, 1894, p. 25.

178. M. Thévenin, *Textes relatifs aux institutions privées et publiques aux époques mérovingienne et carolingienne, institutions privées*, Paris, 1887, nos. 102, 117, 176, 179, 132.

179. Stoff, *loc. cit.*, p. 4.

180. *Codex Diplomaticus Langobardiae, Historiae Patriae Monumenta*, XIII, Turin, 1873, no. 764, anno 975.

181. Thévenin, *op. cit. supra* note 178, at nos. 98 (865), 110 (887), 80 (845). *Recueil des chartes de l'Abbaye de Cluny*, ed. Bernard and Bruel, Paris, 1876 ff., Vol. I, nos. 23 (880), 229 (922), 439 (935), 686 (946).

182. Thévenin, *op. cit. supra* note 178, at nos. 50, 52.

183. C. Devic and J. Vaissete, *Histoire générale de Languedoc*, Toulouse, 1872 ff., Vol. II, nos. 80 (832), 439 (852), 144 (854), 161 (862), 185 (874).

184. Thévenin, *op. cit. supra* note 178, at nos. 50, 52 (also Roman law).

185. *Id.* at nos. 178, 520, 52; *Chartes de Cluny*, Vol. I, no. 189.

186. Stoff, *loc. cit.*, p. 5.

187. *Cluny*, Vol. IV, no. 3489.

188. Brunner, *Deutsche Rechtsgeschichte*, Vol. I, p. 383.

189. Brunner, *op. cit. supra* note 175, at Vol. I, p. 383, and note 3, distinguishes

On the other hand, the existence of a well developed system of personal law among the Romans is uncontested. The maintenance of local and national laws in the empire by the side of the civil law is attested by official and literary documents. But this system, even in its diversity, possessed a unity that is not to be sought in any of the barbarian systems of law established on the soil of the Empire. The fully developed Frankish personal law régime was much different from anything of its kind among the Romans because it touched every phase of personal status.¹⁹⁰

It was the invasions viewed in their broadest sense as a transformation of society that brought these disparate and yet similar elements together and thus laid the foundations of the régime of the personality of law in the form of a system of private international law. But it should be noted that the invasions only produced the personal law system out of ingredients already in existence. If these elements had been absent the results would not have been the same. The variety of experience of the Germanic kingdoms with the principle of the personality of law proves this point abundantly.

An attempt to construct a scheme for comparative study based on the relationship between invasion and personality of law may be defended within limits. Invasions often produce results in the legal sphere resembling those obtained in the fifth and sixth centuries. But they also fail to produce such results where certain elements are lacking. The absence of the person "*vivens legem Romanam*" in England, as Maitland has remarked, prevented the development of a system of personal laws there.¹⁹¹

Given these fundamental considerations the establishment of systems based on the application of personal law principles can be described as follows: (1) There was no one régime of the personality of law; there were several, differing in certain respects from one another: the Ostrogothic, the Visigothic, the Burgundian, and the early Frankish systems. (2) At first personal law rights in each of these kingdoms were accorded only to Romans, not to Germanic peoples other than the rulers. (3) These personal law rights included most private law relations among Romans but not criminal matters. Furthermore, in law cases arising between Romans and Germans the law of the latter enjoyed territorial validity, except among the Ostrogoths.

In terms of the literature on the subject the following seems clear: Brunner makes inadequate provision for the existence of a subjective

between these senses of the word "personality." See also E. M. Meijers, "L'Histoire des principes fondamentaux du droit international privé à partir du Moyen Age," in *Recueil des cours*, 1934, III, 549-551, for the distinction between international law and inter-tribal or intergentile law.

190. H. Klimrath, *Travaux sur l'histoire du droit français*, Vol. I, p. 351.

191. *Materials for History of English Law*, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 67 (1908).

principle of personality.¹⁹² If we accept his view we must assume that the régime was imposed from above by the Frankish rulers. Does such an action square with what we know of the pace of social and legal development? Furthermore, Brunner fails to emphasize the experience of the Visigoths and Burgundians with the principle of the personality of law. Schröder and his school are not entirely correct.¹⁹³ There is no evidence of the full acceptance of the principle of personal laws in the earliest Teutonic codes. There is, however, a subjective principle embedded in Teutonic as in other early law systems: that law like religion is a personal possession, a national or tribal inheritance denied to strangers. The correct view appears to be an eclectic one.

III. THE FRANKISH SYSTEM OF PRIVATE INTERNATIONAL LAW

A. *The National Law of the Individual*

The personal law was acquired principally through birth which also determined tribal or national membership. No one renounced this subjective right "without abandoning a little of himself."¹ An example of the common reaction to such apostasy was the indignation caused by the marriage of the Lombard King Ratchis. He made use of the Roman pre-marital gift *sponsalitium*, instead of the Lombard *morgengabe*.² Meijers finds in the glosses of the thirteenth century Romanist-Lombardist Carolus de Tocco a similar pre-occupation with the right to law—"ius suum cuique tribuere."³ Though Carolus uses the texts of Justinian to explain questions concerning conflicts of law, it must not be inferred that these texts are more than illustrative tracts. For the problems and solutions thereon based have a history going back to the period of personality.⁴

Hence the question, was a free choice of law possible, as we shall see, has no meaning. For the same reason Brunner's theory of reciprocity requires modification to allow for the existence of a subjective right to law. The Jews enjoyed the right to their law (whatever that may have been) obviously not because of national reciprocity.⁵

It is significant that in the Frankish Empire we know of no clearly defined rule of procedure which obliged a person to continue to live by his own law.⁶ This reveals a feature of medieval political life in general, the absence of public sanctions for infringements of a rule.⁷ Of course a

192. *Deutsche Rechtsgeschichte*, Vol. I, pp. 382 ff.

193. *Lehrbuch der deutschen Rechtsgeschichte*, p. 242, note. 12.

1. Meijers, "Principes fondamentaux," *Recueil des cours*, p. 552.

2. *Benedicti Chronicon*, MGH, Scriptores, III, p. 702.

3. Meijers, *op. cit. supra* note 1 at 552.

4. *Id.* at 555.

5. See *infra* text accompanying note 33 *et seq.*

6. Stouff, "Etude sur le principe de la personnalité des lois depuis les invasions barbares jusqu'au XII^e siècle," *Revue bourguignonne de l'enseignement supérieur*, IV, 1894, pp. 21, 24.

7. C. H. McILWAIN, *GROWTH OF POLITICAL THOUGHT IN THE WEST*, 363.

counter action for fraudulent profession was theoretically possible, since legal status was acquired normally through the father. Proofs of personal law adherence were available in the Frankish period in various public documents and private charters and deeds, but the absence of official registers of births made investigation difficult. It does not seem, therefore, that any public investigation was normally made of the individual's birth law.⁸ One case, however, which is attested occurs in the year 824 in Rome, and arose out of exceptional conditions resulting from the new legal situation established in the domain of the popes as a result of Frankish administrative control.⁹ There is also reference to such an inquest in a capitularly already cited of 786 or 792.¹⁰ We must take up a few of the leading features of personal law determination before we enter into further discussion of the question whether it was possible to renounce one's law.

The church lived according to Roman law. The first council of Orleans of 511 established this rule in the following words: "We wish that the Canons and the Roman rule be observed."¹¹ The Ripuarian law refers to this principle in connection with the manumission performed *in ecclesia*, when it declares that the charter of manumission should conform to "the Roman law by which the church lives."¹² One of the capitularies of Louis the Pious also affirms "that the hierarchy of churches should live by the Roman rule."¹³ An interesting *responsum* of 820 or 823, confirming a previous decision of Charlemagne, makes an exception of certain church property: the law to be applied to this property in the event of any claims directed against it is not the law of the church but of the original grantor.¹⁴ The treatment of landed property was for certain purposes based on a personal law that was becoming "real." Furthermore, the churches and convents which were under the protection of the king were subject to the personal law of the king.¹⁵ The convent of Farfa was thus regulated by the Lombard law.¹⁶

8. Opinion of Savigny, *Geschichte des römischen Rechts im Mittelalter*, vol. I, pp. 148, 151.

9. *Capitularia Regum Francorum*, I, no. 161, MGH, p. 323, c. 5.

10. *Cap.*, I, no. 25, MGH, p. 67, c. 5.

11. E. Loening, *Geschichte des deutschen Kirchenrechts*, vol. II, Strassburg, 1878, p. 285: "Id constituimus observandum quod ecclesiastici canones decreverunt et lex romana constituit."

12. *Lex Ribuaria*, LVIII, 1, MGH, p. 242: "Secundum legem romanam qua Ecclesia vivit." But not the qualifications *infra*.

13. *Cap.*, I, no. 168, MGH, p. 335, c. 1. This is probably mistakenly ascribed to Louis. Brissaud, *Manuel*, p. 57, note 2.

14. *Responsa Imperatoris de Rebus Fiscalibus Data*, circa 820 (823?), c. 3, *Cap.*, I, MGH, p. 297.

15. H. Brunner, *Zeugen und Inquisitionsbeweis im deutschen Gerichtsverfahren karolingischer Zeit*, Vienna, 1866, p. 83: "Resipsius secundum legem Salicam aut Ribuarian tuerentur." See also Brunner, *Forschungen zur Geschichte des deutschen und französischen Rechtes*, Stuttgart, 1894, p. 165.

16. Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts in geschichtlicher Entwicklung*, vol. V, p. 78, note 78.

The position of the clergy vis à vis the national laws is more difficult to define. Little doubt exists that a majority of the clergy in the sixth, seventh, and eighth centuries insisted on the right to live by the Roman law.¹⁷ Nevertheless, as time goes on, more and more cases occur of clergy conforming to the law of their birth. In order to explain this change it is necessary to distinguish between the Frankish and the Lombard territories.

Flach has pointed out, as a solution of the problem of the legal status of the clergy among the Franks, that the text of the Riparian law varies on the subject of the composition of the clergy.¹⁸ The early texts equate the composition of the clergy with that of the Romans.¹⁹ The revised texts of Charlemagne's time determine the composition according to nationality.²⁰ The conclusion drawn by Flach is that in the earlier period when the clergy consisted mainly of men of Roman origin the Roman law applied to them as a personal law, but that when more of the clergy were recruited from the Germanic nations the personal laws of the members of the ecclesiastical establishment became more varied.²¹ The Carolingian period which witnessed the increase in the power of the Austrasian Franks, also resulted in some Germanization of the clergy.²²

The documents originating in Lombardy show us, however, on several occasions, members of the clergy continuing to profess Roman law. A law of Liutprand prescribes that if a Lombard enters the clergy the children do not undergo a change of law but continue to be subject to the Lombard law.²³ The inference is that the father changed his law on becoming a priest. Later on the Lombard law under the influence perhaps of the Frankish practice altered the position. A deacon named Guntzo makes a donation in one of the documents cited in the *Historiae Patriae Monumenta* and receives a *launegild* according to the Lombard law.²⁴ This suggests that he lived by Lombard law though, in view of the confusion of terminology, this is by no means a conclusive inference.

17. Loening, *Geschichte des deutschen Kirchenrechts*, vol. II, p. 286. But see Brissaud, *Manuel*, p. 57, note 1 for a review of the older literature on this highly controversial question.

18. J. Flach, *Les Origines de l'ancienne France*, vol. I, Paris, 1886, pp. 289-290.

19. *Lex Ribuaria*, XXXVI, 5 (Codd. A), ed. Sohm, MGH, p. 230 ". . . bis quinquagenus solidus culpabilis iudicetur."

20. *Lex Ribuaria* (emendata), XXXVIII, 5 (Codd. B), ed. Sohm, MGH, p. 230: ". . . iuxta nativitas." See, however, Fustel de Coulanges, *Nouvelles recherches*, p. 380, who treats the word *nativitas* as a reference to a social rather than a racial distinction.

21. *Id.* at 290.

22. Lot, *Les Invasions germaniques*, p. 261.

23. *Liutprandi Leges*, 153: The woman who entered a convent apparently did not change her law, for in 737 a woman embraces religion while professing to live by Lombard law, *Historiae Patriae Monumenta*, XIII, no. 8. Some doubt attaches to the authenticity of this document. See another document cited by J. Kohler, *Beiträge zur germanischen Privatrechts-geschichte*, Stuttgart, 1896, Part II, p. 7, no. 2 dealing with lands deeded by a clergyman named Felix for which he received a *launegild*; he had inherited these lands from his wife, hence the Lombard law.

24. *Hist. Patr. Mon.*, vol. XIII, nos. 118, 326.

Other documents of the tenth century show members of the clergy invoking the Lombard and the Salic laws.²⁵ In the eleventh century, Salic law is professed by Bishop Adelricus.²⁶

An interesting example of textual distortion is the construction put on the capitulary of Louis the Pious placing the *church* under the Roman law.²⁷ The *clergy* invoked this capitulary as authority to change from their national laws to the Roman law.²⁸ A document of the eleventh century in which a member of the clergy disposes of property states, "Just as it is written in the law that the hierarchy of the churches live and act according to this law, so do I act according to this law."²⁹

The clergy became independent of the secular authorities in the same way as the lay holders of immunities.³⁰ The leaders of the church slowly established a separate church jurisdiction based on control of matters lying within the sphere of church authority and on control of the persons of the clergy which became the later *privilegium fori* or benefit of clergy. The justice which the church succeeded in monopolizing for itself grew up, therefore, out of secular conditions associated with the personal law system.

The law of a majority of the ruling class was the Salic law. Many of the descendants of Roman families eventually gloried in their connection with the law of the ruling families.³¹ The great fortune of the Salic law, in this regard as well as in others, has attracted the attention of students and will be noticed elsewhere in this study. But the point that calls for emphasis is the ease with which the transition from national law to class law is effected. This transition is clearly disclosed in the commentary to the *Lombarda* which compares the claim of a person to his national law with the right of the clergy to their law.³²

The position of the Jews under the personal law régime is a matter

25. *Chartes de Cluny*, II, 1229, anno 967. *Hist. Patr. Mon.*, vol. XIII, no. 326, col. 548, anno. 885; no. 703, anno 967.

26. *Hist. Patr. Mon.*, vol. I, no. 273, anno 1028: "Nos Adelricus episcopus . . . qui professi sumus omnes lege vivere salicha."

27. *Cap.*, I, MGH, no. 168, p. 335, c. 1, cited in note 13:

Ut omnis ordo ecclesiarum secundum Romanam legem vivat: et sic inquirantur et defendantur res ecclesiasticae, ut emphyteusis under damnum ecclesiae patiuntur non observetur sed secundum legem Romanam destruat, et poena non salvatur.

28. *Hist. Patr. Mon.*, vol. XIII, no. 974, col. 1713, anno 1000.

29. Muratori, *Rerum Italicarum Scriptores*, Milan, 1723-1751, vol. IIb, p. 1002, anno 1086. See also Pertile, *Storia del diritto italiano*, vol. I, p. 67, note 10.

30. This topic is treated in the section on feudalism, *infra*.

31. Thévenin, no. 105 (872): "Ex genere Francorum." *Hist. Patr. Mon.*, vol. XIII, nos. 230, 243, 333, 875. See especially E. Mayer-Homberg, *Die fränkischen Volksrechte im Mittelalter*, I, p. 374 ff.

32. *Leges Longobardorum cum Argutissimis Glosis Caroli de Tocco*, in *Lege, Truum et Iudices*, c. 2, 58, 2, f. 39v, cited in Chapter 1 *supra*. Cf., Meijers, "L'Histoire des principes fondamentaux de droit international privé a partir du Moyen Age," *Recueil des cours*, Académie de Droit International, Paris, 1934, III, vol. 49, p. 554.

of dispute.³³ Not being members of a regular state they were not entitled to the use of Jewish law. In the sixth century they seemed to be *viventes legem Romanam*. But in the Carolingian period they were not treated as *Romani*. Their position in this period involved some recognition of the Jewish law and can best be explained as a royal privilege accorded to strangers or *wargangi*, forming a kind of "Jewry law."

In principle, the law of the father determined the law of the offspring. This accords with the social and legal ideas of the Germanic people which attached importance to the form of paternal authority called *mundium*.³⁴ An exception to this rule is the case of children whose father entered the clergy and thus became subject to the Roman law. They remained subject to the original law of the parent.³⁵ Another exception is afforded by the privilege of children born out of wedlock

33. Under which law did the Jews live, the Roman or the Jewish? It appears that Roman law was first applied to them. Theodoric's *Edict*, Sec. 43 (MGH, *Leges*, V, 166) states: "Circa Iudaeos privilegia legibus delata servantur: quos inter se iurgantes et suis viventes legibus eos iudices habere necesse est, quos habent observantiae praeceptores." Pope Gregory the Great also seemed to consider them as living under Roman law: "Sicut [Iudaei] Romanis vivere legibus permittuntur," (Gregory, *Ep.* II, 6 (891)). So also the *Interpretatio* to the *Breviary*, II, 1, 10 (*Cod. Theod.*, II, 1, 10): "Iudaei omnes qui Romani esse noscuntur" and the *L. Visig.* XII, 2, 14: "Libertate vero servum Christianum Hebreus si maluerit, ad civium Romanorum dignitatem eundem manumittere debet." On the other hand the *Lex Romana Curiensis* of the eighth century (M. Conrat, *Geschichte der Quellen und Literatur des römischen Rechts im früheren Mittelalter*, Leipzig, 1891, vol. I, pp. 286-292 gives the year 766) contrasts *Iudaeus* and *Romanus* for purpose of law. See Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 403, and note 2. The Merovingian period appears to be one of transition. The evidence for the question of attachment to Jewish law or Roman law is small. Hence much dispute in the literature on the subject which is summarized by SOLOMON KATZ, *THE JEWS IN THE VISIGOTHIC AND FRANKISH KINGDOMS OF SPAIN AND GAUL*, 83-84 (1937). Much of this discussion, however, misses the vital point. When the Jews are treated as *Romani*, are they under Roman law *qua* Romans, or under Roman law provisions dealing with Jews? The answer varies according to locality and it is doubtful whether the barbarian codes of the period can give a complete answer. Under the Carolingians the Jews were not treated as subject to Roman law. In two charters of Louis the Pious Jews are granted "*secundum legem vivere*." *Formulae Imperiales*, 30 (MGH, *Formulae*, p. 309); 31 (p. 310); 52 (p. 325). See the *Capitula de Iudaeis*, c. 6 (MGH, *Cap.*, I, 259): "Si Iudaeus contra Iudaeum aliquod negotium habuerit, per legem suam se defendat." In accordance with the status of foreigners in general the payment for the murder of a Jew went not to kinsmen but to the royal *fiscus*. (*Formulae Imperiales* 30, 31 in MGH, *Form.*, p. 309, 310). They were also exempted from trial by ordeal. See *Formulae Imperiales*, 30. The *Edictum Pistense* prescribes a fine in gold for counterfeiting by Jews. *Ed. Pist.*, c. 23 (MGH). Other references to the status of Jews are contained in *Capitulare Missorum Aquisgranense Alterum* of 809, c. 13 (MGH, *Cap.*, I, 152), dealing with the number of witnesses required at a trial by a Jew. In general see KATZ, *op. cit.* *supra* note 33, at 84-87 and notes. More recently Bernhard Blumenkranz, *Juifs et chrétiens dans le monde occidental*, 430-1096, Paris, 1960, following Guido Kisch, *The Jews in Medieval Germany*, Chicago, 1948, p. 15 ff, makes a distinction between "Jewish law" and "Jewry-law." Blumenkranz, at 298, argues forcefully against the "Jewish law" being considered a personal law like the barbarian and Roman laws. This is supported by the fact that the barbarian laws contain no mention of Jews, not even for determination of wergeld though Gregory of Tours does picture them as exercising what Blumenkranz, at 299, calls the "Germanic right" of *faida*, *Historia Francorum*, 7, 23.

34. Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 393; Stouff, "Etude," *Rev. bourg.*, 1894, p. 16.

35. *Liut.*, *Leg.*, 153, cited *supra*.

of selecting their own law, though the choice usually favored the law of the mother. This seemed to be the rule in Italy as the following excerpt suggests: "Iustum est ut homo de adulterio natus vivat qua lege voluerit"³⁶ (It is just that a man born in adultery lives by the law of his choice). However, among the Franks it is probable that natural offspring were either treated as servile or, by adoption, shared the same law as the father.³⁷

The law of the freedman varied among the different Germanic nations. Among the Ripuarians the status of the freedman depended on whether he had been released according to the formalities of Roman or of Frankish law.³⁸ It was commonly believed that among the Burgundians the national law to which the former serf belonged before his change of status, regulated his new condition of freedom.³⁹ This is based on a misinterpretation of the *Lex Romana Burgundionum* which simply allowed the ruler to emancipate a serf by Roman law.⁴⁰ This usage which was also followed in Lombardy, resulted from an improper reading of an edict of Rothari. The edict simply prescribed that the freedman should conform to the conditions laid down by the act of manumission, the *leges dominorum*.⁴¹

The Frankish method of freeing the slave was *per denarium* (by fictitious purchase), before the king. After this formality, the former slave became subject to the Salic or Ripuarian law.⁴² The Roman method of manumission, which was more widespread, was by testament, or in the church, or by charter. If one of these methods was employed, the slave assumed Roman nationality. The freedman assumed the legal status and the *wergeld* of the Roman.⁴³ The option of using any one of several formalities in manumission may have produced some strange results. A Roman who freed his slave according to the formalities of the Salic law thereby transformed the former slave into a Salian Frank.

The status of married women seems also to have varied. Generally

36. *Quaestiones ac Monita*, c. 30, MGH, *Leges*, IV, p. 593.

37. J. M. Pardessus, *Loi Salique*, p. 449.

38. *Lex Rib.*, LVII, 1: "Si quis libertum suum per manum propriam seu per alienam in praesentia Regis secundum legem Ripuariam ingenuum demiserit, per denarium . . . sicut reliqui Ripularii liber permaneat." Cf. also *Lex Rib.*, LXI, 1; LVIII, 1; *Lex Salica*, XXVI.

39. Klimrath, *Travaux sur l'histoire du droit français*, vol. I, p. 351. The reasoning on which this is based is extremely vague.

40. *Lex Rom. Burg.*, III, 2: ". . . liberti Romani natione a principe manumissi. . . ." See Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 393, note 54.

41. *Ed. Roth.*, 226, MGH, 80 series, p. 47; *Cap.*, I, no. 98, MGH, p. 205, c. 6.

42. *Lex Rib.*, LVII, 1, quoted in note 38. Cf., *Lex Salica*, XXVI, ed. Behrend.

43. *Lex Rib.*, LXI, 2, MGH, p. 253: "Quod si aliquid criminis admiserit, secundum legem Romanam iudicetur. Et qui eum interfecerit, 100 solidos multetur." For France, *Appendix ad Marculfum*, 61: De Roziere, *Formules*, no. 63: "Semper ad civitatem debeat pertinere Romanam." De Roziere, *Formules*, nos. 62, 75, 88: "Civis romanus ipsos eos esse praecipio." For Italy, *Hist. Patr. Mon.*, XIII, no. 243, anno 867. Devic and Vaissète, *Histoire générale de Languedoc*, vol. II, 49 (*Preuves*, col. 123).

the married woman assumed the law of her husband.⁴⁴ This tendency was fortified by express provision of church councils in the ninth century and following.⁴⁵ Meijers ascribes the frequent application of the husband's law in the documents to the fact that it was the husband who usually made the gift or donation; when the wife made the grant, her birth law was cited separately.⁴⁶ The case of the Countess Matilda who though married to a Lombard continued to use her original law, the Salic, is not untypical of this practice.⁴⁷

Lombard documents give us additional information on the status of the wife. The husband regularly acquired the *mundium* (paternal or marital authority) over his wife who thereby became subject to his law. A law of Liutprand declares: "If a Roman marries a Lombard woman and obtains the *mundium* over her, she becomes a Roman."⁴⁸ An interesting complication was resolved as a result of the application of this rule. If the woman had remained a Lombard, she would not have been able to remarry without the consent of the heirs of her first husband. The second husband would have had to pay them a composition if the consent had not been obtained. Since the woman was a Roman the consent of the heirs was unnecessary in order for her to contract a new marriage. It would appear, therefore, that in addition to the wife's being subject to the husband's law, the widow remained under the law of her husband. The Constitution of Lothar abolished the older rule on the latter point and declared that for the future, the widow should return to her original national law.⁴⁹

For the sale of property, as already suggested, women in the Lombard documents conformed to their original law rather than to that of the husband. In 961 a Lombard woman married to a Roman disposes of property according to the Lombard law.⁵⁰ In 998, the Countess Ermengarde married to a Lombard makes a donation according to Salic law.⁵¹ The principle revealed in these documents is quite clear: no one need obligate himself or surrender either property or rights except according to personal law rules accepted in a specified region.⁵²

The question of a free choice of law to which we now turn, for a

44. Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 393.

45. Stouff, "Etude," *Rev. bourg.*, 1894, pp. 19, 38, 290.

46. Meijers, "Droit int. prive," *Rec. des cours*, p. 536, note 2.

47. Stouff, *loc. cit.*, p. 16 quoting Saint-Pere de Chartres, I, *proleg.*, p. xcvi, no. 4, anno 1107: "Ego Mathildis, comitissa et ducatrix, et filia quondam Bonifacii, qui fuit similiter dux et marchio, que professa sum lege vivere salica."

48. *Liut. Leges*, 127, MGH, 8° series, p. 134.

49. *Hlotharii Capitula Italica Memoriae Olonnae Comitibus Data*, 822-823, *Cap.*, I, MGH, p. 319. See *Hist., Patr. Mon.*, XIII, no. 634, anno. 959.

50. *Hist. Patr. Mon.*, vol. I, p. 193.

51. Ficker, *Urkunden zur Reichs und Rechtsgeschichte Italiens*, IV, 1874, 34; Thèvenin, *Textes*, 113: "Qui professa sum ego ipsa Ermengarda comitissa ex natione mea legem vivere Solicha, set nunc pro ipso viro meo legem vivere videor Langobardorum."

52. Meijers, "Principes de droit int. prive," *Rec. des cours*, p. 588.

long time aroused controversy. The right of an individual to change his birth law at will was suggested by Montesquieu who made it the basis of an elaborate theory for the disappearance of the Roman law in northern France. According to Montesquieu, the reason the Roman law did not survive in the so-called country of customary law or *pays de droit coutumier* was that the Franks allowed the conquered population to embrace the Salic law.⁵³ Furthermore, the Salic law offered an incentive to Romans to accept it because of the higher composition allowed to Franks.⁵⁴ This free choice of law was based on a number of arguments which do not bear up well under examination. The theory was taken up in detail by Savigny and answered to the satisfaction of most students.⁵⁵ The main points of the controversy, however, deserve notice.

The first and principal evidence for a free choice of law is founded on the single reading of the Salic law already alluded to.⁵⁶ As pointed out, however, Herold's manuscript version is probably an aberration.⁵⁷

Another argument is based on the so-called "professions." It has been commonly assumed that this meant that a person was simply bound by whatever law he first professed but that the original profession was made in complete liberty. It is quite clear that the profession had no such meaning or intention. The profession of law is often stated side by side with the nationality of the person. This does not mean that the two ideas of nationality and law are distinct. As already shown, it was only in exceptional cases that the birth law was changed and the use of the two terms side by side was meant to allow for a possible change in a person's legal status brought about, for example, by marriage.

The rule of Lombard law which permitted children born out of wedlock to choose their own law would certainly not have been necessary if the choice of law were common to all persons.

Savigny cites an apparent argument for the free choice of law in a document of the early twelfth century. In it Oddo Blanco professes the Roman law though his sons somewhat later affirm their adherence to the Lombard law.⁵⁸ Savigny seeks the explanation for this anomaly in a copyist's error, for the deed mentions a *launegild*, an institution of Lombard law.⁵⁹ There is also the possibility that Oddo had entered the clergy and assumed a new law.

An argument for the free choice of law also is based on a text of Liutprand cited elsewhere which seems to allow individuals a choice of

53. MONTESQUIEU, *SPIRIT OF THE LAWS*, Bk. XXVIII, ch. 4.

54. *Ibid.* Bk. XXVIII, Chapters 3, 4.

55. Savigny, *Rom. Recht im Mittelalter*, vol. I, pp. 151 ff.

56. *Lex Salica*, XLIV, ed. Hessels, Cod. 10, col. 250.

57. *Id.* at ch. 1, note 104.

58. Lupi, *Codex Diplomaticus Civitatis et Ecclesiae Bergomatis*, col. 228.

59. Savigny, *op. cit. supra* note 55 at 153.

legal procedure.⁶⁰ This statement cannot be regarded as countenancing the free choice of law. It merely allows the use for certain purposes of agreements and conventions in which the state had no special interest.⁶¹

The most important of all the documents cited on the general question of the free choice of national law is undoubtedly the Constitution of Lothar issued in the year 824 in which the people of Rome were given an opportunity to choose under what law they wished to live. The actual decree has come down to us in two texts. One is the approved or official Lombard text, and the other is a text contained in a Roman collection of church canons. There are one or two differences in these texts which have some bearing on the question under discussion. The first sentence of the Lombard text follows:

We wish that all the Roman people be questioned as to what law they wish to live under so that by such law as they have professed they may abide.⁶²

The Roman text begins:

We wish moreover that all the senate and people of Rome be asked under what law they wish to live so that they may live under that law.⁶³

The Roman text contains a reference to the senate of Rome which is absent from the Lombard text. However, it is doubtful whether any inference can be drawn therefrom concerning the effect of this ordinance on the Lombard kingdom as distinct from the city of Rome.⁶⁴ The important point is that in both texts the application of this principle is confined to the city of Rome, and the explanation of this fact is that Rome, which up to this time had not had the system of the personality of law, was now obliged to establish it for the benefit of Franks who had come into the city perhaps in connection with the business of government. The use of the word *vult* in the ordinance is not to be construed, therefore, as implying a choice by the whole Roman population of a territorial code for themselves but rather, in conformity with the personal law system in general, as implying a choice by individuals of the law

60. *Liutprandi Leges*, 91: ". . . Et si quicumque de lege sum subdiscendere voluerit et pactionis aut convenientias inter se fecerint, et ambe partis consenserint, isto non impotetur contra legem, quia ambe partis voluntariae faciunt. . . ."

61. Savigny, *op. cit. supra* note 55, at 156-157.

62. *Cap.*, I, no. 161, MGH, p. 232, c. 5, cited in previous chapter.

63. This text was originally included in the *Collectio Canonum* of Cardinal Deusdedit, in 1086 or 1087, and has been reprinted several times, Savigny, *op. cit. supra* note 55, at vol. I, pp. 159-160. *Capitulare Romanum*, ed. E. Baluze, *Capitularia Regum Francorum*, Paris, 1780, vol. II, col. 318, c. v: "Volumus etiam ut omnis Senatus et Populus Romanus interrogetur, quali vult Lege vivere, ut sub ea vivat; . . ."

64. Savigny, *op. cit. supra* note 55, at vol. I, pp. 166-167 argues against the so-called Lombard text's actually being a Lombard ordinance, pointing to the unwonted use of "populus Romanus" and also to the absence in the *Lombarda* of the gloss of Carolus de Tocco on this provision.

under which they were to live. If the purpose of the ordinance had been to establish a territorial law for Rome it would only have perpetuated the *status quo*, for there is no doubt that the Roman population would have chosen Roman law.

The gloss of a Paris manuscript referring to the Constitution of Lothar adds, however, "It is not to be thought that the Roman people were to be questioned any further since they confessed, at this time, to be living under the Roman law."⁶⁵ This suggests that what was originally intended as an affirmation of the personal law principle was subsequently interpreted as establishing a territorial law. Another document of somewhat uncertain provenance and date, the Constitution of Conrad II, also seems to contain the same interpretation of the ordinance of 824.⁶⁶ Meijers in addition seems to accept the later interpretations of the Constitution of Lothar making a change of law possible in Rome.⁶⁷ No doubt many Ripuarians called themselves Salians in Italy,⁶⁸ but the Italian commentators of the Constitution such as Aripandus, Albertus and Jacobus do not appear to argue for a free choice of law.⁶⁹ The Act of Lantemann of 1237 which conferred a *morgengabe* on his wife though she professed to be "living by Roman law," may be an example of mutual borrowing rather than of repudiation of personal law.⁷⁰

Was there ever outright repudiation of national law? The instances cited by Stouff are inconclusive. In one a clergyman, Felix, after making a gift to his daughter declares, "although subject to Roman law I have received from you, my daughter, a *launegild*."⁷¹ The *launegild* or counter-gift was an institution of Lombard law and the reason the transaction was accompanied by this procedure was that Felix had originally received the lands from his wife by Lombard law. The Bishop of Brescia, who in the eleventh century received a *launegild* from the citizens of his episcopal city, may also be acquitted of violating his "national" law, for in Italy

65. Baluze, *op. cit. supra* note 63, at vol. II, col. 1291: "Non est putandum populum Romanum ulterius esse interrogandum, quando quidem Romana lege confessi sunt se vivere eo tempore."

66. MGH, *Legum Sectio IV, Constitutiones et Acta Publica Imperatorum et Regum*, vol. I, 1893, ed. L. Weiland, p. 82. Conradi II. Constitutiones, 37. Mandatum de Lege Romana. (1027-1039):

Imperator Chuonradus augustus Romanis iudicibus. Audita controversia, que hactenus inter vos et Longobardos iudices versabatur nulloque termino quiescebat, sancimus, ut quecumque amodo negocia mota fuerint, tam inter Romane urbis menia quam etiam de foris in Romanis pertinenciis, actore Longobardo vel reo Langobardo, a vobis duntaxat Romanis legibus terminentur nulloque tempore revivescant.

Savigny, *op. cit. supra* note 55, at vol. I, p. 164.

67. Meijers, "Principes du droit int. prive," *Rec. des cours*, pp. 558-559.

68. Mayer-Homberg, *Die frankischen Volksrechte im Mittelalter*, I, p. 19 ff.

69. Meijers, *op. cit. supra* note 67, at 559, n. 1.

70. Voltellini, *Acta Tirolensia*, I, no. 592 cited by Meijers, *op. cit. supra* note 67, at p. 559, n.3.

71. Kohler, *Beitrag zur germanischen Privatrechts-geschichte*, 1885, II, 2, Thevenin, *Textes*, p. 61. Stouff, "Etude," *Rev. bourg.*, p. 23. Cf., note of Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 395, note 60.

at this time, as well as in France, the clergy granted property by the birth law rather than by Roman law.⁷²

On the whole, in studying the question of the individual's personal law in the Frankish period, it seems necessary to make allowance for some differences in practice from one region to another and from the eighth to the ninth century. In principle, a free choice of law was certainly not permitted. In practice, the free choice might be achieved in legitimate ways. In theory, the average person accepted his law with the same good grace with which he accepted membership in his national group or in his church.

B. *Conflicts of Law in the Frankish Empire*

Inasmuch as a person's entire status depended upon his personal law, it was inevitable that conflicts of law should arise when persons of different national origin became involved in litigation.⁷³ Some of the questions arising from such encounters were regulated by the capitularies which had a territorial application, or by specific dispositions of the separate barbarian laws, as in the Burgundian law provisions for the settlement of disputes between Burgundians and Romans. In addition to this, a fusion of doctrines was slowly taking place among the national law systems which was to reduce the number of possible conflicts of law as time went on.⁷⁴ During the Frankish period there was constant "oscillation" going on between the conception of a common law regulating the concerns of all the inhabitants, a kind of *ius gentium* (Roman law of nations), and the idea of a system of private international law governing peoples of differing race.⁷⁵

Rules were worked out in the several fields for resolving these conflicts. Uniformity was not attained, but a dominant principle can be discerned in all these practices. It is "that no one may lose a right, no one may obligate himself except in conformance with his personal law."⁷⁶ Of course, the application of the principle varied, but this was to be expected

72. *Hist. Patr. Mon.*, XIII, 21, p. 44, n.1. See also *ibid.*, no. 145 (1842). The witnesses to this document are Alamanni. The example cited by Stouff, *loc. cit.*, p. 23 based on *Hist. Patr. Mon.*, XIII, no. 145 is inconclusive.

73. Stouff, "Etude sur le principe de la personnalite des lois," *Revue bourguignonne de l'enseignement superieur*, IV, 1894, pp. 282 ff. Brunner, *Deutsche Rechtsgeschichte*, vol. I, pp. 385 ff.

74. Stouff, *op. cit. supra* note 13, at 287.

75. Brissaud, *Manuel d'histoire due droit français*, pp. 58-59.

76. Meijers, "L'Histoire des principes fondamentaux du droit international prive a partir du Moyen Age," *Recueil des cours, Academie de droit international*, III, vol. 49, p. 555. The principle of consent to taxation in the later Middle Ages is based on the same idea. See McIlwain, *Growth of Political Thought in the West*, pp. 189, 373 and the numerous illustrations there given. Typical expressions of this point of view in the capitularies are: Boretius, *Cap.*, I, p. 201, c. 4 (790): "De vero statu ingenuitatis aut aliis quaerelis unusquisque secundum legem se ipsum defendat;" and the Aquitanian capitulary of 768, Boretius, *Cap.*, I, p. 43, c. 10: "ut omnes homines eorum legis habeant tam Romani quam et Salici. . ."

in a period which placed more emphasis on rights than on sanctions or the machinery of control.⁷⁷ Furthermore, the ignorance of certain personal laws in some regions also rendered a consistent application difficult to achieve. Let us trace the operation of this dominant principle in the leading legal questions that arose from the association of the races in the Frankish Empire.

Marriage did not ordinarily give rise to a conflict of laws. The old interdict against the marriage between a barbarian and a Roman fell into desuetude in the barbarian countries.⁷⁸ The Visigoth law of Recceswinth specifically abrogated the law forbidding the marriage of Roman with barbarian.⁷⁹ It probably never had validity among the Franks.⁸⁰

According to whose national law was the marriage ceremony to be performed? Generally the wife conformed to the national law of the husband.⁸¹ In the betrothal of Clovis and Clotilda, Frankish ceremonies were observed.⁸² The Lombard king Ratchis failed to endow his wife with a *morgengabe* and was severely censured by his people for this oversight.⁸³ An interesting case, however, arose which was settled by the Council of Tribur in the ninth century. A woman of Saxon nationality was deserted by her husband. Although her husband was a Frank, the betrothal ceremonies had taken place by the Saxon law. The husband alleged the non-observance of his national law and repudiated the marriage. The Council of Tribur determined that betrothal and marriage ceremonies were valid provided that they had been contracted in agreement with the law of one of the parties.⁸⁴ The decisions of the Council of Tribur have often been understood to change the rule that the husband's law was followed in the marriage ceremony. This is not so. The Council merely mitigated the harsh consequences of either this rule or the rule

77. In the Middle Ages the power of monarchy is "limited" in the sense that the king is under the law but he is not "controlled" by any other organ of government, McIlwain, *op. cit. supra* note 76, at 363.

78. Stouff, *op. cit. supra* note 73, at 290. The interdict found its way into the *Lex Romana Visigothorum* and was practiced in Languedoc up to the seventh century; Haenel, *Lex Romana Visigothorum*, p. 92, *Interpretatio*. Devic and Vaissète, *Histoire générale de Languedoc*, vol. I, p. 529.

79. *Lex Visigothorum Reccesvindiana*, III, I, I, Antiqua, MGH, 8° series, pp. 86-87, quoted *supra*.

80. Lot, *Les Invasions germaniques*, p. 215.

81. Stouff, *op. cit. supra* note 73, at 19, 290. Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 391. Bernard and Bruel, *Chartes de Cluny*, I, No. 86, p. 96 of 904. *Ibid.*, I, No. 105, p. 117 of 909: ". . . Ego F. desponso mihi iuxta legem meam romanam. . ."

82. Stouff, *op. cit. supra* note 73, at 292.

83. *Chronicon Benedicti*, MGH, *Scriptores* III, p. 702, c. 16. Cf., *supra* note 2.

84. *Concilium Triburiense*, 895, *Iudicia*, c. 4, Boretius and Krause, *Capitularia*, II, MGH, p. 207: "De Francia nobilis quidam homo nobilem de Saxonia Saxonum lege duxit uxorem. . . Definivit super hoc sancta synodus ut ille transgressor evangelicae legis subigatur penitentiae, a secunda coniuge separetur, priorem resumere cogatur." See also Ch. 39 of rules of the Council, *op. cit.*, p. 235. Meijers, *op. cit. supra* note 76, at 556.

requiring observance of two personal laws, and thus implied that one law would thereafter suffice.

The morning gift, or *morgengabe*, made by the groom to his wife was also given in accordance with the groom's law.⁸⁵

The purchase-price of the bride by which the husband acquired the *mundium* over her was determined by the bride's national law.⁸⁶ In the same way the Lombard bridegroom paid the *reipus* or redemption money to the kinsmen of the widow of the Salian race whom he wished to marry.⁸⁷

Contracts between persons of different nationality only occasionally gave rise to conflicts of law, for in most of the covenants concluded between such persons the forms of Roman law were observed. Accordingly, contractual documents in which no law is mentioned invariably appear to follow Roman law forms.⁸⁸ Where the Roman law was not employed in the making of a contract and where other formalities were observed the documents record the national law of the person who grants or sells rather than that of the purchaser or the receiver. The usual formula is: "I, Count Bernard, and my wife, Senegundis give to you, just as my law, the Salic, recalls."⁸⁹ In the ninth century Ragimbald, a Frank, gave lands to the monastery near Metz.⁹⁰ The formalities were discharged before a *placitum* (tribunal of "hundred") according to the custom of the Franks. Count Theodoric in the tenth century sold property to the abbey of Babenberg.⁹¹ The actual transfer of the property took place by the procedure of the Frankish and Saxon laws. The documents coming from Lombardy in all such cases of sale recall the nationality of the seller. He is either a Roman, a Salian, a Ripuarian, a Goth, an Alaman, a Bavarian, or a Burgundian.⁹² At Cremona in the tenth century a transfer of property was made by a Lombard to a Frank named Alcherus. The formality of the *launegild* was employed in conformance with the national law of the Lombard donor.⁹³ In this document the

85. Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 391 and note 42. Bernard and Briel, *Chartes de Cluny*, I, no. 189, p. 176 of 912: "... porcione mea secundum lege mea Gonbada in morgingiva . . . tibi dono ad abendum."

86. *Liutprandi Leges*, 127, MGH, 8° series, p. 134.

87. *Cartularium Langobardicum*, ed. A. Boretius, MGH, *Leges*, IV, no. 16.

88. Stouff, *op. cit. supra* note 73, at 294. The notion of a contract was poorly developed in Germanic law. See section *infra* on fusion of national laws.

89. Devic and Vaissète, *Hist. gén. de Languedoc*, V, 138, col. 300 (985).

90. H. Loersch and R. Schroder, *Urkunden zur Geschichte des deutschen Privatrechtes*, Bonn, 1881, no. 77: "957-Tradidi namque per manus fidelium meorum lege salica viventium. . ."

91. Loersch and Schröder, *op. cit. supra* note 90, at no. 83 (1027-1038).

92. Thèvenin, *Textes*, 52, *Cartularium Langobardicum*, 2.

93. *Historiae Patriae Monumenta*, XIII, 432: "Et accepi ego qui supra Arderigo a te qui supra Altecherio Launchild manitias pars uno." See nos. 84 and 421 in same work. Cf., Troya, *Codice diplomatico longobardo*, V, 430, no. 880, anno 767, and no. 118; Brunner, *op. cit. supra* note 85, at vol. I, p. 389.

nationality of the donor is not specifically mentioned but must be inferred.

Emancipation occasionally gave rise to conflicts of law. The law of the person asserting his freedom was valid in lawsuits.⁹⁴ Brunner, however, believes that in cases where the master had concealed the fact that the slave had lived as a free man, the national law of the master was applied.⁹⁵ An interesting capitulary of 801 allows the plea of the former slave who had enjoyed liberty for thirty years to prevail against the contrary plea of the Roman and Lombard masters, but not against that of the Frank or Alaman masters.⁹⁶ The reason was that the latter laws had not accepted the Roman rules of prescription.

The witnesses to documents of sale, whenever their law is recorded, belonged to the nationality of the seller. A capitulary added to the Salic law ordains that anyone desiring to dispose of goods take suitable witnesses "either among the residents of the district or among those who live under the same law as himself."⁹⁷ A document of the twelfth century originating in Thuringia and cited by Loersch and Schröder shows this rule in effect in the sale of some lands by a noble woman to the church of St. Gregory. The act of sale affirms: "the witnesses should be Franks, because the land sold is situated in Frankish country, and because Matilda is subject to the law of the Franks."⁹⁸ Here we observe the tendency of the national law to blend with a territorial principle.

The personal law of the ward determined the disposition of his or her property and the settlement of any legal issues that might arise.⁹⁹ In the same way the law of church lands under the protection of laymen was valid against that of the protector.¹⁰⁰ In testamentary succession the law of the testator governed the rules of succession to property.¹⁰¹

Interesting evidence of the way in which the law of the "principal" party, which was that of the person obligating himself or alienating property, even if improperly acquired, received judicial recognition, is contained in the trial procedure of the Goth, Joshua, and the Frank Rodestagnus. A church belonging to Joshua had been seized by Rodestagnus. The latter promised restitution. This promise was made by a procedure familiar to the Franks, the *adramitio*.¹⁰²

94. Brunner, *op. cit. supra* note 85, at vol. I, p. 392.

95. *Ibid.*

96. *Cap. I*, no. 98, MGH, p. 206, c. 8.

97. *Cap. I*, no. 136, MGH, p. 282, c. 6, quoted *supra*. See also Brunner, *op. cit. supra* note 85, at vol. I, p. 388, notes 25, 26.

98. Loersch and Schröder, *Urkunden*, no. 100, p. 76, 1133-1152.

99. *Cap. I*, no. 91, MGH, p. 192, c. 5: ". . . ut viduas et orfanos tutorem habeant iuxta illorum legem, qui illos defensent . . ."

100. *Ibid.*

101. *Cap. Ital.*, I, no. 105, MGH, p. 218, c. 14: "Observamus ut romanus populus successionem eorum iuxta suam legem habeant." Cf., *Liut. Leg.*, 91.

102. Thévenin, *Textes*, no. 114 contains an account of this interesting case based

A curious variant on the rule that the law of the donor applied in transactions of contract or sale occurs in the treatment of donations made to churches. A law of Liutprand by special favor excused the churches from giving the *launegild* in return for gifts made to them by Lombards.¹⁰³ The inference is that the gift was to be made according to Lombard law, rather than according to the Roman law by which the church lived. This explains, according to Stouff, the unusual feature noticeable in acts of exchange made in Lombardy between churches and individuals.¹⁰⁴ The nationality of the individuals involved in the transaction is often cited, as in the act of exchange between the Abbot of the monastery of St. Ambrose and the priest Adelbert, who is mentioned as living under the Lombard law.¹⁰⁵ In the Frankish territories proper exchanges between churches and Franks are often made according to the Salic law because, as Stouff again observes, these acts of exchange are usually performed to the benefit of the church.¹⁰⁶

The law applied to landed property often did not vary. A capitulary of Louis the Pious, already cited, made church lands subject to the law of the original donor of the lands.¹⁰⁷ Married women¹⁰⁸ and clergy,¹⁰⁹ though they lived by another law, nevertheless disposed of landed property by their original national law. Thus we find "the severance of landed property from the tribal law of its occasional possessor."¹¹⁰

The principle of the personality of law is applied by the Riparian law and several of the capitularies to the field of court procedure.¹¹¹ Lawsuits between persons of different nationality were subject to certain general prescriptions: (1) The tribunal usually contained judges of the

upon Germer-Durand, *Cartulaire de Notre-Dame de Nîmes*, 8 (898). Cf. also the pleas at Narbonne, 933, Devic and Vaissète, *Hist. gén. de Languedoc*. V. 57, col. 160. On the *adramitio* or *arramitio* see Brissaud, *Manuel*, p. 1384.

103. *Liut. Leg.*, 73, MGH, 8° series, p. 113.

104. Stouff, "Etude," *Rev. bourg.*, 1894, pp. 296-297.

105. *Hist. Patr. Mon.*, XIII, no. 451 (913); between Adelbert, Archdeacon of Bergamo and Landeric, living by the Salic law, *Hist. Patr. Mon.*, XIII, no. 604 (953). See also nos. 662, 710, 786.

106. Stouff, "Etude," *Rev. bourg.*, 1894, p. 297. Thévenin, *Textes*, no. 72 (836), exchange of movables between monks and a priest in Burgundy; *ibid.*, no. 95 (862-863), exchange of lands between an abbey and a layman in Burgundy; *ibid.*, no. 169 (1081-1105), exchange of serfs with an abbey.

107. *Cap.*, I, no. 145, MGH, p. 297, c. 3.

108. *Hist. Patr. Mon.*, I, *Chartae*, no. 193 (961). See Pertile, *Storia del diritto italiano*, vol. I, 2nd ed., p. 69, note 22.

109. Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 390, note 35, cites the case of the nun, Warnhild, who in 856 sells "iuxta saligam legem" what her deceased husband gave her on their marriage "iuxta suam saligam legem," *Registrum Farfense*, Rome, 1881, vol. II, p. 250. Cf., also the case of Felix, already cited in a previous chapter. He was a clergyman who left lands to his daughter and received the *launegild*, according to Lombard law, J. Kohler, *Beiträge zur germanische Privatrechtsgeschichte*, part 2, p. 7, no. 2.

110. BRUNNER, *op. cit. supra* note 85, at vol. I, p. 389.

111. *Lex Ribuaria*, XXXI, 3, ed. Sohm, MGH, p. 224 quoted in full Chapter 1: "... in iudicio interpellatus, sicutlex loci contentit ubi natus fuit, sic respondeat." *Cap. Ital. Pippini*, 790, *Cap.*, I, no. 95, MGH, p. 201, c. 4.

nationality of each litigant.¹¹² In the trial of Joshua and of Rodestagnus, Gothic and Salian judges participated.¹¹³ (2) Each litigant was allowed delays in accordance with the rules of his own law.¹¹⁴ In the trial referred to, the judges gave Rodestagnus a delay of forty nights, which was based on the Salic law.¹¹⁵ (3) Each litigant furnished proofs, oaths, and testimony prescribed by his national law.¹¹⁶ The Roman produced witnesses,¹¹⁷ the barbarian brought oath helpers or underwent the duel or the judgment of God.¹¹⁸ An exception to this rule was contained in the Burgundian law, which imposed judicial combat in any case involving Burgundians.¹¹⁹

A few words are needed more specifically about the ordinary tribunal of Frank law, the *Mallum*, and its composition. The court was, as Lot puts it, an adaptation of the pre-conquest machinery "to the new needs of the Germanic administration of justice."¹²⁰ It associated Romans and barbarians in a common judicial organization. This it did through the medium of the suitors, the *rachimburgi(i)* or *boni homines* selected from the principal races. Later, when the court system was reformed under Charlemagne, these were replaced by the *scabini*, professional judges or judgment sayers. It is a reasonable guess that the reform itself was dictated by the needs of the personal law régime, in particular the need for judicial personnel familiar with the several national laws.¹²¹ The

112. See *Cap. Miss. Spec.*, c. 48, *Cap.*, I, no. 35, MGH, p. 104 cited in Chapter 1.

113. Thévenin, *Textes*, no. 114; Stouff, "Etude," *Rev. bourg.*, 1894, p. 301.

114. *Expositio*, c. 7, *Ad Lud. P.*, 15, MGH, *Leges*, IV, p. 530: "Ceteri vero secundum suam legem, veluti Romanus 20 dies habeant indutias."

115. Thévenin, *Textes*, no. 114, p. 168: "Indices decreverunt et iudicium ut in quadraginta noctes suum auctorem presentare faciat." See Pérard, *Recueil de plusieurs pièces curieuses servant à l'histoire de Bourgogne*, Paris, 1664, p. 34.

116. *Cap. Ital.*, no. 105, I, MGH, p. 219, c. 14: "... et quando iurant iuxta suam legem, iurent . . ." *Ed. Pist.* of 864, c. 20: "... secundum suam legem se inde sacramento idoneum reddat." *Cap. Legi Add.* of 816, no. 134, I, MGH, p. 268, c. 2. *Cap. Legibus Add.* of 818-819, no. 139, I, MGH, p. 282, c. 6.

117. L. V. Muratori, *Rerum Italicarum Scriptores*, II, 2, 505, in a lawsuit involving the abbey of Farfa. Cf. also the *notitia* of a judgment given in 870, *Chartes de Cluny*, I, no. 15, p. 18.

118. Thévenin, *Textes*, nos. 5, 24, 25, 32, 46 (oath helpers); nos. 49, 102, 125, 160 (proof by battle); no. 146 (*iudicium Dei*); no. 39 (judgment of the Cross).

119. Agobard, *Adversus Legem Gundobadi*, 4, MGH, *Epistolae Karolini Aevi*: Si subito contigerit alicui ex ipsis disceptatio in iudiciis, nullum poterit habere testem . . . eo quod non recipiatur testimonium super Gundobadum. Agobard, *loc. cit.*, 6, 7, 9.

120. Lot, *Les Invasions germaniques*, p. 211.

121. Bernard Althoffer, *Les Scabins*, Paris and Nancy, 1938, p. V finds the cause of the development of *scabini* and *rachimburgii* in the personality of law. See especially p. 107ff on the role of the *scabini* in the court; and pp. 133-138 on the manner in which they discharged this function. See p. 165ff for a catalog of legal actions involving *scabini* in the Carolingian era. J. Flach, *Les Origines de l'ancienne France*, I, Paris, 1886, 228-229, also emphasizes the necessity of *rachimburgii* and *scabini* belonging to the same nationality as the litigants: "qu'en d'autres termes ils fussent des pairs." Most recently on the role of *scabini*, F. L. Ganshof, "The Impact of Charlemagne on the Institutions of the Frankish Realm," *Speculum*, 1965, XL, 1, pp. 55-57.

need is echoed more than once in the capitularies and is expressed as early as the seventh century in the *formula* of Marculf quoted elsewhere.¹²²

Thereafter judges of several nationalities appear frequently in court records, though the composition of these tribunals varies considerably in different regions. In the south of France the documents disclose the mixed character of the courts. These occur at Marseilles in 844; in a village near Arles in 845; at Toulouse in 918; at Nimes in 898; at Narbonne in 933; and at Arles in 968.¹²³ In the north and east there is the evidence of Rabanus Maurus that the principle of mixed tribunals was applied in Saxony. Waitz generalizes this rule to include the entire northern part of the empire. To Beauchet, however, the provision in a capitulary of 817 permitting, in the absence of witnesses of the same nationality, the use of others—"vel si illos habere non potuerit, tunc de aliis quales ibi meliores inveniri possunt" (or if he has not been able to have those, then from others such as can be found there among the best) —raises doubts about the application of the principle outside the *midi* and Italy.¹²⁴

How about the lawsuit of a Goth or a Burgundian in a region such as Austrasia where there were not likely to be found *scabini* of the same nationality as the litigants? A capitulary of Ansegisus allows the transfer, under certain conditions, of the case so that "liceat ei sacramentum in patria sua, id est in legitimo sui sacramenti loco jurandum offerre, et is qui cum eo litigatur, si velit, sequatur illum in patriam suam ad recipiendum illud sacramentum" (it be permitted him to take the oath in his own country, that is to offer his avowal in the legitimate place of the oath, and he who litigates with him, let him follow him into his country for the purpose of receiving that oath) allows, in other words, a change of venue in order to permit the litigant the use of his "legitimate" mode of proof in his *patria*.¹²⁵

An interesting *Capitulaire Missorum* of 802 issued by Charlemagne orders the counts to declare by what law they live and to judge according to this law.¹²⁶ Roman litigants under this rule would either have had to

122. Marculf, *Formulae*, I, 8; Zeumer, pp. 47-48. On the capitularies of 802 (*Cap.* I, no. 34) and 806 (*Cap.*, I, no. 35, c. 48), see Ganshof, *loc. cit.*, pp. 58-59.

123. L. Beauchet, *Histoire de l'organisation judiciaire en France-Epoque franque*, Paris, 1886, p. 287. For additional examples see *Cartulaire de Saint-Victor de Marseille*, I, 290, (Arles); Pérard, *Recueil de pièces servant à l'histoire de Bourgogne*, p. 35 (Autun).

124. Beauchet, *op. cit. supra* note 123, at 289. G. Waitz, "Sendrecht der Mainwenden," *Zeitschrift für deutsches Recht*, XIX, p. 84.

125. Beauchet, *op. cit. supra* note 123, at 289-290. Chénou, *Histoire du droit français*, I, p. 240ff. *Cap.*, ed. Boretius, MGH, vol. I, p. 268, c. 2 anno 816.

126. *Capitulaire Missorum Item Speciale*, 802, c. 48, *Cap.*, vol. 1, MGH p. 104. M. A. v. Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts in geschichtlicher Entwicklung*, Bonn, 1864-1874, vol. V, p. 75, note 67, emends the passage in the text to read "Confiteri faciant partes qua." In this way he brings it into apparent consistency with Marculf, Bk. I, no. 8, cited above, which makes no distinction as to the personal law of the judge. Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 388, note 27 rejects the emendation and confines its effect to Neustria. Brunner takes issue with Sohm, *Die fränkische*

accept the judgment of Frankish judges declaring Frankish law or demand a tribunal containing judges professing Roman law. Apparently there had been frequent cases of Frankish judges deciding lawsuits involving men of other nationalities. The ordinance would have had the effect, if strictly observed, of barring judges living under a national law different from that of parties to a suit. Its application may have been confined to the *iudices*, strictly speaking, rather than to the counts, though the text itself seems explicit.

Ut comites et iudices confiteantur qua lege vivere debeant et secundum ipsam iudicent (so that the counts and judges declare by what law they ought to live and according to that law let them judge).

A lawsuit involving the abbeys of St. Denis and of Fleury on the Loire shows us the practical application. The case was brought before judges of the Salic law who, since the principals lived by the Roman law, were obliged to refer the litigation to Orleans where judges of the Roman law could be found.¹²⁷

How were conflicts of law that arose from torts or crime settled? In the event of the commission of a crime such as murder, two considerations entered. In the first place, the guilty person violated his national law. Secondly, the murderer incurred the hostility of the family of the victim which, under Teutonic law, even at a very late date under the Frankish monarchs, could exact vengeance from the guilty party. The influence of government and of the law was early exerted in order to induce the family of the injured person to renounce the *faida*, or private war, and accept a payment equivalent to the magnitude of the damage or injury sustained. The consequence of this second line of thought was that it was the privilege of the injured party to determine the amount of damage in accordance with the precise provisions of his national law. The first line of reasoning was based on the fundamental conception of a person's liability to punishment in accordance with the dictates of his personal law, which is clearly expressed in the Ripuarian Law.¹²⁸

Reichsund Rechtsverfassung, Weimar, 1871, p. 173 who suggested that the count be judged and outlawed by his own national law. Brunner rightly emphasizes the royal authority exercised by the count, which enabled him to carry out the ban without regard to his own national law, but perhaps with some regard to the national law of the province he ruled. C. 57 of the *Cap. Miss. Spec.* states: "Caeteri vero banni, quos comites et iudices faciunt secundum legem uniuscuiusque componantur"; the national law of the judge is certainly not meant here. To reconcile Marculf, Bk. I, no. 8 and *Cap. Miss.*, 48, I suggest that the count presided in the court at all times but that in the case of litigants of nationality other than his own he selected *iudices* or *cognitores* of the litigants' nationalities. See Brissaud, *Manuel*, p. 54, note 1.

127. *Miracula Benedicti, Acta Sanctorum*, ed. Bolland, VIII, p. 309 (MGH, *Scriptores*, XV, 1, p. 490).

128. Esmein, *Cours élémentaire d'histoire du droit français*, 15th (-14th) ed. by R. Genestal, Paris, 1930, pp. 85-90 who, however, fails to emphasize adequately the public crime. The tariffs of composition may be regarded as a "prime contre la vengeance" rather than as indemnity or fine, Lot, *Les Invasions germaniques*, p. 166ff.

The rule of personality applied in certain cases. The Ripuarian law states that a Salian Frank, a Burgundian, an Alaman, or a member of any other race accused of having committed a crime in the Ripuarian country was to be judged not according to Ripuarian law but according to his own law, "*sicut lex loci continet ubi natus fuerit sic respondeat*" (just as the law of the place where he was born prescribes, so may he respond).¹²⁹ A capitulary of 782 or thereabouts, dealing with the misdeeds of Frankish and Lombard counts in Italy, invokes penalties imposed by the Lombard law.¹³⁰ The case of the Lombard nun who, on authorization of her guardian, married a Frank is of interest because the principle of personality was applied to the extent that the husband was punished in conformance with the Frankish law, and the nun and her guardian subjected to the penalties of the Lombard law.¹³¹ The general principle here observed seems to be that the law of the defendant must be applied in criminal matters.

Very gradually the view prevailed that it was the condition and the law of the victim that was to be consulted rather than the personal law of the guilty person. A capitulary of Pippin decrees that every crime which could give rise to private vengeance must be settled by the scale of composition determined by the law of the victim.¹³² In Italy, the principle thus affirmed was accepted completely. An interesting document of Italian origin considers the question of compositions in the Roman law. The author finds Roman precedents for composition in the Law of the Twelve Tables. Manifest or open theft in the Twelve Tables was punishable by a payment of four times the value of the stolen article. Non-manifest theft entailed a double penalty. If a Roman was robbed by a Lombard, the Lombard would, in accordance with the provisions of the Law of the Twelve Tables, pay the Roman a composition of double or quadruple.¹³³ The doctrine here accepted conformed to the rule laid down in the capitulary of Pippin.¹³⁴ An Italian capitulary states: "*quando componunt, iuxta legem cui malum fecerint componant*" (when they compound, according to the law of the person to whom they have done injury let them make composition).¹³⁵ Another capitulary decrees a threefold fine for theft and infringement of the domestic peace.¹³⁶

129. *Lex Ribuaria*, XXXI, 3, 4. (XXXV, 3, 4 of Edition of Beyerle and Buchner, 1954).

130. *Cap.*, no. 91, I, MGH, p. 192, c. 7.

131. Muratori, *Rerum Italicarum Scriptores*, II b, 942 (circ. 874).

132. *Pippini Capitulare*, no. 95, I, MGH, p. 201, c. 4, cited *supra*.

133. *Quaestiones ac Monita*, 7.

134. *Cap.*, no. 105, I, MGH, p. 219, c. 14:

Langobardus vel Romanus si evenerit quod causam inter se habeant, observamus, et . . . , quando iurant, iuxta suam legem iurent et, quando componunt iuxta legem, cui malum fuerint, componant. . . .

135. Besides *Cap. Ital.*, no. 105 *cf.*, *Cap. Harist* of the year 779, no. 20, *Forma Langob.*, I, p. 49, c. 11. See *Cap. Pip.*, 782-786, no. 91, I, p. 193, c. 8. This appears in the *Liber Leg. Lang. Pip.*, 8, in the form: ". . . emendetur iuxta ut eius est lex, cui malum ipsum perpetratum fuerit.

136. *Cap.*, no. 70, I, MGH, p. 160, c. 2.

The documents of the ninth century contain views of the nature of composition and its incidents of the two types just described. Louis the Pious in a capitulary provides that a Saxon or a Frisian guilty of a crime against a Salian Frank was liable for a composition fixed by the Salic law.¹³⁷ The value of the money was also set by this law, for at this time the content of the *solidus* varied considerably from place to place. On the other hand, the *Capitulare de Villis* upheld the older principle that the law of the guilty party determined the amount of the composition.¹³⁸ Ducange in the article *Legem suam componere* cites some charters from Toulouse identifying violation of contract with delict and making the person guilty of breach of contract liable for the payment of a fine determined by his own personal law.¹³⁹

In addition to the two aspects of the nature of criminal law just treated two others appear. The law applied in criminal matters is sometimes the *lex loci delicti commisi* or law of the place of the crime.¹⁴⁰ This form of criminal justice is applied to the crime of perjury by a Lombard paraphrase.¹⁴¹ The *Lex Saxonum* also decrees the punishment of the Saxon offender by the law of the place of the crime.¹⁴² The *lex fori* also appears as the competent law in the *Edictum Pistense*.¹⁴³ This rule though not entirely consistent with the personal law principle is an outgrowth of it. A fourth aspect under which criminal justice appears is the public crime. This topic will be treated below.

The treatment of crime during the period of the personality of law thus shows traces of divergent doctrines as to the nature of offenses against the public order and individuals. These differences testify to the heterogeneous character of the society and legal sources of the time. Three influences other than the territorial may be recognized in the Frankish period bearing on the definition of crime: (1) The system of composition;

137. *Capitula Legi Addita*, 816, I, no. 134, MGH, p. 268, c. 3: ". . . ibi volumus ut quadraginta denariorum quantitatem solidus habeat, quem vel Saxo, vel Frisio ad partem Salici Franci cum eo litigantis solvere debet." The *solidus* of 12 *denarii* appears in a capitulary of 743, *Cap.*, I, MGH, p. 28, c. 2.

138. *Cap.*, I, MGH, p. 83, c. 4:

Franci autem qui in fisci aut villis nostris commanent, quicquid commiserint, secundum legem eorum emendare studeant.

139. Ducange, *Glossarium*, s. v. *Legem suam componere*.

140. Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 386.

141. *Cap. Haristall.*, 779, *Forma Langobardica, Capitularia*. I, MGH, p. 49, c. 10: ". . . sicut lex loci illius ubi periurium factum est, a longo tempore fuit."

142. Karl V. Richthofen, *Zur Lex Saxonum*, Berlin, 1868, pp. 2ff.; *Lex Saxonum*, c. 36 in MS additions to *Spangenberg Codex* quoted by Brunner, *op. cit. supra* note 140, at vol. I, p. 386, note 19: ". . . secundum illorum legem ubi factum fuerit." The competent tribunal, as Brunner points out, is the Saxon one. Hence there is no question in this law of the *lex fori*.

143. *Edictum Pistense*, 864, *Cap.*, no. 273, II, MGH, p. 315, c. 13:

In illis autem regionibus in quibus secundum legem Romanam iudicia terminantur, iuxta ipsam legem culpabilis iudicetur.

See also chapters 16, 20, 23. There is a hint here of the *lex fori*. The edict will be treated more fully in a subsequent chapter.

(2) the principle of the personality of law; (3) the *lex loci delicti commissi* and its variant, the *lex fori*.

The rules of the personal law régime for the settlement of conflicts, inconsistent though they appear at times, reveal clearly the operation of a principle guiding political and legal affairs: no one may obligate himself, no one may lose a right except by "due process" of personal law.

IV. THE COMMON LAWS OF THE FRANKISH EMPIRE

A. *Territorial Law and Personal Law*

Two currents may be distinguished that were transforming Roman and barbarian law and bringing them into closer union.¹ One affected the "public" or administrative law. It consisted of the extension of royal power over process, the *bannitio*, or royal summons often replacing the *mannitio*, or private "instance"; and of the increasing role of the court in the investigation and punishment of crime, which often ignored the system of private composition. The conception of crime was thus advancing at the expense of tort, and with it that of a uniform procedure.

The other current is more difficult to trace, for its effects must be sought in legal practice rather than in official enactments. It promoted a mingling of private law ideas and institutions and produced changes in the procedure and substance of barbarian and Roman law. If it carried the Gallo-Romans away from the classical conceptions of *dominium* (ownership) and of *testamentum* (testament), it undermined the traditional barbarian ideas of family solidarity by introducing individual ownership, female succession to property, and a greater influence of the Church over marriage and family law.

The common law which thus shows evidence of developing in this period has a twofold source, one in the capitularies, which are uniform in application, the other in the national laws themselves as they undergo fusion and unification. Leaving the second subject for treatment elsewhere, let us study the relations of the capitularies and the national laws. How far was the law of the Frankish period territorial, how far personal?

Does the distinction between territorial and personal law correspond with the difference between public and private law? The answer is that, in the Frankish period, public and private law are inextricably mingled, just as they were in the earliest period of Roman history.² The Law of the Twelve Tables was private law in the sense that it dealt with the constitution of the family, the *patria potestas* (paternal authority) and other matters that today would be classed under civil law; it was "public"

1. P. Imbart de la Tour, *Histoire politique, des origines à 1515 (Histoire de la nation française, III)* Paris, 1920, pp. 172-176.

2. Emile Jarriand, *Histoire de la Nouvelle 118 dans les pays de droit écrit depuis Justinien jusqu'en 1789*, Paris, 1889, pp. 429-431.

law in the sense that the family shared with the state extensive "political" powers. Only with the lapse of time, for example, did the rules of succession based on the agnatic principle give way to rules in which family sentiment rather than political necessity were allowed to prevail with the testator.

In the same way the private law of the Frankish period was based on certain "political" principles, such as the solidarity of the family, or, when this disappeared, of the social groups that took its place. It is only on occasion that we can distinguish a notion of public law in the ordinances and statements of the Frankish emperors. But at best these declarations are theological rather than political.³ Public and private law are to all intents linked.⁴

Lawmaking in this period is still predominantly a judicial process savoring more of jurisprudence than of legislation.⁵ Even when important changes are introduced into the law of the period the process is concealed by what Pétrau-Gay aptly terms "juridical prestidigitation."⁶ The dogma or the fiction of the law's immutability is maintained throughout, and only in matters outside the sphere of the national laws, or rather through other channels, does the royal will work unopposed. Legislation in the sense of *avowed* interference with immemorial rules by an *independent organ* of government issuing *general* rules does not develop in the field of public law until the thirteenth century and in the field of private law until the sixteenth century.⁷ Therefore, there can be no question of using the distinction between law and custom as the basis for the division between territorial law and personal law in the legal systems of the Frankish Empire.

Finally the question arises, how far were the national laws of the period personal and the capitularies territorial? Here one runs into the familiar distinction made by German scholars between the *volksrechte* (national laws) and the *reichsrecht* (imperial or territorial law). According to this scheme the national laws were the products of the organic activity of the national groups in the Frankish Empire and subject to change only through the initiative of the groups which issued them. The capitularies, in their turn, were legislative enactments of the Frankish rulers which did not alter the national laws unless ratified by the national groups for whom they were intended. Thus, the *capitulum legi additum*, or capitulary additional to a national law, dealt with the same matters of private law

3. See L. Halpen, "L'Idee d'état sous les carolingiens," *Revue historique*, 1939, vol. CLXXXV, p. 59 ff.

4. J. Pétrau-Gay, *La notion de "lex" dans la coutume salienne et ses transformations dans les capitulaires*, Grenoble, 1920, pp. 4-5.

5. J. Pétrau-Gay, "La 'Laghsaga' salienne," *Revue historique de droit français et étranger*, XIV, 1935, p. 303.

6. *Ibid.*

7. *Id.* at 305. For a similar view see MCLWAIN, *GROWTH OF POLITICAL THOUGHT IN THE WEST* 189.

as the *lex* to which it was attached. But the *capitulum per se scribendum* (capitulary issued by the King alone), as well as the *capitulum missorum*, not intended for combination with the personal law, dealt only with administrative or "political" matters in the Empire. This in brief is the view of capitulary law held by Boretius (less so by Seeliger), and others.⁸

These theories were challenged in a striking manner by Fustel de Coulanges, who denied the popular character of the national laws, and insisted on the royal origin of all legislation in the Frankish epoch as well as on the Roman traditions that inspired it.⁹ Though containing a great deal of truth the position of Fustel de Coulanges was too extreme. The same may be said of the views of Simon Stein, which also represent a reaction against the conceptions of Boretius and the Germanists. Fustel de Coulanges made inadequate allowance for the customary character of the law of the period, whereas Stein failed to note undoubted differences between the *capitulum legi additum* and the *capitulum per se scribendum*.¹⁰

The balance between these views has been struck by Pétrau-Gay, whose ideas may be summed up as follows: There is a difference between the *capitulum legi additum* and the *capitulum per se scribendum*, but mainly in the form of emission.¹¹ In the former the king is the successor of the *laghsaga* or law-sayer of German custom; the *capitulum legi additum* is therefore equal in authority to the *lex* it amends. The *capitulum per se scribendum* is issued by the king in virtue of the *bannum* (coercive authority) possessed by the Germanic ruler and also in virtue of his authority as successor of the Roman emperors; its duration is, therefore, limited only to the life of the king.¹² Furthermore, no difference in content is apparent between the two types of capitulary; they both deal with the same matters, even of private law.¹³

8. A. Boretius, *Beiträge zur Kapitularienkritik*, Leipzig, 1874; G. Seeliger, *Die Kapitularien der Karolinger*, Munich, 1893; M. Thévenin, *Lex et capitula* (*Bibliothèque de l'Ecole des Hautes Etudes*, 35th fascicle), Paris, 1878, pp. 37 ff. Seeliger is least extreme and his study remains valuable. For judgments on this literature see above all F. L. Ganshof *Recherches sur les capitulaires*, ch. 1. A fundamental work is E. Mayer-Homburg, *Die fränkischen Volksrechte im Mittelalter*, vol. I, *Die fränkischen Volksrechte und das Reichsrecht*, Weimar, 1912, especially 1-54, 425 ff. For the oral character of the capitulary see the important study of Auguste Dumas, "La parole et l'écrit dans les capitulaires carolingiens," in *Mélanges d'histoire du Moyen Age dédiés à la mémoire de Louis Halphen*, Paris, 1951.

9. Fustel de Coulanges, *La monarchie franque*, 2nd ed., pp. 63-135, 304-378, 598-648; idem, *Les transformations de la royauté pendant l'époque carolingienne*, 2nd ed., pp. 356-411, 453-500.

10. Simon Stein, "Lex und Capitula," *Mitteilungen des österr. Institut für Geschichtsforschung*, Innsbruck, vol. 41, 1927, pp. 301 ff.

11. J. Pétrau-Gay, *La notion de "lex,"* pp. 295 ff.; idem, "La laghsaga," *op. cit. supra* note 5, at 288.

12. Pétrau-Gay, *La notion de "lex,"* pp. 303-304; idem, "La 'Laghsaga' salienne," *op. cit. supra* note 5, at 293 ff.

13. Pétrau-Gay, *La notion de "lex,"* pp. 252-254; idem, "La 'Laghsaga' salienne," *op. cit. supra* note 5, at 288. The *Edictum Pistense*, Cap., II, MGH, p. 315 lays down rules

What emerges from these observations is that it is difficult to classify one group of law sources as territorial and another as personal. The capitularies were personal as well as territorial ordinances. The national laws themselves (the *leges*), though predominantly personal, were also territorial in certain respects.

For some matters the Germanic laws established uniformity in legal procedure which overrode the personal law principle and formed a stock of territorial legal principles in this period. The Visigoths employed the Roman method of judicial inquiry against Visigoths as well as Romans.¹⁴ The Salic law imposed compurgation on Romans: "If a Roman is accused of having despoiled a Frank, and there is no certain proof, this Roman shall deny the accusation by twenty-five oath helpers."¹⁵ The Ripuarian law prescribes compurgation for Roman as well as Ripuarian.¹⁶ The Burgundian law states: "If a free man, barbarian or Roman, is accused of a crime, let him swear with his wife, his children, and his relations to the number of twelve."¹⁷

As a result of the mutual operation of the national laws and of the capitularies there was some confusion as to their respective spheres of application. Hincmar of Rheims describes a "flight to the capitularies" in one of his letters:

Quando enim sperant aliquid lucrari, ad legem se convertunt: quando vero per legem non aestimant acquirere, ad Capitula confugiunt: sicque interdum fit, ut nec Capitula pleniter conserventur, sed pro nihilo habeantur, nec lex. . . .¹⁸

In consequence of the same difficulty a Lombard jurist sought to define more carefully the two fields of capitulary law and national law.¹⁹ Under this division the personal laws of Lombards and Romans covered successions, contracts, oaths, and composition. "Concerning all other matters let us live by the common law which the most excellent master Charles, the King of the Franks and Lombards, has added to the [Lombard] edict." As Stouff observes, the "criterion is exact but incomplete," and he attempts to complete it by distinguishing between public and private law, the former dominated by territoriality, the latter

of private law as well as "public" law for all persons living outside the "regions where Roman law prevails." No distinction is otherwise made as to nationality. The edict is certainly not a *capitulum legi additum*, though it has some of the characteristics of a *capitulum legibus additum*, or capitulary additional to all the national laws. For Petrau-Gay the appearance of this second type of capitulary marks the decline or at least the transformation of the personal law system.

14. *Leges Visigothorum*, VI, I, 2, MGH, 8° series, p. 176.

15. *Lex Salica*, XIV, 2, ed. Hessels, Cod. 2, col. 83.

16. *Lex Ribuariorum*, LXVI, 2 MGH, p. 255.

17. *Leges Burgundionum*, VIII, 1, ed. De Salis, MGH, p. 49.

18. Hincmar, *Opera Omnia*, ed. Sirmond, Paris, 1645, pp. 217-225, Selection XV entitled *Ad Episcopos Regni, Admonitio Altera pro Carlomanno Rege apud Sparnacum Facta*.

19. *Capitula Italica*, I, no. 105, MGH, p. 219, c. 14.

by the principle of personality.²⁰ But besides being too precise, this distinction does not help us to classify the content of the "*communi lege*" (common law). The passage really suggests what has been noted above, that it is impossible to classify the capitularies as public law and the national laws, or *leges mundanae*, as private law. The difference between private and public law, even if recognized in Frankish law, certainly does not correspond with any classification of the law sources themselves. Savigny is at pains to disprove that this statement makes the capitularies sources of private law.²¹ But it is certain that the capitularies "additional to the national laws" include what we may call private law today. By "common law," as used in the passage, therefore, should be meant legal doctrines, practices or procedures, whether of public or private law, originating in the folk law or the royal will, which had been made common to the empire by the capitularies.

A capitulary of Louis the Pious issued in A.D. 821 is also important for the distinction between capitularies and national law, which is expressed in its closing words: "But not only are they to be called law but they are to be held as law."²² This transforms certain *capitula per se scribenda* into *capitula legi addita*.

We do not find in the Frankish period the clear articulation between various spheres of law that some modern scholars imagine for us. Keeping this in mind let us examine the branches of law that were subject to territorial principles.

The same authorities were imposed in the various districts over members of all nationalities.²³ Marculf gives a formula, referred to in the previous chapter, containing the act of nomination of a count in the Merovingian monarchy who governs in the name of the king "men of every race, Franks, Burgundians, Romans."²⁴ The court system or judicial organization, though adapted to the necessities of the personal law régime, as explained above, was nevertheless organized on a territorial and a unitary basis.²⁵

20. Stouff, "Etude," p. 29.

21. Savigny, *Geschichte des römischen Rechts im Mittelalter*, vol. I, p. 174.

22. *Capitularia*, ed. Boretius and Krause, no. 143, MGH, c. 5:

Generaliter omnes admonemus ut capitula quae praeterito anno legis salicae per omnium consensum addenda esse consumimus, iam non ulterius capitula sed tantum lex dicantur, immo pro lege tencantur.

The importance of this statement for the growth of jurisprudence is indicated by Pétrau-Gay, "La 'Laghsaga,'" *op. cit. supra* note 5, at 281 ff. Cf., Thévenin, *Lex et capitula*, pp. 139-140. See especially Ganshof, *Recherches sur les capitulaires*, pp. 74-78.

23. Fustel de Coulanges, *La monarchie franque*, pp. 274 ff.

24. Marculf, I, 8, discussed *supra*, Chapter 2, note 126.

25. Stouff, "Etude sur le principe de la personnalité des lois depuis les invasions barbares jusqu'au XII^e siècle," *Revue bourguignonne de l'enseignement supérieur*, vol. IV, 1894, p. 31.

Documents revealing judicial organization based on territorial foundations exist in large numbers. The following are included in Thévenin, *Textes relatifs aux institutions privées et publiques aux époques mérovingienne et carolingienne*, Part I, *Institutions privées*,

Procedure was also governed in many respects by territorial principles. The Frankish kings had inherited from the Romans the advanced judicial processes of investigation by the judge and laws of evidence, and from the barbarian tradition the system of composition and individual self help.²⁶ Both systems were merged in the dominant procedure of the Frankish period, so that Romans accepted the principle of individual composition and barbarians adapted themselves to the judicial and inquisitorial procedure.²⁷ The capitularies turned these practices into common law.

In criminal law there is some question about the extent to which the personal law applied. This question is taken up elsewhere in connection with conflicts of law, but it seems clear that a distinction must be made between compositions for private offences due to individuals and violations involving the public interest which were not subject to the national law systems. The following statements illustrate the operation of the "public" law.

Undoubtedly, the Roman system of penal law enjoyed the approval of the Frankish monarchs. Childebert II in his decree of the year 596 gave the courts the power of life and death over his subjects and ordered them to hang murderers in the event of their being apprehended *in flagrante delicto* (in the commission of a crime). The *rachimburgi* (suitors) were to have no part in this procedure: "The man who has known how to kill ought to learn to die; we do not wish that he should redeem himself or compound."²⁸

The capitularies often fail to make any distinction of race in matters of criminal law. Most texts of the capitularies prescribing a penalty begin with the words "*si quis*" or "*si quis ingenuus*," "*si quis servus*," general expressions implying that in certain respects at least the criminal law was uniform.²⁹ The fourth article of the Constitution of Clothar first offers the natives the benefit of Roman law, but only for their private affairs; it remains silent in regard to crimes.³⁰ Gregory of Tours does not seem to

nos. 32, 36, 41, 80, 85, 100, 100 *bis*, 100 *ter*, 102, 104, 107, 108, 115, 123, 128, 131 (all dealing with the public *mallum*); nos. 37, 39, 62, 89, 94, 101, 133 (dealing with other pleas).

26. Esmein, *Histoire du droit français*, pp. 85-90.

27. Fustel de Coulanges, *La monarchie franque*, pp. 418, 419. The monastery of St. Denis brought suit against an abbey in 692. In spite of the fact that both parties appear to have been under Roman law the defendant was adjudged an oath with three oath helpers, which he did not fulfill, and lost the case, J. M. Pardessus, *Diplomata*, Paris, 1843, II, no. 424. See P. van Wetter, *Droit romain et droit germanique*, I, p. 15, note 2 for this as well as other examples of territoriality.

28. *Childeberti II Regis Decretio*, 596 (?), c. 5, *Capitularia*, I, MGH, pp. 15-16.

29. See, for example, the *Edictum Pistense*, no. 273, MGH, II, pp. 312 ff. The evidence for a unitary system is marshalled by Fustel de Coulanges, *La monarchie franque*, Ch. XIII, pp. 406 ff; idem, *Recherches sur quelques problèmes d'histoire*, 2nd ed., pp. 359 ff. For similar view see L. de Combes, "L'Invasion des barbares, l'église et le statut personnel," *Revue catholique des institutions et du droit*, vol. 22, 1899, p. 419.

30. *Cap.*, I, MGH, p. 18, c. 4, quoted *supra* Chapter III.

make any distinctions between Romans and barbarians in regard to criminal law. The same punishment, as we gather from his accounts, applies to all.³¹

The nature of the Constitution of the Frankish Empire is a matter of dispute.³² The law sources show the ruler in various positions. Though the national laws of some of the barbarian peoples are merely statements of custom and the legislative power of the king therein revealed practically a nullity, other codes such as those of the Burgundians and the Visigoths are almost legislative enactments in our sense of the term.³³ It is in the capitularies, however, that the legislative power of the King as the successor of the Roman Caesars becomes most pronounced.

It seems safe to conclude that important portions of the laws and capitularies of the Frankish era show territorial as well as personal features. The distinction between personality and territoriality, however, must be sought in specific provisions of the laws rather than in any classification of the law sources themselves.

B. *The Fusion of Laws in the Frankish Period*

The personal laws borrowed freely from one another. The capitularies and the canons of church councils contributed their share to the common stockpile of institutions. The result of the process of fusion was the establishment of a common law, or sometimes of a number of common laws, overriding the diversity of personal laws and even of regional customs. The ingredients which entered into the synthesis were pretty well diffused, but the Roman law enjoyed a marked preponderance in southern France and many parts of Italy, while the barbarian codes, newly merged in several territorial laws, predominated in northern France, the Low Countries, Germany, and, for a time, part of northern Italy. If the Carolingian Empire had survived, Western Europe might have

31. Fustel de Coulanges, *La monarchie franque*, pp. 468-471. However, the story of Vigilius, the archdeacon of Marseille, recorded by Gregory of Tours, *Historia Francorum*, ed. R. Poupardin, IV, 43 tends to show the principle of the personality of law in operation. Though released from the payment of a fine of 4000 *solidi*, Vigilius obtained against Albinus the imposition of a fine of *quadruple*, in accordance with the Roman law. This is explained by De Combes, *op. cit. supra* note 29, at 421 as an exceptional case due to the special position of Provence which at the time preserved some part of its independence in the empire. The whole account of this episode is hardly clear and cannot be adduced in defense of personal or territorial principles.

32. Esmein, *Histoire de droit français*, p. 57.

33. Esmein, *op. cit. supra* note 32, at 65, 99, 100. Esmein, *Histoire*, p. 677 emphasizes the priority of written law over custom in the Frankish empire. The latter, he claims, could not be invoked except in the absence of a written text. It appears to this author that Esmein underestimates the customary character of most of the *leges barbarorum*. This notwithstanding capitularies of Pippin, *Cap. Ital.* 790, c. x, Boretius, *Cap.*, I, 201: "Ubi lex est, praececlat consuetudinem et nulla consuetudo superponatur legi," and of Charlemagne (802), Boretius, *Cap.* I, 96: "Ut iudices secundum scriptam legem iuste iudicent, non secundum arbitrium suum." The *lex* remains only a part of custom, the written part.

achieved, on the basis of this partial synthesis, what England later did, a common system of law and legal administration.³⁴

It would not be within the purview of this study to undertake a systematic survey of the results of the legal syntheses that were taking place in the ninth, tenth and eleventh centuries. A brief summary, which is in danger of becoming a mere catalogue, is all that can be attempted here.

In no field are the effects of this fusion more marked than in the laws dealing with the condition of persons. The Roman and Germanic laws took different views in regard to the surrender of personal liberty. The Germanic law allowed such alienation,³⁵ the Roman law forbade it.³⁶ The *Romani* often ended up by accepting the Germanic rule and giving it a romanic tegument.

There were various methods of manumission, some Roman and some barbarian.³⁷ The Frankish method was to enfranchise slaves *per denarium*, (by fictitious purchase). The Roman method of manumission was by testament, by charter, or *per ecclesiam* (in the church).³⁸ Nevertheless, the Franks and Lombards freed their slaves by the Roman method, with the consequence of endowing the freedmen with the personal law corresponding to the form of emancipation.³⁹

The formalities and the donations connected with marriage belonged to the realm of personal law. The Germanic laws took a different view of these matters from that of the Roman law.⁴⁰ Marriage gifts in Germanic law originated with the husband (e.g., the *morgengabe*), in Roman law with the family of the bride (e.g., the *dos*). Among other changes that occurred, the Roman *dos* almost disappeared to give way to the *dos ex marito*, a hybrid institution that approximated the *morgengabe*.⁴¹

34. SMITH, *THE DEVELOPMENT OF EUROPEAN LAW* 20 (N.Y. 1928).

35. Tacitus, *Germania*, 24: "Venire se et alligari patitur."

36. *Digest*, XL, 12, 10; Just. Cod., VII, 16, 10. Several of the *formulae* deal with sales of liberty, *Formulae Andecavenses*, 19 (Zeumer, *Formulae*, MGH, pp. 10-11; De Roziere, *Formules*, no. 45). Cf., *Formulae Andecavenses*, 25 (Zeumer, MGH, p. 12; De Roziere, *Formules*, no. 46); *Formulae Turonenses vel Sirmondicae*, 10 (Zeumer, MGH, pp. 140-141; De Roziere, *Formules*, no. 44). *Recueil des chartes de l'Abbaye de Cluny*, ed. Bernard and Bruel, I, 30 (887). Paul, *Sententiae*, II, 19, 1, ed. Haenel, p. 366.

37. Viollet, *Histoire du droit civil français*, 2nd ed., pp. 297-302. Chénon, *Histoire de droit français*, I, pp. 355-361.

38. *Lex Salica*, XXVI, 1, 2, ed. Behrend, pp. 45-46; *Lex Ribuaria*, LVIII, 1; LXI, 3; LXII, 2; LIV, 2. Thevenin, *Textes*, nos. 11, 20, 27, 34.

39. *Liutprandi Leges*, 9, MGH, 8° series, p. 89. *Lex Ribuaria*, LXI, 1 MGH, p. 252: "Si quis servum suum libertum fecerit, et civem Romanum portasque apertas conscripserit."

40. Viollet, *op. cit.* *supra* note 37, at 774. Chénon, *Histoire du droit français* I, 381 ff. E.g., Thévenin, *Textes*, no. 42; van Wetter, *Droit romain et droit germanique*, Part I, pp. 66-67, note 4.

41. Tacitus, *Germania*, 18: "Dotem non uxormarito, sed uxori maritus offert." For *morgengabe* see Thévenin, *Textes*, nos. 48, 78. The wife, however, brought to the husband under the name of *faderfium* goods which he administered but part of which was probably treated as his property, *Leges Longobardorum*, *Rotharis*, 182, 201; Brissaud, *Manuel*, pp.

The rules of legal capacity underwent widespread unification during the period of the personality of law. The synthesis of the barbarian and Roman laws of capacity⁴² led to the acceptance by some of the barbarians of the Roman principle of guardianship in the interests of the ward; and on the part of the Romans to the resurrection of the ancient *tutela perpetua*, or perpetual guardianship of women, in conformity with barbarian legal principles.⁴³ In other words, the Romans acquired the *mundium* (paternal and marital authority) over women.

The barbarian rules of prescription gave way gradually to Roman principles of acquisitive prescription of twenty years and extinctive prescription of thirty years.⁴⁴ The dominance of Roman principles was secured though prescription was treated in one of the capitularies of Charlemagne as within the domain of personality.⁴⁵

The subject of legal agreements or conventions, though based on the principle of personality, reveals a fusion of Germanic and Roman principles but with the Roman ideas becoming dominant.⁴⁶ Germanic law did not have a clearly defined notion of contract at the period of the invasions. The barbarian codes seemed to confound contracts and conveyances in the same manner as did the early Roman law in the Code of the Twelve Tables.⁴⁷ In general under the influence of the Roman law the barbarians developed a keener appreciation of the essential elements of a contract, especially the "mental engagement." Under the influence of the Roman law they acquired the habit of using writing to consummate a contract. Vice versa the Romans retreated from the advanced jurisprudential ideas of the empire and fell back on the greater use of formalities such as the stipulations. Then they went a step further and added to the typically Roman elements of the contract the barbarian formalities of the *launegild*, the *wadium* (pledge), and the *handelanc* (hand or

1640 ff. Chénon, *Histoire du droit français* I, 403-404. The confusion is evident in several documents of *Chartes de Cluny*, ed. Bernard and Bruel, nos. 7, 88, 105, 189, 358 (Thévenin, *Textes*, nos. 175, 176, 177, 178, 179).

42. Brissaud, *Manuel*, pp. 1143-1147, 1159.

43. Stouff, "Etude," *Rev. bourg.*, 1894, p. 42. Was the Roman *patria potestas* instituted in favor of the parent? Was the *mundium* of Germanic law established in favor of the dependent? P. van Wetter, *Droit romain et droit germanique dans la monarchie franque*, Part I, pp. 37-57, Paris, 1899. A. Heusler, *Institutionen des deutschen Privatrechts*, II, Leipzig, 1886, no. 156, 431; Chénon, *Histoire*, I, 380, 393. The sale of children was common and was regulated by the *Edictum Pistense*, 864, MGH, *Capitularia*, no. 273, vol. II. c. 34. See Thévenin, *Textes*, no. 156, for a typical sale of this kind, and Loersch and Schroder, *Urkunden zur Geschichte des deutschen Privatrechts*, 2nd ed., no. 87 for the sale of wife and children around the year 1100. For the sale of *mundium* over a wife see MGH, *Leges*, IV, p. 461 (Thévenin, *Textes*, no. 47).

44. Brissaud, *Manuel*, pp. 1271-1272; Viollet, *Histoire du droit civil français*, pp. 570-573. Chénon, *Histoire*, I, 440-443.

45. *Capitularia*, I, 98, MGH, p. 206, c. 8.

46. Brissaud, *Manuel*, pp. 1377 ff.; Viollet, *Histoire du droit civil français*, pp. 594-603; Stouff, *op. cit. supra* note 43, at 46 ff.; Chénon *Histoire*, I, 436-440.

47. Van Wetter, *Droit romain et droit germanique*, Part II, p. 10; Stouff, *op. cit. supra* note 43, at 46.

glove).⁴⁸ The Germans made use of both factors. The result was the existence of a common law of contract mainly Roman in its origin employed equally by Roman and barbarian.⁴⁹

The treatment of wills and testamentary succession in the period of the personality of law shows tendencies toward unity and territoriality of law.⁵⁰ The Germans themselves had no wills at the time of Tacitus,⁵¹ and even at the time of the invasions, though they shortly borrowed the institution from the Romans.⁵² This notwithstanding that the Germans like the Romans of early republican times possessed a will which had the characteristics of a *donatio inter vivos* (donation by the living).⁵³ The old Roman *familiae emptor* (fictitious purchaser of estate) had his counterpart in the Germanic *salmann* (trustee).⁵⁴

Intestate succession, though technically a matter for the determination of the national laws, became subject to rules of the common law whose growth has been described.⁵⁵ The Roman law differed from the Germanic law in the equality which it recognized among both sexes and also in the rights of succession granted to the children of a predeceased parent. The Germanic laws to a great extent excluded the woman from the heirs on intestacy and also excluded the grandchildren who were children of a predeceased son or daughter.⁵⁶ Roman and barbarian practices became merged and, if the Romans accepted less often the Roman rule in regard to equality of inheritance, the barbarians accepted no less infrequently their own rule in regard to the inferiority of the female in intestate succession.

The succession of grandchildren by representation in direct line, both among the Romans and the barbarians underwent some change.⁵⁷ In

48. *E.g. Hist. Patr. Mon.*, XIII, no. 681:

964. Ego . . . Zachan . . . qui habitare videor infra civitate Brixiam, . . . tibi vero Andreverga dilecta plurimum sponsa mea . . . promisi tibi dare ipso die quando te sponsavi, in qua etiam per wadium firmavi, terciam porcionem secundum legem meam romana; quod tibi promisi, adimplere desidero. Proinde pro dotis donationem titulum et propter nuptias dare hac tradero videor . . . tibi iam dicta . . . uncias quattuor, quod est porcio tertia ex universam omnem meam substantiam.

49. Stouff, "Etude," *Rev. bourg.*, p. 54. M. Lemarignier, "Les Actes de droit privé merovingien et carolingien de l'abbaye de Saint-Bertin," *Revue du Nord*, t. XXIX, 1947, pp. 271-272, points to the confusion in the documents between acts of sale and gifts.

50. Brissaud, *Manuel*, pp. 1578 ff.; Viollet, *Histoire du droit civil français*, pp. 862-864; and 890-891; Chénon, *Histoire*, I, 454 ff.

51. Tacitus, *Germania*, 20.

52. Chénon, *op. cit. supra* note 50, at I, 457-458.

53. Brissaud, *Manuel*, pp. 1583-1584, 1596-1598; Viollet, *Histoire du droit civil français*, 2nd ed., pp. 890-891.

54. Van Wetter, *Droit romain et droit germanique*, Part II, pp. 13-14. Thévenin, *Textes*, nos. 35, 78, 82, 132 contain examples of *donationes*; nos. 18, 73, 76, 99 contain wills. M. Aubénas, *Le Testament en Provence*, Aix-en-Provence, 1927, p. 18, notes that most acts of the 11th century described as testaments are really donations *inter vivos*.

55. Brissaud, *Manuel*, pp. 1525 ff.; Viollet, *Histoire du droit civil français*, 2nd ed., pp. 817 ff.; Chénon, *Histoire*, I, 443-451.

56. Stouff, "Etude," *Rev. bourg.*, pp. 273-274.

57. Brissaud, *Manuel*, p. 1538; Viollet, *Histoire du droit civil français*, 2nd ed., pp. 832 ff.

general the succession of the grandchildren to the inheritance of the mother, which was absent in some of the barbarian laws and limited under the Theodosian Code,⁵⁸ gained headway.

The common laws which were growing up in various parts of the Frankish Empire thus show us ingredients of both Germanic and Roman origin. From the Germanic law came the system of composition, the method of proof by oath and by compurgators, the perpetual tutelage of women, the notion of family authority contained in the word *mundium*, the vendibility of liberty, the substitution of the dowry on the man's side, and new forms of wills or succession.

From the Roman law also came important elements of new customary laws. Such were some of the forms of manumission, types of contract, donations in marriage, some types of guardianship, the rules of long prescription, the clauses found in conventions and in testaments, forms of intestate succession and the equal division of property among sons and daughters. It is difficult to assess this Roman influence and to state definitely that the Roman law was the dominant influence on the mixed law of the later Frankish period, as Stouff affirms.⁵⁹ It is safer to treat the Roman ingredient in terms of nomenclature rather than substance. When all law became customary the only permanent influence that survived was the memory of attachment to the Roman law, as Montesquieu had so clearly pointed out.⁶⁰ These memories of Roman law will help realize the reception of the Justinian law later on in the *pays de droit écrit* (country of written law).

V. THE DECLINE OF THE PERSONAL LAWS

A. *Decline of the Personal Law System: General*

The decline of the national laws occurred from the ninth to the eleventh centuries. In Italy the process of change is easier to follow than in France. In the first place the personal laws survived for a longer period here than elsewhere. In the tenth century when mention of the national laws elsewhere almost disappeared, in Italy the Lombard and Roman laws continued to be practiced side by side. Italian documents of the tenth and eleventh centuries abound in professions of law.¹ The center for the study

58. *Cod. Theod.*, V, 1, 4 (*De Leg. Her.*). *Grimualdi Leges*, 5, MGH, 8° series, p. 75. *Capitularia*, I, no. 7, MGH, c. 2.; Chénon, *Histoire*, I, 444 ff.

59. Stouff, "Etude," *Rev. bourg.*, p. 278. In this matter Stouff, no doubt, leans toward the Romanist views of Fustel de Coulanges, G. Blondel, *Nouv. rev. hist. de droit franc. et étran.*, 1895, p. 120. A philological treatment of the Germanic laws from the same point of view is Leo Wiener, *Commentary to the Germanic Laws and Medieval Documents*, Cambridge, Mass., 1915, especially the words, *Fredum, Faída, Testibus Idoneis*. For a balanced view, A. von Halban, *Das römische recht im den germanischen Volksstaaten*, II, pp. 313 ff. For a review of von Halban's work, M. Rintelen, *Zeitschrift für Rechtsgeschichte*, XXIX, *Germ. Abt.*, 383-387.

60. *SPIRIT OF THE LAWS*, Bk. XXVIII, Ch. 12.

1. The following professions occur at the turn of the century: *Historiae Patriae Monu-*

of Lombard law was Pavia where the systematic arrangement of the Lombard Edict, known as the *Lombarda*, originated.² While the study of the Roman law was gathering momentum at Bologna and other places, the Lombard schools were glossing and analyzing the contents of the Edict, and in the early thirteenth century the *Lombarda* acquired its great commentator in Carolus de Tocco.³ Though the Lombard laws underwent considerable Roman influence as a result of this treatment, their distinctive character somehow survived, even after the reception of the Justinian law began to tip the scales against them.⁴ In 1038, if we may credit the date, the Emperor Conrad II by edict made Roman law once more the sole law in the Roman territories.⁵

The survival of the Lombard law side by side with the Roman law in Italy long after the national laws had ceased to be cited in France is a curious phenomenon. We witness a struggle comparable to, and yet differing from, similar ones in France and Germany, between the native custom and the "learned" law based mainly on the revived study of the Justinian law books.⁶ Whether the conflict was between the "moderni" and the "antiqui" of Pavia, or later on between the Lombardists of Pavia and the Romanists of Bologna,⁷ or still later between the "mos Italicus" representing the Bartolist accommodation of Roman and native law, and the "mos Gallicus" of Cujas and the exponents of a purified Roman jurisprudence,⁸ we see an alternation of unyielding antagonism between them (as with Lucas of Penna) and mutual adjustment (as with Carolus de Tocco).⁹ In fact, "not until the introduction of the French codes, in the legislative period of the early 1800's, can the Lombard law be said to have quite lost its independent life."¹⁰

The causes of this singular longevity of Lombard law may be found

menta, XIII, anno 1000 no. 986 (bill of sale): Johannes . . . , qui professo sum lege vivere langobardorum.

Ibid., anno 1000, no. 987 (exchange of goods). There is no question in these documents of pure Lombard law. Roman influences as well as others are apparent in some of the provisions.

2. Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 563.

3. Savigny, *Geschichte des römischen Rechts im Mittelalter*, vol. V, pp. 174-183. It goes without saying that Carolus was a Romanist by training as well as a Lombardist.

4. The Lombard law became *faex* as opposed to the Roman law or *lex*. See in general K. Neumeyer, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus*, Part I, *Die Geltung der Stammesrechts in Italien*, pp. 217-223. For the expression "*faex, non lex*," p. 61, note 7.

5. *Cambridge Medieval History*, III (1926), p. 267. See, however, Ch. 2 and note 66, *supra*.

6. For France, E. Meynial in *Mélanges Chabaneau*, Erlangen, 1906, pp. 557-584. For Germany, Stintzing in *A General Survey of Events, Sources, Persons and Movements in Continental Legal History by Various European Authors*, Boston, 1912, p. 361 ff.; for Italy Calisse, *op. cit.*, p. 97 ff.; and F. Calasso, *Medio evo del diritto*, I, *Le Fonti*, Milan, 1954, pp. 453 ff, 503 ff.

7. Calisse, *Id.* at 99-100.

8. *Id.* at 142.

9. *Id.* at 111-113.

10. *Ibid.*

not only in the obvious persistence of Lombard national feeling but, what is more important, in the development of a juristic tradition promoted by schools, treatises, and an ordered daily practice. As was the case in England, "taught law" proved to be "tough law."¹¹ In addition Lombard feudal law, finding a secure lodgment at Bologna with the *Libri Feudorum* helped Lombard legal institutions and ideas survive.¹²

In France the process of transition from personality to territoriality is more difficult to follow. The meaning of law undoubtedly underwent a change during the obscure period between the collapse of the Carolingian Empire and the rise of the Capetian monarchy. For prior to the tenth century the laws practiced by the members of the various nations were in part at least based on official compilations valid for members of the nations throughout the empire. Even the Breviary of Alaric probably had official validation under Charlemagne and his successors.¹³ But after the ninth century all these laws became simple customs retaining only in name the character of national laws. Only the Roman law maintained more completely its position as a legislative code.

M. Jarriand makes too sharp a distinction between law and custom in affirming that before the ninth century the national laws were *leges* and that after that time they were transformed into *mos* or *mores*.¹⁴ *Lex* and *mos* are too closely parallel to be distinguished even in the earlier period.¹⁵ What can be affirmed, however, is that the legislative character

11. *Id.* at 95-107.

12. *Id.* at 112.

13. Was there an official confirmation of the Breviary in the reign of Charlemagne? A manuscript of Cujas, lost today, bears the following legend immediately after the *commonitorium*:

Recognovimus. Dat sub die IV Non. Feb., anno XXII. Alarici regis, Tolosae. (506)—Et iterum anno XX. Regnante Karolo, rege Francorum et Longobardorum, et patricio Romanorum.

If this statement were merely the copyist's annotation it would have appeared at the end of the code. Evidences in support of this view are (1) that many MSS of the law appear after 788; (2) differences in provisions between one MS and another suggest official retouching. This squares with what we know about Charlemagne's interest in the revision of the national laws. The *Epitome Aegidii* of the eighth century based on the Breviary, for example, contains some changes from the code. (3) The council of Troyes of 878 received a request from the Bishop of Narbonne to introduce into the Roman law a more severe provision in regard to sacrilege; the pope, John VIII, after examining the laws of Justinian and Charlemagne ordered a constitution of Justinian to be added to the Breviary: "... et praecipimus ut in fine codicis legis mundanae scribatur haec lex." See Jarriand, *Histoire de la Nouvelle 118 dans les pays de droit écrit*, p. 102. In the same sense see Haenel, *Lex Romana Visigothorum*, pp. xxii-xxiii; Tardif, *Histoire des sources du droit français. Origines romaines*, pp. 135-136; van Wetter, *Le Droit romain et le droit germanique dans la monarchie franque*, Part II, pp. 58-60, note 3. *Contra*, Savigny, *Rom. Recht im Mittelalter*, II, section 57; Glasson, *Histoire des institutions et du droit de la France*, vol. II, p. 154.

14. Jarriand, *op. cit. supra* note 13, at 176, 180. The author also suggests that custom would take possession of certain fields of law more quickly than others: for example, the administrative field and also the formalities accompanying certain acts. The distinction is specious. The doctrines of the national laws were just as subject to modification by custom.

15. E. JENKS, *LAW & POLITICS IN THE MIDDLE AGES* 8 (2d ed. 1919). See Ch. 3, note 33, *supra*.

implied to a certain extent in all the *leges* in the Carolingian period gave way in the tenth century to a form of law in which the "customary" characteristic predominated over the legislative.

The documents show the operation of the personal law system during the tenth and eleventh centuries. They are of several varieties. There are the reports of judicial processes or pleas, which indicate more or less accurately whether the personal law system is still operative. There are also the documents attesting to acts of sale, gifts, wills, which often indicate the national law by which the formalities are discharged. Still other legal instruments of the tenth century contain what are obviously *formulae* borrowed from the formularies of the Frankish period, and in their case there is some doubt as to the evidence they offer for the survival of the personal law system.

Such are pleas at Nîmes (898, 902);¹⁶ Ausson (918);¹⁷ Narbonne (933);¹⁸ the sale of property "in the country of Lyons" (905);¹⁹ the creation of a dowry of land in the "country of Lyons and the country of Vienne" (905);²⁰ the grant of landed property to a prospective bride (909);²¹ the creation of a *morgengabe* in the Burgundian country (912);²² the transfer of goods to a congregation "in the Salnensian district" (957);²³ the gift of goods "in the country of Vienne" to the Monastery of Cluny (967);²⁴ the notice of abandonment of a claim at Arles (967).²⁵

Formulae in charters of the year 1000, 1015 and 1047 still speak of the personal laws.²⁶ Other references to the national laws conceived in a similar vein occur in documents as late as 1095.²⁷ However, it is probable that these references are conventional phrases bearing no relation to the national laws, certainly as regards the content of these laws. By the eleventh century the Salic law doctrines are no longer practiced.

What is true of the *formulae* just mentioned also applies to several charters of the twelfth century originating in Brabant in one of which (1152) a judgment is rendered "iudicio principum et maxime Salicorum,"²⁸ and in the other of which (1151) a legacy to an abbey is made

16. *Cartulaire, Notre-Dame de Nîmes*, ed. E. Germer-Durand, no. VIII (Thévenin, *Textes relatifs aux institutions privées et publiques aux époques mérovingiennes et carolingiennes. Institutions privées*, no. 114, pp. 167-168). *Cart. de Nîmes, anno 902*; Jarriand, *Histoire de la Nouvelle 118*, p. 177.

17. Devic and Vaissète, *Histoire générale de Languedoc*, vol. V, col. 137, no. 43 (XLII).

18. *Id.* at Vol. V, col. 161, no. 57.

19. *Chartes de Cluny*, no. 90 (Thévenin, *Textes*, no. 117).

20. *Chartes de Cluny*, no. 88 (Thévenin, *Textes*, no. 176).

21. *Chartes de Cluny*, no. 105 (Thévenin, *Textes*, no. 177).

22. *Chartes de Cluny*, no. 189 (Thévenin, *Textes*, no. 178).

23. Thévenin, *Textes*, no. 132.

24. *Id.* at no. 136.

25. *Id.* at no. 137 (*Cartulaire de Saint Victor de Marseille*, no. 290).

26. Jarriand, *Histoire de la Nouvelle 118*, p. 179.

27. *Id.* at 179.

28. Aubert Le Mire (Miraëus), *Opera Diplomatica et Historica*, Louvain, 1723-1748,

"observata Salicae legis omni cautela."²⁹ In the first of these documents the mere reference to "Salian princes" does not by any means prove the survival of Salic law. In the Low Countries the *franci homines*, for example, were members of a social class rather than Salian Franks.³⁰

The second of the charters citing a "legacy made according to Salic law" is suspect on several grounds but principally because the *Lex Salica* makes no provision for legacies or indeed for any form of will.³¹ The possibility nevertheless exists that the original Salic custom had undergone changes in this region. Several documents invoke the Visigothic law, especially the provision making gifts to churches irrevocable.³² The Burgundian law is cited in a charter in 912,³³ and the Frankish law's authority acknowledged side by side with that of the Roman law in documents of 1083 and 1096:

scripta est testatio huius scripti per paginam et testamentum, secundum sanxita legum Romanorum et Francorum (the attestation of this document has been written by page and testament according to the sanctity of the Roman and Frankish laws).³⁴

But again this seems to be a formula without any specific reference to the national laws. In the tenth century the doctrines of these laws cannot be directly recognized in the practices of the time.

When Roman law is spoken of in the Frankish period it invariably refers to the law included in the Breviary. Savigny was undoubtedly successful in proving that the Justinian law, in part at least, was known in southern France and Italy from the sixth century on. But it is safe to say that on the whole it did not penetrate the legal practice of the time.³⁵

vol. I, p. 698. Eugene Defacqz, *Ancien droit belgique. Précis analytique des lois et coutumes observées en Belgique avant le code civil*, Brussels, vol. I, 1846, p. 133. See also van Wetter, *Le Droit romain et le droit germanique dans la monarchie franque*, Part I, p. 19, note.

29. Aubert Le Mire, *op. cit. supra* note 28, at vol. 1, p. 700; Defacqz, *op. cit. supra* note 28, at 133; van Wetter, *op. cit. supra* note 28, at Part I, p. 19. References to the Salic law continue in documents up to the fourteenth century. The exclusion of the female line from the throne of France in the fourteenth century was based on an incorrect interpretation of the Salic law some time after the event.

30. Meijers, "L'Histoire des principes fondamentaux de droit international privé a partir du Moyen Age," *Recueil des cours*, p. 570.

31. Van Wetter, *op. cit. supra* note 28, at Part I, p. 19.

32. A donation made by Adelaide, daughter of Pierre-Raimond, Count of Carcassonne to the Count of Barcelona uses the following words (Devic and Vaissète, *Hist. gén. de Languedoc*, V, col. 579, no. 295, anno 1070):

Lex Gothorum praecipit in libro V eiusdem legis, titulo II, capitulo VI, "ut res donatae si in praesenti traditae sint, nullo modo repetantur a donatore. . ."

33. *Chartes de Cluny*, no. 189 (Thévenin, *Textes*, no. 178): ". . . secundum lege mea Gonbada in mergingiva ad integrum tibi dono. . ."

34. *Cartulaire, Saint-Honorat de Lerins*, ed. H. Moris and E. Blanc, Paris, 1883, pp. 92, 215 quoted by Jarriand, *op. cit. supra* note 26, at 194.

35. Savigny, *Rom. Recht im Mittelalter*, II, sections 37-55. Also Brunner, *Deutsche Rechtsgeschichte*, vol. I, p. 562. Jarriand, *op. cit. supra* note 26, at 78 ff. for a summary of the controversy; H. Fitting, *Die Anfänge der Rechtsschule zu Bologna*, Berlin and Leipzig, 1888, *passim*; P. Vinogradoff, *Roman Law in Medieval Europe*, 2nd ed., pp. 37-41. Above

References to the Roman law, unlike those to the barbarian laws, bear a closer affinity to their sources. Acts providing for sales, gifts and wills at least suggest familiarity with the doctrines of the Roman law. *Formulae* like "Auctoritas enim iubet ecclesiastica et lex consistit romana ut quicumque rem suam alicui transfundere voluerit . . . (For the ecclesiastical authority orders and the Roman law prescribes that each person should be willing to transfer goods to another) Legum romanarum sanctiaria auctoritate novimus . . ." (We have renewed by the sacred authority of the Roman laws . . .) leave no doubt as to the influence of Roman law terms.³⁶ But more than this it is impossible to affirm. The law of the Breviary cannot be recognized in documents of the tenth and eleventh centuries. Roman law, like Germanic law, has become custom in a hitherto unknown sense.

The conclusion that emerges inevitably from the study of the documents of the tenth and eleventh centuries is that the national laws based in part at least in the eighth and ninth centuries on official promulgation and validation have become local customs retaining only occasionally the national names. The Roman law recurs in documents of the south of France, though Visigothic law has some hold in the southwest.³⁷ The documents originating in the north of France and the remainder of the Frankish Empire show the dominance of barbarian laws,³⁸ or rather of an amalgam of national laws in which the Roman influence is very small.

Why this decline of the personal law system? The answer is many sided: (1) Racial assimilation accounts for the decline to a certain extent; (2) the weakening of the central power explains the collapse of the Carolingian experiment with private international law; (3) the national laws themselves became submerged in a number of local laws representing a mixture of Roman and barbarian elements. Two reasons offered for the decline do not apply in France: (1) The legal renaissance affected the personal law system only in Italy; (2) the influence of publicists and ecclesiastics like Agobard of Lyons favoring a unified legal system was ineffectual.

In order to trace the disintegration of the personal law principle and the transformation of law into territorial law it will be helpful to

all, the masterly survey of Paul Koschaker, *Europa und das romische Recht*, Munich, 1947. See note 96, *infra*.

36. Jarriand, *op. cit. supra* note 26, at 197.

37. *Id.* at 292. For the geography of the 700 odd French customs, Chénon, *Histoire*, I, p. 500 ff.

38. The customs of northern France have been divided into three geographical groups. To the north and east of the linguistic frontier there reigned a more or less pure Germanic custom with its community property, family solidarity and absence of representation. A second region was that of Picardy and the neighboring areas of romance speech (at least after the sixth century) where Frankish legal influence was strong but not unalloyed. The region around Paris shows a Germanic custom greatly infused with Roman elements. See Yser, "Les Deux groupes de coutumes du nord," *Revue du nord*, 1953.

examine the thought of one publicist, Agobard, and see why his advocacy of legal unity proved unsuccessful. Then a study of the decline of the system under two aspects would normally follow: (1) the conversion of personal laws into the *droit écrit* and *droit coutumier* in France; (2) the absorption of personal law principles by the feudalism of the tenth and eleventh centuries and the emergence of a new kind of territorial law. Only the first of these topics will be examined here; the second must be left for treatment elsewhere.

B. Agobard of Lyons and the Personal Law System

Agobard of Lyons had a vision of legislative unity that makes his letter to Louis the Pious, written in the year 817, important for the study of the political and legal thought and procedure of the time.³⁹ Of interest also by way of comparison is Agobard's attack on the ordeals.⁴⁰ So far as his thought may be extracted from these documents Agobard seems to be opposing (1) the system of ordeal and trial by battle; (2) the separate existence of the Burgundian law, the work of an Arian ruler, in the Frankish Empire; (3) the whole system of the personality of law. He urges that the Frankish law of the emperor be applied to all his subjects. Some of these ideas Agobard may have brought with him from Spain, his native land, which he quitted after the Saracen invasions.⁴¹ In Spain the system of personal laws had given way to territorial law in the seventh century, and Agobard, in the tradition of the great St. Isidore, may have sought the establishment of a more closely knit community in *Francia* (Frankland).

In order to bring out Agobard's thought on these questions it may be well to summarize his letter to Louis the Pious.

The diversity of laws in every country, city and even home gainsay the unity and work of God. "How many times does it happen that five men walk or are seated together and that no one has the same law as another of his brothers. . . ." Though otherwise trustworthy witnesses, the testimony of these Christian men is not valid in a legal action involving a person subject to the Burgundian law, "so called from the name of

39. *Epistolae Karolini Aevi*, III, *Epistolae*, V, MGH, Berlin, 1899, pp. 158-164: *Agobardus Lugdunensis archiepiscopus de unitate legis Christi praefatus Ludovicum imperatorem exhortatur, ut, lege Gundobadi haeretici propter iudicia Dei perniciose sublata, Burgundiones ad legem Francorum transferat*. Text also in *Patrologia Latina*, CIV, col. 113-126.

40. *Patr. Lat.*, CIV, col. 249-268. *Liber de divinis sententiis digestus cum brevissimis adnotationibus contra damnabilem opinionem putantium, divini iudicii veritatem igne vel aquis vel conflictu armorum patefieri*.

41. S. Grelewski, *La Réaction contre les ordalies en France depuis le IX^e siècle jusqu'au Décret de Gratien-Agobard de Lyon et Yves de Chartres*, Rennes, 1924, p. 23 and notes. See also Mgr. Bressolles, *Saint Agobard, Evêque de Lyon (760-840)*, (*L'Eglise et l'état au moyen âge*, IX), Paris, 1949, p. 87 ff. A review of the above work by J. Lemarignier, *Revue historique de droit français et étranger*, 1951, no. 4, pp. 594-596 also dwells on the letter to Louis.

its author, a great enemy of the Catholics, an adherent of this Arian heresy of which there are only a few rare partisans left amongst you."⁴²

It would be desirable for the Emperor to transfer the Burgundians to the law of the Franks. This would eliminate the practice of judicial combat which is part of the Burgundian law and which is a "perversion of all order." "Let no faithful soul come to believe, therefore, that God reveals on earth the secret actions of men by means of [the ordeal of] hot water or iron and much less so in bloody combats."⁴³ Perjury and bribes pervert justice among "the subjects of the Burgundian law, among whom cases are not settled by discussion and by truthful testimony but by recourse to arms, which prevents the weak from daring to retain the goods that are being demanded from them, or from seeking the goods that are taken from them. . . ."⁴⁴

Would that a uniform law governed all the subjects of the Empire. "But because this is a great undertaking and perhaps impossible to man, at least may this single law, of which we have just spoken, be removed from our midst not only as useless but also as harmful."⁴⁵

Similar views were expressed by Agobard in another of his works devoted to the ordeals⁴⁶ which on the whole adds nothing to the famous letter to Louis the Pious just summarized.

If the argumentation pursued by Agobard in his treatise may sound theological to modern ears, it is because the system of ordeals was closely linked with ecclesiastical activity. The *ordines iudiciorum Dei*, or the *formulae* employed in the judicial proofs contain prayers recited by the clergy with the participants. Biblical precedents are constantly invoked to prove the efficacy of the system.⁴⁷

In fact Agobard's opposition to the ordeals was not unchallenged among the clergy. The opinion of Hincmar of Rheims ran directly counter to the views of Agobard. In his treatise *De Divortio Lotharii et Tetberge*, Hincmar espoused the cause of the ordeal and cited Biblical examples in its favor.⁴⁸ The church in this matter decided to follow Hincmar and

42. MGH, *op. cit. supra* note 39, at ch. 4, p. 159: "Nam plerumque contingit, ut simul eant aut sedeant quinque homines, et nullus eorum communes legem cum altero habeat exterius in rebus transitoriis. . ." Ch. 5, p. 160, Ch. 6, p. 160: ". . . cuius auctor extitit homo hereticus et fidel catholicae vehementer inimicus-cuius legis homines sunt perpauci-non possit super illum testificari alter etiam bonus christianus."

43. *Id.* at ch. 7, pp. 160-161; ch. 9, pp. 161-162.

44. *Id.* at ch. 10, p. 162.

45. *Id.* at ch. 14, p. 164.

46. *Patr. Lat., op. cit. supra* note 40, at CIV, col. 249-268.

47. *Formulae Merovinginci et Karolini Aevi*, ed. K. Zeumer, MGH, *Legum Sectio V*, Hanover, 1886, pp. 715, 604, 605, 614, 617, 619, 623, 629, 632, 633, 638. Grelewski, *op. cit. supra* note 41, at 37.

48. Hincmar, *Opera Omnia*, *Patr. Lat.*, CXXV, col. 625-772, especially *Interrogationes*, IX, X (*Opera Omnia*, ed. Sirmond, vol. I, pp. 561 ff.).

the Council of Tribur (895) declared against Agobard's views.⁴⁹ In this matter as well as in his opposition to the personality of law Agobard was obviously ahead of his time, and it was a long while before the church took a definite stand against the whole system of *iudicia Dei* (judgments of God).⁵⁰

In his opposition to the system of proofs, as in other matters, Agobard was probably inspired by Roman ideas. In the Roman system proof was a burden on the plaintiff as it is in mature jurisprudence.⁵¹ In early medieval law, not only barbarian but to a certain extent in the debased Roman law that grew up in the Middle Ages also, proof was considered a privilege and an obligation of the defendant.⁵² Barbarian legal arrangements differed in detail in regard to the system, such as in the acceptance of trial by battle.⁵³ But on the whole they show an essential uniformity.

Agobard's opposition may well have been based on his knowledge of the Roman legal system. His opposition to barbarian methods also had ample precedent in the Visigothic legislation which did not allow trial by battle and allowed only the proof by hot water.⁵⁴ Agobard had a royal precursor in Liutprand, the Lombard ruler, who admitted his inability to abolish the system among the Lombards.⁵⁵

The Burgundian laws made much use of ordeals.⁵⁶ But the same laws also allowed the use of witnesses, and one may wonder whether Agobard was not exaggerating the frequency of judicial combats.⁵⁷ Furthermore, contrary to the inference one may draw from a reading of Agobard's tracts, it was the Frankish laws that made the use of the ordeal popular.⁵⁸

49. *Concilia Aevi Karolini*, ed. Werminghoff, MGH, *Legum, Sectio III*, 2, Hanover and Leipzig, 1906-1908, c. 15, C. II.

50. Grelewski, *op. cit. supra* note 47, at 54, 55 ff.

51. *Digest*, XXII, 3, 2, *De probationibus et praesumptionibus*.

52. Esmein, *Cours élémentaire d'histoire du droit français*, 15th ed., p. 88. But cf., P. van Wetter, *Droit romain et droit germanique*, Part II, p. 35.

53. MONTESQUIEU, *SPIRIT OF THE LAWS*, Book XXVIII, chs. 13, 14 has interesting observations on these differences and their consequences, not strictly correct. Was the obligation imposed by most of the barbarian codes on the defendant to swear or purge himself of guilt a burden on the accused? van Wetter points out that this procedure constituted a privilege for the defendant as well as an obligation, *op. cit. supra* note 28, at 35. Furthermore the Salic law seems to have put the burden of the oath on the accuser, though later this feature was abandoned. For conflicting views see van Wetter, *op. cit. supra* note 28, at 32-34. Also see Esmein, *Histoire du droit français*, p. 91 and notes.

54. *Leges Visigothorum*, Ant. II, I, 21, MGH, 8° series, p. 52 (MGH, 4° series, Hanover, 1902, ed. K. Zeumer, p. 250); Brunner, *Deutsche Rechtsgeschichte*, vol. I, 2nd ed., section 48; Brissaud, *Manuel d'histoire du droit français*, pp. 81-82.

55. *Leges Longobardorum*, MGH, *Liutprandi Leges*, c. 56, p. 129 (p. 106, MGH, 8° series); c. 71, p. 136 (p. 112, MGH, 8° series); c. 118, p. 156 (p. 130, MGH, 8° series).

56. *Leges Burgundionum*, MGH, ed. R. De Salis, VIII, XLV, LXXX.

57. *Leg. Burgund.*, II, VIII, XVII, XIX, XXXIII, XLII, XLV, LXXX, XCIX; Grelewski, *op. cit. supra* note 41, at 45.

58. J. Déclaireuil, "Les Preuves judiciaires dans le droit franc, du Ve au VIIIe siècle," *Nouvelle revue historique de droit français et étranger*, 1898, p. 472.

Montesquieu had inferred from Agobard's letter that the Salic law did not allow trial by battle. There is little doubt, however, that trial by battle was practiced under the Salic law.⁵⁹ If such was the case why did Agobard advocate the adoption of the Frankish law among the Burgundians? Was he ignorant of the Frankish legal procedure? It does not appear so, for in his letter against the Jews, Agobard in citing earlier Frankish decrees on the subject, shows some knowledge of the latter law.⁶⁰

The answer given by Grelewski to the question why Agobard favored a change to the Frankish law system is that, though Agobard knew that the latter permitted trial by battle, yet he felt that the introduction of the Frankish law would help simplify procedure and allow the extension of proof by witnesses throughout the Empire. Agobard felt that the Burgundian law in its insistence on the *iudicia Dei*^{60a} was the great stumbling block to this step.⁶¹

The Burgundian law was different from other barbarian laws in that it settled conflicts between Romans and Burgundians more frequently on the basis of Burgundian law than on the basis of the rule of personality. In some respects the Burgundian law was, therefore, territorial.⁶² How far this territorial application of the law, especially in cases involving Burgundians and other barbarians, still existed in the ninth century when the Burgundian kings were nothing but a memory cannot be answered positively. Since the former Burgundian realm retained some identity and perhaps autonomy it is likely that the provision in question was still observed. Agobard's diatribe against it would be incomprehensible otherwise. Though the question of what law would be applied in a contest between a Frank, for example, and a Burgundian remains difficult to answer, yet in the cases, prescribed in the law, of contests between Romans and Burgundians, it is safe to say that Burgundian law was applied. In such instances it made no difference, as it did make a difference in the other national laws, who was the defendant or the plaintiff, or whether the thief was caught in the act. The Burgundian law would have had to apply if one of the parties involved was a Burgundian.

59. SPIRIT OF THE LAWS, Book XXVIII, chs. 13, 19. E. Mayer, *Geschworengericht und Inquisitionsprozess*, Munich, 1916, pp. 37 ff.

60. *Epistolae Karolini Aevi*, MGH, V, pp. 185-199. He also shows knowledge of the work on Frankish law of a predecessor at Lyons, Leidradus. Remy Ceillier, ed., *Histoire des auteurs sacrés et ecclésiastiques*, vol. 12, Paris, 1862, pp. 366-367. B. Blumenkranz, *Les Auteurs chrétiens latins du Moyen Age sur les Juifs et le Judaïsme*, Paris, 1963, pp. 152-168.

61. Grelewski, *op. cit. supra* note 41, at 45.

62. *Leges Burgundionum, Prima Constitutio*, 3, MGH, p. 31. For provisions binding on both Burgundians and Romans see also VIII, 1; IX, X, 1; XIII; XV, 1; XXVIII, 1; XXXVIII, 10. Stouff, "Etude sur le principe de la personnalité des lois depuis les invasions barbares jusqu'au XII^e siècle," *Revue bourguignonne de l'enseignement supérieur*, IV, 1894, pp. 289-290. See Chap. 1, *supra*. All the barbarian laws possess territorial features to a greater or lesser extent. The territoriality of the Burgundian law must be understood with this in mind. See especially A. Coville, *Recherches sur l'histoire de Lyon*, p. 196 ff.

It was this eccentric feature of the Burgundian legislation linked to cumbersome testimonial procedure that made Agobard attack it, though he was fully aware that the Frankish law permitted the judicial duel.

The number of laws that were practiced at this time in Lyons was probably considerable. Is there any significance in Agobard's use of the number five when he describes the multifarious legal situation in the well known passage on the number of laws in Lyon?⁶³ Since the Empire contained many more than five national law systems the suggestion has been made that the number five represented all the personal laws practiced in Lyons after the *Divisio Imperii* (Division of the Empire) of 817.⁶⁴ This is based on the assumption that with every partition of the Empire the number of laws practiced in each part was reduced automatically. There are two objections to this view: (1) Agobard's letter was written in the year 817 which is the year of the *Divisio Imperii* when Lothar, the son of the Emperor Louis, received a share of authority in the Empire and not after the latter event, as De Combes states. (2) Secondly, it is to be doubted whether the divisions of the Empire affected the number of personal law systems recognized. Though the Lombard kingdom was always treated apart from the rest of the Carolingian Empire, the theoretical unity of the rest of the Empire survived all the divisions.⁶⁵ Furthermore, the deeds and *formulae* showing the application of the various personal laws in the empire display no relation whatever to the political divisions of this period.⁶⁶ The laws of the Empire were still the laws of peoples rather than the laws of territories and would, therefore, be little affected by the splitting up of the Empire. Localization of law was certainly advancing, as we have seen, and it is sometimes difficult to distinguish local custom from national personal law as in the *Edictum Pistense*, but the private law systems of the Empire were still largely personal in the ninth century. The use by Agobard of the number five was, therefore, probably accidental.

Agobard's request that the Burgundian law be eliminated was not heeded, for its continuance is vouchsafed by the legal documents and by a statement of Hincmar (died 882) to this effect.⁶⁷ Agobard's attempt

63. *Adversus Legem Gundobadi*, MGH, c. 4, p. 159 quoted above in note 42, *supra*.

64. L. de Combes, "L'Invasion des barbares, l'église et le statut personnel," *Revue catholique des institutions et du droit*, 1899, vol. 22, p. 417.

65. Brissaud, *Manuel*, p. 526. See also Flach, *Les Origines de l'ancienne France*, Paris, vol. IV, pp. 1, 5 ff. On the Merovingian partitions, H. Brunner, *Deutsche Rechtsgeschichte*, vol. II, 2nd ed. by Cl. von Schwerin, Munich and Leipzig, 1928, p. 33.

66. This fact would emerge from an examination of the documents under the index heading "Personality" in Thévenin, *Textes relatifs aux institutions privées et publiques aux époques mérovingiennes et carolingiennes. Institutions privées*, and in Loersch and Schröder, *Urkunden zur Geschichte des deutschen Privatrechts*.

67. Hincmar, *Opera Omnia*, ed. Sirmond, II, p. 234 (*Patr. Lat.*, vol. CXXV, col. 1026), *Communi episcoporum nomine ad regem de coercendo et extirpando raptu viduarum puellrum ac sanctimonialium*:

Ch. XII. Defendant se quantum volunt qui huiusmodi sunt, sive per leges, si ullae sunt, mundanas, sive per consuetudines humanas, tamen si Christiani sunt, sciant se in die iudicii nec Romanis, nec Salicis, nec Gundobadis, sed divinis et Apostolicis legibus iudicandos.

in the letter to the Emperor to raise the specter of Arianism against the Law of Gundobad does not appear to have been successful. Such an effort would have been more timely three centuries before his time when the Burgundians were Arians and the Gallo-Roman population was opposed to them for this reason if for no other.

Gaul itself during the partitions of the ninth century showed the emergence of distinct regions each of which developed a sectional and even a national feeling. For ages such names as Gothia (Septimania), Provence, Aquitaine, Burgundy, Neustria, and Austrasia testified to the endurance of this local feeling.⁶⁸ The growth of the great regions has received the attention of historians since Thierry's day. Jacques Flach devoted the third and fourth volumes of his *Origines de l'ancienne France* to the movement.⁶⁹ Departing from the practice of some predecessors, Flach emphasized the importance of the *ethnic and national* elements in the life of these principalities.⁷⁰ In doing so he undoubtedly underestimated the role of the vassalic bond.⁷¹ But his basic position is sustained by a recent historian of the period, Dhondt, who concurs in seeing a national element at the foundation of the territorial principalities in the ninth and tenth centuries.⁷² Burgundy, in particular, that region that shifts its boundaries constantly throughout history, has retained the name and perhaps the imprint of its fifth century conquerors.⁷³ The survival of Burgundian national feeling is curious in view of the statement of Agobard about the small number of persons belonging to the Burgundian law.⁷⁴ On the other hand it squares well with the influence ascribed to the Burgundian law by J. Ficker in his remarkable investigations into the law systems of medieval Europe.⁷⁵ Their bearing on the subject will be noted below.

In view of the strength of this nationalistic current in the region of

68. H. Klimrath, *Travaux sur l'histoire du droit français*, vol. I, pp. 306-307. See in general E. Sestan, *Stato e nazione nell'alto Medioevo: ricerche sulle origini nazionali in Francia, Italia, Germania, Naples*, 1952.

69. Vol. III, Paris, 1909; vol. IV, Paris, 1917.

70. Flach, *op. cit. supra* note 65, at vol. IV, pp. 319 ff. The primary entities making up the France of today are recognized as Aquitaine, Burgundy and Francia (the region of Paris).

71. Lot, *Fidèles ou vassaux*, Paris, 1903. Esmein, *Histoire*, p. 310, n.2. Flach also, Vol. III, p. 161 insists on the preeminence of the Frankish race in Francia over the other territories. See Esmein, *op. cit. supra*, at 331, note 1 for a critique.

72. J. Dhondt, *Etude sur la naissance des principautés territoriales en France (IX^e-X^e siècle)*, Bruges, 1948, p. 247.

73. E. Freeman, *Historical Geography of Europe*, vol. I, London, 1882, pp. 93-94; F. Lot, *Les Invasions germaniques*, Paris, 1935, pp. 175-177.

74. Agobard, *loc. cit.*, c. 6, p. 160: ". . . cuius legis homines sunt perpauci . . ." Cf., M. Chaume, "Le Sentiment national bourguignon de Gondebaud à Charles le Téméraire," *Mem. Acad. Sciences*, Dijon, 1922.

75. J. Ficker, *Untersuchungen zur Erbfolge der ostgermanischen Rechte*, Innsbruck, 1891-1909, I-V, VI (posthumous), nos. 1341, 1342. My own knowledge of these views insofar as they concern France is based on R. Caillemer, "La Formation du droit français médiéval et les travaux de Julius Ficker," in the *Annales des Facultés de Droit et des Lettres d'Aix*, no. 1, (vol. II) 1906, pp. 33-58; and *Annales de la Faculté de Droit d'Aix*, (vol. I), pp. 1 ff., pp. 207 ff. See especially pp. 6-20 in the latter issue.

Lyons it is not strange that Agobard should have been unsuccessful in his attempt to overthrow the legislation of Gundobad. Thus Agobard was running counter to two forces of the age, regional nationalism and the principle of the personality of law. His ideas were probably based on Roman conceptions of universal sovereignty and these ideas, though they provided a facade for the empire of the Franks after Charlemagne, were not deeply rooted.⁷⁶ Was Agobard unaware of this feeling? Apparently not, for he recognizes the impossibility of ending the régime of the personality of law.⁷⁷

C. *The Edictum Pistense and the Transition to Territoriality
in the Pays de Droit Ecrit et Coutumier*

The principle of personality demanded two conditions which proved difficult to meet in the period of the decline of the Frankish Empire. In the first place the race of the defendant had to be determined. Owing to a mixture of peoples this became difficult to ascertain. In the second place the judges had to have knowledge of the laws of the litigants. This knowledge became rare.⁷⁸ Law gradually became localized, attached to regions. But during the ninth and tenth centuries this change from personality to territoriality was only partial. The laws of the regions were still known by the original national designation of a majority of the inhabitants. The old national laws were cited by name, but their contents had undergone great change.⁷⁹ This is not strange, for we must remember that the old national laws were themselves nothing but customs, customs declared in a judicial manner by the *laghsaga* or his royal successor.⁸⁰ In the ninth and tenth centuries the national laws continued to develop in a judicial manner.⁸¹

The transition to territoriality appears in a curious fashion in the ninth century. The first document in which it may be studied is the *Edictum Pistense*.⁸² The *Edictum* issued in the year 864 by Charles the

76. Jenks, *Law and Politics in the Middle Ages*, 2nd ed., p. 17. Cf., Halphen, "L'Idée de l'état sous les Carolingiens," *Rev. hist.*, CLXXXV (1939) p. 59 ff (cited elsewhere).

77. Agobard, *Adversus Legem Gundobadi*, MGH, c. 14, p. 164: ". . . Sed quia hoc grande est et forsitan homini impossibile . . ." Yet his plea may not have completely fallen on rocky soil, as L. Halphen, *Charlemagne et l'empire carolingien*, Paris, 1949, pp. 239-241, points out.

78. Esmein, *Cours élémentaire d'histoire du droit français*, 15th ed., p. 679.

79. Thévenin, *Textes relatifs aux institutions privées et publiques, aux époques mérovingienne et carolingienne*, *Institutions privées* p. 241, note 1; p. 202, note 2; Brunner, *Deutsche Rechtsgeschichte*, vol. I, 2nd, ed., p. 505.

80. J. Petrau-Gay, "La 'Laghsaga' Salienne," *Revue historique de droit français et étranger*, XIV, 1935, pp. 77-85.

81. This point will be more fully developed below.

82. The literature on the *pays de droit écrit et coutumier* is not as great as the subject deserves. Esmein, *op. cit. supra* note 78, at 680-681; Tardif, *Histoire des sources de droit français. Origines romaines*, pp. 267-280. The division between the two regions was worked out by Felix Berriat-Saint-Prix, *Histoire du droit romain* and reproduced by Klümper, *Travaux sur l'histoire du droit français*, vol. II, pp. 170 ff., 220 ff. See also E. Jarriand,

Bald for the first time in any document raises the distinction, mainly in criminal law, between regions in which Roman law is valid and other parts of the Empire in which the capitularies determine the penalties for crime.⁸³ The relevant parts of the edict are discussed below.

The criminal and penal law in the edict is largely based on the capitularies, but provision is made frequently for "judgments according to the Roman law in those regions in which such judgments are followed." Remarkable is the statement in Chapter 20 that "in supererogation of that law [the Roman] or in derogation thereof neither we nor our predecessors have made any ordinances or determinations."⁸⁴ Though the capitulary law is largely territorial in its effect, the Roman law still appears to be considered a personal law if we judge from the words of Chapter 28: "De illis autem, qui secundum legem Romanam vivunt. . ." (Concerning those persons moreover who live according to Roman law).⁸⁵ Yet in Chapters 13, 16, 20, 23 31 the Roman law is confined to certain "regions."⁸⁶ Similarly the other, Germanic personal laws included under the head of *leges mundanae*, are allowed by Chapter 9 to determine the penalties for perjury. Confusion is, however, produced by basing this concession on the capitularies and then by prescribing an ecclesiastical penance for the offense.⁸⁷ Chapter 20 also punishes perjury "just as is stated in . . . the capitularies."⁸⁸ Chapters 6 (cited), 17 (coinage), 25 (treason), 27 (evasion of military duty) on the other hand make no distinction by region or national law.⁸⁹ Though most parts of the edict are concerned with criminal

Histoire de la Nouvelle 118 dans les pays de droit écrit depuis Justinien jusqu'en 1789, Chaps. XII, XIII.

83. *Capitularia*, MGH, ed. Boretius and Krause, II, no. 273, pp. 310-328. The edict has been analyzed from the point of view of the royal legislative authority by Fustel de Coulanges, *Les Transformations de la royauté pendant l'époque carolingienne*, 2nd ed., pp. 480 ff.

84. MGH, II *op. cit. supra* note 83, at 319:

quia super illam legem vel contra ipsam legem nec antecessores nostri quodcumque capitulum statuerunt nec nos aliquid constituimus.

85. MGH, II, *op. cit. supra* note 83, at 322.

86. *Id.* at 315, 316-317, 319, 320, 324. Fugitives from the Norman invasion on settling in the kingdom and contracting marriages should follow the old custom of the land and the children should follow the condition of the mother. It is difficult to see how this provision and what it implies for private law relations are compatible with the principle of the personality of law. We are dealing in this case with territorial law. It is clear that the royal power of legislation, based on the Germanic institution of the *laghsaga* and on Roman imperial ideas could regulate relations of private law as well as public law. Cf. Fustel de Coulanges, *Les Transformations*, 483.

87. *Id.* at 314.

88. *Id.* at 319.

89. MGH, II, *op. cit. supra* note 83, at 313, 317, 321, 322, ch. 6 provides for an oath: Quia non habent domos, ad quas secundum legem manniri et banniri possint, dicunt quod de mannitione vel bannitione legibus comprobari et legaliter iudicari non possunt.

It thus appears that the oath now required of the *franci homines* is a breach of old procedure. In order to justify this innovation the edict proceeds to explain "quoniam lex consensu populi fit et constitutione regis." The meaning of this celebrated phrase is that law has a twofold origin, popular (or rather judicial, the work of the *laghsaga*) and royal. The *consensus populi* is described by Petrau-Gay, *La Notion de "lex,"* pp. 221 ff. as a survival in

law a few such as Chapter 6 dealing with procedure and Chapter 28 dealing with gifts to the church and debts to the crown, and Chapter 31 concerning the effect of marriages between Normans and Franks may be classified as private law. Of these, Chapters 28 and 31 make the usual distinction between regions subject to capitulary and those subject to Roman law.⁹⁰

The *Edictum Pistense* reveals the transition from personality to territoriality of law and also the relation of capitulary to national law. Law is still personal in the edict, especially the Roman law, but its practice is confined to certain regions. The criminal law is thus applied no longer to a large number of members of various national systems, but is enforced in two regions. In the region of the later *droit coutumier*, the edict specifically prescribes penalties. For example, the counterfeiter is condemned to lose his right hand according to the prescription in the thirty-third chapter of the fourth book of the Capitularies (of Ansegisus) which in turn reproduces section 19 of a capitulary of Louis the Pious of 818 or 819.⁹¹ In this and in other cases the edict pays no heed to the principle of the personality of law. A Salian Frank under the strict rule of personality would not have been liable to a penalty other than that prescribed in the Salic law. Of course, counterfeiting was an offense against the king and as such a matter of "public" law and, therefore, the rule of personality would in this case give way to that of territoriality. However, the facility with which Charles the Bald prescribes penalties would indicate an affinity between the Capitulary law and the Salic law, as well as other Germanic legal systems, and would imply great royal power in the modification of the provisions of the *leges barbarorum*. Such a power apparently did not exist *vis à vis* the Roman law.⁹²

The conclusions thus far reached may be stated as follows: (1) The criminal law of the Germanic nations is dominated by the capitularies.

Carolingian period of earlier sanction or protection of law by the people. See Fustel de Coulanges, *Les Transformations* 488-489.

90. All cited.

91. *Capitularia*, MGH, I, p. 285. That the law so recognized, however, is not a territorial but a personal law practiced by the majority of inhabitants of a district is clear from the following excerpts:

regionibus . . . secundum legem Romanam; . . . in terra . . . in qua secundum legem Romanam; . . . in regionibus in quibus secundum legem Romanam; . . . De illis qui secundum legem Romanam vivunt; . . . secundum legem nostram infantes matrem sequantur; . . . salva constitutione legis Romanae in eis qui secundum illam vivunt . . .

92. MGH, *Cap.*, II, 319, c. 20 quoted *supra*, note 84. It is impossible, as Petrau-Gay rightly affirms, to distinguish the *capitulum legi additum* and even the national *lex* from the *capitulum per se scribendum* in content. They cover the same subject matter. It is only in the form of emission that the difference arises. The *Edictum Pistense* is undoubtedly a capitulary *per se scribendum*. Petrau-Gay, *La Notion de "lex" dans la coutume salienne et ses transformations dans les capitulaires*, p. 254; *contra*, Boretius, *Beitrag zur Kapitularienkritik*, pp. 36-53. See especially Ganshof, *Recherches sur les capitulaires*, pp. 96, 101: the law of family, of property and of proof was annexed to the capitularies after 803.

(2) The civil laws of the Germanic nations, the *leges mundanae*, are open to modification by the capitularies. (3) The Roman law appears in the ninth century as the principal personal law. (4) The Roman law enjoys a criminal as well as a civil application at least for Romans. (5) The Roman law is also a quasi-territorial law, a *lex fori*, in southern France. (6) The capitularies form a territorial law in civil as well as in criminal fields in the north of France. Out of the union of the various barbarian laws and the capitularies in this region there developed a type of common law, which, as we shall see, was known as the "Salic" law.⁹³

The edict reflects throughout a dualism in law that is perhaps the counterpart of the duality of functions of the Germanic king. He is not merely the expounder of jurisprudence, the *laghsaga* of his German followers and the possessor of the old Germanic *bannum*, but he is also the successor of the Roman emperors. Some confusion results from this multiple position.⁹⁴

The existence of the *pays de droit écrit* and of the *pays de droit coutumier* is recognized in the eleventh century by the *Exceptiones Petri*, which describes differences in procedure between the regions in regard to collecting debts. The process of judicial condemnation was necessary only in the country of written law. In the regions in which Roman law did not apply it was sufficient to offer the capital to the creditor in the presence of witnesses.⁹⁵

The subsequent history of these regions lies outside the scope of this paper, but at the time of the revival of the Justinian law the regions of the south could boast a long association with Roman "customary" law that was of great importance in paving the way for the introduction of the "learned" law of the thirteenth century.⁹⁶ The process by which the

93. Tardif, *Histoire des sources de droit français. Origines romaines*, pp. 269-270. The capitulary for Aquitaine thus contrasts: "Tam Romani quam et Salici," (*Cap.*, MGH, I, 43, c. 10). See Ch. I *supra* and discussion below.

94. It is unfortunate that Petrau-Gay in his illuminating studies has not seen fit to describe the relations of the royal power to the Roman national law. It is possible that the imperial crown acquired by Charlemagne gave the ruler the full rights of legislation of the emperors, but the *Edictum Pistense* does not reveal this fact clearly.

The two functions, one judicial, one legislative, were distinct under the Merovingians. The *laghsaga* or law sayer exercised the first; the king exercised the second. The *leges barbarorum* were declarations of custom, the function of the *laghsaga*. Under the Carolingians, as the capitulary quoted *supra Cap.*, MGH, no. 143, c. 5, "Generaliter omnes admonemus . . ." makes clear, the ruler combined in himself the two functions of *laghsaga* and legislator, Petrau-Gay, "La 'Laghsaga' salienne," *loc. cit.*, pp. 280-285.

95. Book II, c. 31 (Savigny, *Geschichte des römischen Rechts im Mittelalter*, vol. II, p. 363). The most recent edition is by Mor, *Scritti giuridici preirneriani*, vol. II of the collection *Orbis Romanus*, no. 10, Milan, 1938. For discussion see J. C. Naber, "De Petri Exceptionum patria et annis," *Melanges Paul Fournier*, Paris, 1929, pp. 573-585; H. Kantorowicz, *Studies in the Glossators of Roman Law*, Cambridge, 1938, ch. 6, pp. 112-121; and F. Calasso, *Medio evo del diritto*, I, *Le Fonti*, Milan, 1954, p. 297 ff.

96. Calasso, *Medio evo del diritto*, p. 181 ff., 607 ff.; Chénou, *Histoire*, I pp. 502-510, 513 ff.; cf., Olivier Martin, *La Coutume de Paris*, Paris, 1925, pp. 5-13. See Jarriand, *Histoire de la Nouvelle 118 dans les pays de droit écrit*, pp. 204 ff. for a picture of the

Justinian law was substituted for the Theodosian law including the Breviary and the *Papian*, and by which it penetrated legal practice and instruction, is one that needs more clarification than it has received. When these substitutions occurred they were treated by the *parlements* of the *midi* as alterations or re-definitions of established custom.⁹⁷ "It was as if a country which having lost its codes, had lived for some centuries on their memory and had one day rediscovered them."⁹⁸ Yet when some of the jurists spoke of the Roman law as a common law, the theory was not abandoned that it was a customary law enunciated and defined by the royal courts, not promulgated by past emperors, that was involved.⁹⁹

What is the explanation for the development of two systems of law in the north and south of France? It was not, as Montesquieu suggested, a result of either conscious choice by individual inhabitants, for the free choice of law did not exist, nor of legislative action for the *Edictum Pistense* legislated after rather than before the fact. Nor do the Romanist views of Fustel de Coulanges with their insistence on the survival of Roman institutions explain the dominance of Germanic law in the north.¹⁰⁰ If the Frankish elements tended to predominate in northern France it was not owing to any enforced imposition of their law by the conquerors. It was owing rather to a gradual transformation of the law of a majority or of the most influential part of a population into the law of the territory. This process is revealed in the *Edictum Pistense*.

The supposed persistence of certain national law systems in various regions has, however, given rise to several questions. Of the continuous existence of the Roman law in southern France and in Italy there can be no question. Of the survival of Lombard law there is also no doubt, as there is none of a mingling of national elements everywhere. But

extreme diversity among the customs of the south of France. Lyons was *pays de droit écrit* in the fourteenth century but was under *droit coutumier* in the twelfth and thirteenth centuries, R. Caillemier, "Les Idées coutumières et la renaissance du droit romain dans le sud-est de la France," *Essays in Legal History*, Oxford, 1915, pp. 175, 200. This shows the lack of continuity in some regions and also the ease with which "custom" and "Roman law" blended.

97. Brissaud, in *A General Survey of Events, Sources, Persons*, p. 206. Cf., Chénon, *Histoire du droit français*, I, p. 488; Olivier-Martin, *Histoire du droit français*, 2^e tirage, Paris, 1951, p. 122.

98. Esmein, *Histoire*, p. 682.

99. For the exact application of these terms see Esmein, *op. cit. supra* note 98, at 683-688 and the literature cited in the notes. The mode of application of Roman law in both the *pays de coutume* and the *pays de droit écrit* was much disputed. See also Tardif, *op. cit. supra* note 93, at 278 ff.

100. Fustel de Coulanges, *L'Invasion germanique*, p. 549; idem, *Recherches sur quelques problèmes d'histoire*, 2nd ed., p. 402; idem, *Nouvelles recherches sur quelques problèmes d'histoire*, pp. 361-398, especially pp. 382, 396-398. Fustel de Coulanges admits the existence of national groups in the Frankish Empire but denies them racial standing; they were territorial groups. A Ripuarian was resident of the *pagus Ribuarius*. If he entered a Burgundian region he was subject, however, to Ripuarian law. The national laws no longer designated national groups, *Nouv. Recherches*, pp. 378-379 and note 1. The learned author antedates the advent of territoriality, but his thesis is valid for the late ninth century, though it does not sustain a Romanist interpretation of the data.

precisely which national law or laws survived or predominated in northern France and in Germany, especially in the *pays de droit coutumier*?

The theory which has exercised the widest influence and conforms most completely to the terminology of the laws and customs is that of Sohm.¹⁰¹ According to Sohm the law that acquired the ascendancy in northern France and in western Europe in general was the Salic law. The growth of this law, which had commenced with Clovis, continued under the Carolingian rulers. The Salic law gradually supplanted the other Germanic national laws.¹⁰² Even the law of the capitularies was based on Salic custom. The only other national laws that remained after the ninth century were the Roman law and the Lombard law. The law of ancient France, therefore, was predominantly Salic law, but with the juxtaposition of Roman law in the south.¹⁰³ The only national law of Germanic origin that resisted the domination of the Salic law was the Saxon law. But otherwise Sohm found the Frankish law influence dominant in the whole field of "public law" and in the law of the fiefs. All the great movements and ideas of the Middle Ages originated in the country of the Salian Franks. The reform of Cluny and the Crusades originated in this middle region.¹⁰⁴

The theory of Sohm has been widely accepted but also criticized and modified in detail. Brunner has followed Sohm in accepting the influence of the Salic law in France and parts of Germany but has restricted the extent of the influence in Saxony.¹⁰⁵ Schröder, while agreeing with Sohm, is inclined to place more emphasis upon the influence of the Riparian law.¹⁰⁶ Felix Dahn criticized the part of Sohm's theory which set up a distinction between *Reichsrecht* (King's law) and *Volksrecht* (Folk law), and denied the validity of these differences.¹⁰⁷ Nevertheless, an examination of the documents of the tenth and eleventh centuries tends to confirm in the system of Sohm in one respect. In many documents Germans are identified as *Salici* living under the Salic law.¹⁰⁸

If Sohm's thesis is essentially correct from the point of view of national law terminology it has nevertheless suffered a searching revision on the side of doctrine. This has been the work of Julius Ficker.¹⁰⁹ The latter has emphasized the importance of the laws of the East Germans

101. R. Sohm, "Frankisches Recht und romisches Recht," *Zeitschrift der Savigny-Stiftung. Germ. Abt.*, I, pp. 1 ff.

102. Sohm, *op. cit. supra* note 101, at 17.

103. *Id.* at 64.

104. *Id.* at 69.

105. H. Brunner, *Grundzüge der deutschen Rechtsgeschichte*, 2nd ed., 1903, pp. 32, 95.

106. R. Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, 5th ed., p. 638.

107. Dahn, *Die Könige der Germanen*, VII, 2, Leipzig, 1894, pp. 34 ff.; VIII, 3, 1899, pp. 29 ff.

108. See section A, *supra*.

109. J. Ficker, *Untersuchungen zur Erbfolge der ostgermanischen Rechte*, Innsbruck, 1891-1904.

rather than of the West Germans in determining the dominant law characteristics of the Middle Ages. He has examined the contents of the various Germanic laws singling out what he regarded as fundamental and stable elements in each and has reclassified the legal customs of the Middle Ages on this basis. He has found this stable element in the law of the family and of marriage. Indeed, according to Caillemer, he has exaggerated the extent of the stability.¹¹⁰

According to Ficker the original family of Germanic law, both among the West Germans and the East Germans, was the matriarchal rather than the patriarchal family.¹¹¹ The West German tribes in their law were closer to this original matriarchal system than the East German tribes.¹¹² Using the criterion of family law Ficker recognized three systems of law among the Franks. Besides the traditional division between Salic and Ripuarian he included a further classification called the Lorraine law.¹¹³ The Lorraine law shared with the Salic law, called by Ficker the West Frankish law, the domination of the *pays de droit coutumier* of northern France. The principal characteristic of the West Frankish law was the absence of a legal bond between the father and illegitimate offspring. This was a survival of the old maternal system which was subsequently overlaid with patriarchal institutions.¹¹⁴ The Lorraine law was more variegated but was characterized in many cases by the custom of devolution. This was a right of children to landed property in the event of the death of one of the parents. The right of disposition of the surviving parent was limited.¹¹⁵ Thus the *pays de droit coutumier* was distinguished for legal elements of an early maternal system.

To the old Visigothic law, Ficker did not allow a large influence in France, though its importance in Spain was acknowledged. Characteristics of the old Visigothic legislation, such as the equality of sexes and the absence in the code of Euric of a reservation of property in favor of children, were ascribed to old East German legal traditions rather than, as commonly supposed, to Roman law influences. Though southern France was a region of Roman law Ficker recognized the influence of Visigothic law in Septimania and in Gascony. In these cases, however, the Visigothic law influence mingled with that of the Lorraine law.¹¹⁶

In the case of the Burgundian law much dispute exists. For Sohm the Burgundian law in the early Middle Ages had succumbed entirely

110. R. Caillemer, "La Formation du droit français médiéval et les travaux de Julius Ficker," *Annales des Facultés de Droit et des Lettres d'Aix*, II, 1906, pp. 38-39.

111. Ficker, *op. cit. supra* note 109, at no. 949; Caillemer, *op. cit. supra* note 110, at 41.

112. Caillemer, *op. cit. supra* note 110, at 40; Ficker, *op. cit. supra* note 109, at V, part one, on the East German law.

113. Ficker, *op. cit. supra* note 110, at nos. 810, 811.

114. *Id.* at nos. 885 ff., 908, 834 ff., 855.

115. *Id.* at nos. 739, 835.

116. *Id.* at nos. 1059, 1355; Caillemer, *op. cit. supra* note 110, at 4, 1907.

to the Salic law.¹¹⁷ In Ficker's view, however, the Burgundian law exercised the most decisive influence in France. After the defeat of the Visigoths in 507 the Visigothic law in this theory was replaced by the Burgundian law which thus shared with the Roman law a vital part in forming the customs of southern France.¹¹⁸ A leading attribute of the law of the region dominated by the Burgundian influence was the absence of a community of property between husband and wife.¹¹⁹ The spread of some doctrines of the Roman law in the south of France, especially of of Falcidian Fourth, was ascribed by Zeumer to the reception of the *Lex Romana Burgundionum* in the valley of the Garonne.¹²⁰ Ficker extended this influence of the Burgundians and treated the *pays de droit écrit* as identical with the *pays de droit Burgonde* (country of Burgundian law).¹²¹

In all these theories, as Caillemer has remarked,¹²² there is much exaggeration. The classification of Germanic laws on the basis of doctrines of family law and of survivals of a maternal system is helpful in understanding the resemblances and the differences among the various laws but it can hardly bear the historical superstructure that has been erected on its foundation. Nevertheless, it calls attention to the fact that the old national laws ceased to exist in the eleventh century as laws of tribes. The national laws adapted themselves to the regions in which they were to become indigenous and many of their doctrines merged in regional law systems. If the principle of the personality of law is sought in the tenth century it is to be found in new forms of feudal justice.

VI. CONCLUSION

It seems desirable in conclusion to attempt a summation and to orient it in its historical and legal setting. In doing the former two facts stand out, one a principle, that of the personality of law, the other a history, that of the application and extension of personality. If the first of these is a tribal possession rooted in religious conceptions, the second is a complex phenomenon which consisted of the grafting on the world-wide regime of Roman law of several systems of Germanic racial law and of the substitution for a system of legislation of one of customary jurisprudence. What we have traced is more than the unfolding of a primitive principle, it is in many respects a new development, or rather a series of new developments.

117. Sohm, *op. cit. supra* note 101, at 16, 27.

118. Ficker, *op. cit. supra* note 109, at no. 1342; Caillemer, *op. cit. supra* note 110, at 1907.

119. Ficker, *op. cit. supra* note 109, at no. 1305; Caillemer, *op. cit. supra* note 110, at 8, 1907.

120. K. Zeumer, *Zeitschrift der Savigny-Stiftung, Ger. Ab.*, IX, 1888, p. 26.

121. Ficker, *op. cit. supra* note 109, at no. 1341; Caillemer, *op. cit. supra* note 110, at 19-20.

122. Caillemer, *op. cit. supra* note 110, at 37-39, 1906.

When we try to place the personality of law in the perspective of European legal and constitutional development we note first of all its importance for international law. A history of private international law should embrace at least four periods or stages: (1) the personal law regime; (2) the territoriality of the feudal law; (3) the age of the statutes, Italian and French; (4) modern private international law. A study of any of these stages requires that attention be given to those preceding and following, for each embodies some elements of the earlier systems.¹

As public international law accepted its basic tenet of territoriality² from feudalism, private international law from the fourteenth century on increasingly emphasized the role of personality. This it did by distinguishing among personal, real and then mixed statutes. This was the work principally of Bartolus and his French and Italian students.³ It was not only a result of jurisprudence, of "droit savant," which carries us back to the twelfth century. It was a product of custom and of practice, and this takes us back to the early Middle Ages. The continuity denied by Lainé has been sustained by Meijers.⁴ As the latter points out, in France and England succession to real property is governed by the law of its situation, succession to personal property by the domicile of the deceased. The first rule goes back to the personal law system, the second to the feudal regime.⁵

The double heritage of the western tradition, "Germanic" personality and feudal territoriality, is recalled in sundry conceptions of modern public law such as *ius sanguinis* (right based on descent) and *ius soli* (right based on domicile or territory),⁶ and in a distinction made in modern French law between subjects living under territorial sovereignty and citizens sharing national sovereignty.⁷

1. J. BRISAUD, A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS & MOVEMENTS IN CONTINENTAL LEGAL HISTORY 213-216 (Boston, 1912) (*Manuel*, p. 239 ff.).

2. F. Laurent, *Le Droit civil international*, I, Paris, 1880, no. 198, p. 272.

3. M. Gutzwiller, "Le Developpement historique du droit international privé," *Recueil des cours de l'Academie de Droit International*, t. 29, (1929) IV, Paris, p. 395 ff.

4. A. Lainé, *Introduction au droit international privé*, vol. I, Paris, 1888, pp. 54-74. Meijers, "Principes fondamentaux," *Recueil des cours*, *op. cit. supra* note 3, at 50 ff. The continuity seems also to be upheld by Laurent, *op. cit. supra* note 2, at I, no. 168.

5. Meijers, *id.* at 672.

6. J. Brissaud, *Manuel d'histoire generale du droit français public et privé*, Paris, 1903, pp. 1755-1757. J. Mervyn Jones, *British Nationality Law*, rev. ed., Oxford, 1956, pp. 16, 51, 57 and *passim*.

Feudal fragmentation obscured the idea of nationality for a long time. Out of this stage of development came the notion of *ius soli*. Nationality depended on the place of birth: a Frenchman was defined as any person born on French soil. English law perhaps went furthest in this direction. Save for occasional naturalization only birth on English soil sufficed. English nationality could not be surrendered except with the consent of the sovereign, I POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 441. It was not until the eighteenth century that the principle of the *ius sanguinis* came to be applied in France, Brissaud, *id.* at 1756. English law continued to adhere more closely to *ius soli*.

7. A. Esmein, *Elements de droit constitutionnel français et comparé*, 7th ed., Paris, 1921, vol. 1, p. 2.

The importance placed on legal practice rather than doctrine in linking the personal law and feudal periods has important implications for the theory of the *survival of Roman law*.⁸ There seems little doubt that it was as custom rather than as jurisprudence that Roman law survived in southern France, whatever the case might have been in Italy. "Le fait triomphe et l'emporte sur le droit."⁹ Later French kings who insisted on regarding Roman law in these regions as custom rather than as legislation were on sound ground historically in doing so, though their motives were political, for they feared the implication otherwise possible that the Holy Roman Emperor could legislate in their dominions.¹⁰ The ability of Roman law in the early Middle Ages to don a personal and customary husk and then to break it¹¹ is as conspicuous as its later combination with territorial custom to achieve a similar result.¹²

The admission of strangers or of the conquered to legal and political rights is historically achieved through several methods: personality, territoriality, a common law of nations (*ius gentium*), and the system of statutes. Just as Rome made the most ambitious effort to utilize the third of these methods, the Franks applied the principle of personality most extensively. A history of private international law is also a history of the triumphs and setbacks of liberalism and constitutionalism.¹³ The older age of personality placed *rights* in a position almost unknown in our day because it insisted on the *divine* origin and *popular* sanction of all law, and law has been the carrier and safeguard of individual rights throughout.

If we focus on modern conceptions of constitutionalism it is obvious that they owe much to the two factors of personality and territoriality. The Magna Carta is a feudal document, but the earlier age of personality also placed rights in a privileged position, for it based them not on territorial and contractual ties but on birth and "nationality."¹⁴ If anything, the personality of law has been regarded by some modern jurists as a more secure foundation of individual rights than territoriality. One of the preparatory studies for the *Codex Iuris Canonici* (Code of Canon Law) contributed by a future pope contains a plea for its wider role in the law of the church.¹⁵ Considering how much the survival of the Roman law

8. McILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* 169.

9. J. Flach, "Le Droit romain dans les chartes du IX^e au XI^e siècle en France," *Mélanges Fitting*, I, 418.

10. McIlwain, *op. cit. supra* note 8, at 267, 293.

11. F. Kern, *Law and Constitution in the Middle Ages*, KINGSHIP & LAW IN THE MIDDLE AGES, 77 (S. B. Chrimes transl. Oxford, 1948).

12. Stouff, "Etude," *Rev. Bourg.*, 279.

13. R. Dekkers, *Le Droit privé des peuples*, Brussels, 1953, 406 ff.

14. C. H. McIlwain, *The English Common Law, Barrier against Absolutism*, AM. HIST. REV. 25 (Oct., 1943).

15. E. Pacelli, *La Personalité et la territorialité des lois, particulièrement dans le droit canon—Etude historique-juridique*, Rome, 1945 (originally published in 1912 in an Italian version). See especially the introductory notes iii ff. Taking his cue from St. Thomas Aquinas Mgr. Pacelli wrote in 1912, iii:

and through it of the canon law—for “ecclesia lege romana vivit” (the church lives by the Roman law)—owes to the personal law principle this attitude is understandable. But it is also a recognition of the claim that the principle of personality is a sound foundation of a just order in human relations.

Perhaps the principal role of personality has been that of a carrier of antique tradition.¹⁶ Whether the tradition was attachment to a distant Roman or Germanic past, or more concretely to rules of family law and succession, the principle of personality has enabled the customs of submerged cultures to assert anew an influence on social development.¹⁷

The idea of the territory does not enter as a necessary element in the notion of law . . . Several perfect communities, that is, those capable of receiving laws, are purely personal.

16. Meijers, “Principes Fondamentaux,” *op. cit. supra* note 4, at 672-673.

17. E. M. Meijers, “Le Droit médiéval, source auxiliaire de recherche pour l’étude de la diffusion des groupements ethniques en Europe occidentale,” *Etudes d’histoire du droit*, ed. R. Feenstra and H. J. W. D. Fischer, Leiden, 1956, I, pp. 15-18 (Resume). *Idem*, “La Réalité et la personnalité dans le droit du Nord de la France et dans le droit anglais,” Meijers, *op. cit. supra*, at I, 228-246.

Meijers regards the distinction between “real” and “personal” as pre-feudal in France and in England, and traces its origin to an organization of the family “qui se perd dans un passé lointain.” *Id.* at 244-245.