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Consuetudine, Coutume, Gewohnheit and Ius Commune. An Introduction

Abstract

Various views of the historical phenomenon of custom coexist in the world's legal historical scholarship. Some scholars hold that customs are the primary feature of a people's autonomy and self-determination in the permanent struggle against the »imperialist« attitudes of major powers. Others try to stay closer to historical sources, where the concept of custom has apparently served as a tool of argumentation that has proven very useful in defending the jurisdictional rights of collective subjects, such as cities, religious communities or regional powers.

The key to correctly understanding medieval theories of custom is the relationship between custom and the ius commune. The latter is the complex of normative authorities and doctrinal interpretations produced by jurists from the 12th to the 15th century. This relationship was not as conflictual as some of the legal historical literature depicts. Some examples regarding serfdom, private peace and customary procedures of evidence show how complicated the intertwining of the *ius commune*, customary laws and municipal statutes in the late Middle Ages can be.

Emanuele Conte

Consuetudine, Coutume, Gewohnheit and Ius Commune. An Introduction

The issue of the relation between local customary laws and the »common law« (ius commune) is at the root of an imposing tradition of historical studies, a classical one of the European legal historiography. Yet, until today, different visions of the historical phenomenon of customs share the floor of international legal historical scholarship: some scholars still consider customs to be the primary expression of the autonomy and self-determination of the people in permanent struggle against the »imperialist« attitudes of central powers; others try to stay closer to the historical sources, where apparently the concept of custom is used as an argumentative tool, very useful for the defence of the jurisdictional rights of collective subjects as cities, religious or regional powers.

Here I would like to give a brief account of these two different points of view, one of which is associated with the German tradition, the other with the Italian and French traditions.

1 Customs as Volksrecht: The 19th century Germanists

The German legal historical tradition took customary law to be the spontaneous creation of the people, the Volk, which was organised in more or less broad communitarian structures: from the village to the nation. A well-formulated definition of the phenomenon has already been provided in Otto von Gierke's grandiose syntheses contained in the first (1895) of his three-volume work, bearing the ambitious title *Deutsches Privatrecht*: »the customary law is non-promulgated law; it is a law that a community assigns to itself directly through practice (Übung)«.[1] Gierke synthesised the results of many decades of research conducted by German legal historians who, in a quest for the identity of the Germanic national law, had constituted an extremely strong School of »Germanists« that had detached themselves from the typical methodology of the pandectistic scholarship.

It was precisely this debate regarding custom that provoked the division. Georg Puchta's study *Das Gewohnheitsrecht* (1828–1837) suggested a unitary view of this juridical phenomenon, where custom – deemed an expression of the people's conviction (*Volksüberzeugung*) – manifested itself by virtue of the jurists' effort, who were deemed the true interpreters of the people's spirit. But the romantic cultural climate and the aspiration for Germany's national unity led to a distrust of the concepts offered by the legal scholars who – well versed in Roman law – could not grasp the true sense of the Germanic custom.

On the basis of this opposition between the ›law of the people‹ and the ›law of the jurists‹, Georg Beseler's famous work *Volksrecht und Juristenrecht* (1843) opened the way to the separation of Romanists and Germanists. The latter declare the conviction – which has never completely been overcome by the legal culture – that the scholarly opinion (»doctrine«) and the sovereign legislation together had launched ›a war of extermination against the customs‹.[2]

In the course of the 19th century, the glorious age of the German legal science, the concept of custom was consolidated, and it was later generally adopted by the theory and the history of law. In the reconstruction by the Germanists, from Beseler to Gierke and from Waitz to Heusler, custom was the genuine expression of the people: it could empower valid juridical norms *without the intermediation of legislative institutions*. Therefore, such a theory of customs offered a theoretical groundwork for thinking of a legal system existing without a State. Now, this way of conceiving the legal order was particularly useful with regard to the engagement of the German intellectuals in the unification pro-

1 »Gewohnheitsrecht ist ungesetztes Recht; somit Recht, das von einer Gemeinschaft unmittelbar durch Uebung erklärt ist.« Gierke (1895), I, § 20 1, 159. In the German text, customary law is a law »directly declared by the practice of a community«.

2 This was exactly the term used by Gierke (1895) I 161, »*Die Gesetzgebung ist im Wesentlichen der Theorie nicht gefolgt, setzt vielmehr bis heute den Vernichtungskampf gegen das Gewohnheitsrecht fort*«.

cess of Germany, which was achieved in 1871. Before the settlement of a unified German State, the German people could already lay claim to a common legal order based on ancient national customs, whose validity did not depend on the will of a sovereign power, but rather on the common belief of the folk itself. Thus, a shared historical interpretation succeeded in establishing a legal theory strong enough to form an important part of the German constitutional doctrine. When the Second Empire was finally established, the scholarly opinion kept the idea that its constitution (*Verfassung*) was not the expression of the representative institutions that formed the new State, but, on the contrary, it was rooted in the people itself. The constitution of a ›*Volk*‹ was comprised of its customs, to which the new State only gave an external appearance, for it was the intimate conviction of the people that determines its legitimacy.[3]

The idea of custom as a direct emanation of the people without the intermediation of the State was fundamental in deciding the relationship of the people's life and its law. The focus of German history on the Middle Ages – a time when the foundations for German civilisation were thought to have been laid – was taken as a structural element of the national constitution. In other words, the triumph of historicism meant that the national constitution was based, first and foremost, in history. The historiographical current, which was later given the name *Verfassungsgeschichte*, was established, and, from Fritz Kern to Otto Brunner, it propagated an image of the medieval Germanic society in which social life spontaneously shaped the law, and the law permeated the social life in a capillary way that left nothing beyond its regulation.

This view was a mixture of anthropology and legal history; an idea that grew stronger the day after Germany's defeat in the First World War.[4] The scholarly opinion of the constitutional law took it into account and formed the theory of a legal order immanent in the people's identity, a theory which Carl Schmitt then referred to as the ›*konkrete Ordnung*‹.[5]

2 German Historiography and Its Relation to Legal Theory

It seems obvious to me that, with respect to this part of German history, the typical political demands of nationalism profoundly influenced the historians' understanding regarding the key concept of custom. This influence, as we shall see, was weakened in Italy and France. In Germany, however, it still remains strong, and also maintains the connection between legal history and legal theory that characterised the German culture during the 19th and the first half of the 20th century.

In 2009, a voluminous study by Martin Pilch,[6] again, picked up the tradition initiated by the Germanists and highlighted a fundamental characteristic, that is, to look at the centuries comprising the Middle Ages with the explicit aim of constructing a general theory of the normative system. This aim is declared in the title of the book (*Kritik des Normensystemdenkens entwickelt am Rechtsbegriff der mittelalterlichen Rechtsgeschichte*).

History, for Pilch as well as for the classical German Historical School, is an extraordinary object of observation, on the basis of which the jurist can sketch structures (*Rahmen*) that are not simply interpretations of the past, but provide a fundamental model for every age. So the tradition drawing on the Germanist school ends up producing a result not all that different from the one attained by the Pandectists, to whom reproaches were addressed for having used history without a true and adequate historical sense.

* * *

During the time of Gierke's active career, the horizon of German legal history was pretty much confined to Germany. Gierke knew and – as it happens – cited works written in French, English

3 See, e. g., the talk given by Gierke just after the foundation of the Second Reich: Gierke (1874) (reprinted in Gierke [2001], vol. 1, 175 ff.).

4 In 1919, while the Weimar Republic was taking shape, Otto von Gierke gave a speech entitled *Der germanische Staatsgedanke* (now in Gierke [2001], vol. 2, 1063–1091). In the same year, Fritz Kern's long article was published: Kern (1919). Extremely successful, Kern's article took the form of a book and was translated in many languages (including English: see Kern [1939]) and reprinted into the new century.

5 Schmitt (1934) 13.

6 Pilch (2009).

and Italian, but his notes contain almost exclusively references to German studies. This situation is quite understandable, especially given that publications in German in this time comfortably surpassed that of all other languages, not to mention that legal scholarship, legal history and research of the history of legal systems were the areas of scholarship where Germany truly excelled.

In 2009, however, it is much more difficult to justify a study treating the structure of customary law that limits its own horizon to just the German culture and language such as Martin Pilch's mammoth work. With the exception of the literature in English, the bibliographical references are almost entirely of German origin. Furthermore, it completely lacks any comparison with the other prominent view treating the historical issue of custom, the view which was highlighted in the French and Italian studies since the mid-20th century.

One should not overlook these remarks when dealing with the historiographical interpretations of the phenomenon of custom. The historical reconstruction of the Middle Ages has been deeply influenced by the European nationalist culture of the 19th century, and the national characterisations of that period are, in certain cases, still visible up to this century. However, during the second half of the 20th century, some of the traditional interpretations of legal historians have been questioned, and an intensive philological research on the medieval sources brought to light some different points of view. This change of perspective took place partially in Italy, where legal historians initially underwent French and German influences as well as later constituted their own sensibility, which, in turn, influenced the other European regions, including Germany.

3 Italian Legal Historiography, Francesco Calasso and the System of the *Ius Commune*

Nevertheless, it should be pointed out that this distinction is not to be taken literally: among German legal historians, there are many signs of attention being paid to the »non-German« perspective, whereas among French and Italian legal historians, the typical view of the German School is still widely followed, and, in certain cases, arguably dominate over the other one. Hence, the distinction I am suggesting represents a simplification; one which we can take up and utilise, yet that we should also not forget contains numerous contaminations.

For almost the entire 20th century, there was a clear-cut separation between the history of national (Italian and French) laws and the history of Roman law. In the faculties of law, professors dealt with legal history from two completely different points of view. The historian of Roman law studied and taught a legal »system« composed of private-law institutions and pretended as if these institutions have been in constant application in Europe for more than 20 centuries. Therefore, one studied contract, property, procedure and family institutions created by Roman law and that were applied, with some adaptations, in Antiquity, the Middle Ages and the Modern period.

The historical scene concerning the research and teaching of the history of national laws was – to our surprise – the same as for Roman law. So, Italian or French national legal systems were historically constructed on the basis of foundational principles other than the Roman ones and rooted in the customs. Therefore, until the early 20th century, textbooks dealing with the »History of Italian Law« or »History of French Law« only dealt with Roman law in order to show its »influences« on the national law.[7]

It was the Italian scholar Francesco Calasso who stood up against this division and, instead, suggested that the age of the rediscovery of Roman law in Italy (in the 12th century) should be considered the true centre of national legal history. In his view, the national law adopted to a significant extent the logic developed by the schools of law (mostly those in Bologna) as a »*common grammar*« to sort out their different normative complexes: Roman law, canon law, laws of organisations of greater (kingdoms) and smaller (communes) territorial powers, customary laws. Indeed, the distinct element of the medieval experience in Europe was, for Calasso, precisely this »system of *ius commune*« (*sistema del diritto comune*), which placed the customs in a dialectical relationship to the complex of legal sources formed by the Roman and Ecclesiastical

7 On this development and on the methodological position of Calasso, see Conte (2009a) 13–34.

legislations and their interpretations offered in the glosses, commentaries, and other writings of the jurists.

Calasso's lesson has marked the Italian legal historiography and also made its way, with some modifications, into France since the 1960s. It challenged the traditional interpretation, according to which national laws based on customs had struggled throughout history against the uniforming tendency of sovereign powers, supported by the jurists with their rational Roman legal culture.

It is natural that this renewal of perspective stemmed from Italy. Actually, in the 19th and the early 20th centuries, Italian legal history imitated the contrast between national law and Roman law, which, as we have seen, was typical of the German view. Therefore, in Italy as well, Roman law – rationalised by the medieval scholastics – had been presented as the enemy of customs, and, as a result, it was considered to be *at odds* with the fundamental principles of the national law. Nevertheless, even if this interpretation could be accepted as true for Germany, the same could not be said for Italy, where Roman law was born and since Antiquity was very widespread. In Italy claiming an opposition between Roman law and Italian law is truly contradictory.

Calasso emphasised this contradiction, and his suggestion to consider the establishment of the school and the scholarly opinion as the key moment in Italian legal history resulted in an attempt to unite both views: the phenomenon of customs and that of the creation of a juridical science based on Roman law.

But even outside the specific case of Italy, Calasso's views were closer to the cultural feelings of post-war Europe, i. e. suspicious of the Germanists' nationalist reading and much more attracted to a post-ideological reading of the medieval sources. For Italy and France, the medieval definitions of custom always stemmed from the jurists who had studied the law of Justinian at a university. So, if one wanted to stay on the side of medieval texts, it was not possible to separate customs from the culture of the jurists who had described them.

This adherence to the sources is the defining character of the works of one of the most important of Calasso's disciples: Ennio Cortese. In his seminal work on the medieval theory of the juridical (legal) norm,[8] Cortese reconstructed the medieval scholarly opinions about custom with a degree of precision that, even 50 years after its publication, still remains unequalled.

Following the works of medieval Italian and French jurists, Cortese points out, with great attention to detail, the substantial problems of the theory of custom that had already arisen in the 12th century. Indeed, the jurists concentrated on the question of the legitimacy of customs and started from some definitions that are found in Roman law: custom is a source of law because it expresses the will of a people by means of the fact itself.

Thus, the legitimacy of customs is constructed by reference to the very elements medieval jurists had singled out to qualify the law issued by the sovereign power – namely, the will of the lawgiver, which made up the subjective element of the norm and the equity of its content, which constituted its objective element. What distinguishes custom from law, then, was the peculiar character of the lawgiver, who consisted or represented the people.

The glossators of the 12th and 13th centuries, therefore, had already sketched out a principle that was, again, later suggested by the German Historical School of the 19th century, specifically by Georg Puchta.[9] According to Puchta, the normative character of custom did not depend on the *fact* of the uniform behaviour of a people; this behaviour was rather the external *manifestation* of a will.[10] Since ›the people‹ has a normative power, its behaviour, protracted through time, demonstrated its will, as lawgiver, to establish a juridical norm.

This medieval idea of custom was long resisted within the European legal doctrine,[11] and it produced a fundamental distinction between the *fact* and its translation into a *juridical norm*. The simple behaviour of a people does not by itself give rise to any *consuetudo*: it is only a *usus* or a *mos*, that is to say, a simple fact that cannot by itself bind everyone. Yet when this fact is repeated over the course of a very long period of time (some authors main-

8 Cortese (1962–1964).
9 Puchta (1828–1837).
10 Landau (1991) 170.
11 Landau (1991) and Conte (2008).

tain that it should be time immemorial, others, 10 or 20 years), the duration turns it into a *ius*, that is, a custom. This precise distinction was introduced by the French school of Orléans, which flourished in the second half of the 13th century. Cortese[12] stressed its creativity and recognised that it was their top representatives, Jacques de Revigny and Pierre de Belleperche, who formulated a theory that was later taken up, again, by the Italians (from Cino da Pistoia to Bartolus) in the 14th century.

4 Customs within the Framework of *Ius Commune*. Italy and France

The reference made to the French scholarly opinion that emerged in the early 1960s in Cortese's work added a new aspect to the panorama sketched by Calasso, which instead focused exclusively on Italy. For Calasso, the medieval *diritto comune* represented a wonderful model for the integration of a common law that dictated general principles and guided the jurists' reasoning, integrating in the same organism the local laws that disciplined the communities at various levels (which composed the vast world of medieval Europe). It was the framework of the *diritto comune* that fascinated many Europeans who worked on the reconstruction of a common legal past after the disaster of the Second World War. Calasso thought that this model could be extended to the whole of Europe; however, he did not pay attention to the works of the 13th century French jurists.

The philological care and the adherence to the sources, which I mentioned above, on the contrary, drove the next generation of historians to pay more attention to unpublished works, that is, to go back and examine the manuscripts themselves. This was the case for a large part of the works of the Orléans jurists, and thus the French example was included in the great fresco of a European *ius commune*.

Indeed, the question of custom was more relevant for France than for Italy. Actually, since the 19th century, French historians of national law have heightened the peculiarity of the national history precisely by insisting on the importance of custom. All of the college textbooks on legal history reiterated (and still reiterate) that the very country was divided into two large zones: in southern France, the system would have been influenced by written Roman law (*pays de droit écrit*), whereas in the north of France, a *droit coutumier* would have taken form – this [customary] law was bound to forever mark French national law. Deeply influenced by the theories of the German legal historians, French historians had built up a strongly nationalist narrative[13] based on the sharp distinction between customary law and Roman law. The former responded to the spirit of the French people in a similar fashion as the Germanic law for the Germans, while the law of jurists based on Roman law was, therefore, considered alien to the French fatherland.

When defining the *coutume*, however, French historians drastically limited the sources to which they referred: they only used compilations of local laws or minor treatises that claimed to report customary rules. Following the German Germanists' example, French historians neglected the works of medieval jurists who, being educated in Roman law, were considered foreign to the world of *coutumes*. It was an anti-historic attitude because it disregarded the sources in favour of an ideological reading as well as to safeguard the opposition between customs and the *ius commune* as two irreconcilable worlds.

On the contrary, the new philological sense ingrained in the generation of post-war historians urged a return to the medieval jurists, who were the first to tackle the issue of valid customs in many cities of middle and northern Italy as well as southern France; then, inside the new, larger kingdoms like France and Sicily, there were jurists who had faced the intertwining of common Roman-Canon law, written laws enacted by the king and valid norms at the local level. The jurists of both the Orléans and Naples schools – unknown to Savigny's survey and thus little studied by the

12 Cortese (1962–1964), vol. II, 101–104 and 151–158.

13 J.-L. Halpérin (2012) stresses the strongly conservative and nationalist orientation of the most influential legal historians during the first half of the 20th century: from Chénon, Déclareuil to Olivier-Martin, who retained remarks of a racist nature in the 1948 edition of his textbook (n. 5).

19th-century historians – were, therefore, re-evaluated by Mejiers, who was followed by Robert Feenstra and the latter's Dutch disciples (Waelkens and Bezemer).[14] They provided a framework that, in the second half of the 13th century, sketched a true and adequate system of the sources of law that confronted and integrated each other.

5 Custom as Jurisdictional Power Regulated by Norm

However, this is not the time to provide a detail description of this complicated system, which, after all, shall be the topic of specialised studies. Instead, let us limit ourselves to recall the contribution made by André Gouron, who addressed the legal history of southern France, usually defined as *pays de droit écrit*, where Roman law was studied and applied since the middle of the 12th century. Since his first publications in the 1950s (he was born in 1931), Gouron focused on the historical studies of medieval law as it was concretely applied. Thanks to his substantial knowledge of the documents dealing with practice, he was able to devote himself to the search for the witnesses of the encounter between local legal practices and the theoretical knowledge of the early jurists who had brought about the first achievements in legal scholarship in southern France. Looking at his sources without ideological prejudice, Gouron did not find local communities demanding acknowledgement of their own laws based on customs. When the term *consuetudo* appeared in the sources, it referred to *rights enjoyed* by a lord or a commune that constituted itself as an institution and, thus, could exercise its rights as if it were a person.[15]

Gouron's observation is consistent with many others made by medieval historians who claim to have come across the term »consuetudo« in the documents – meaning what we would refer to nowadays as »subjective right«. Very often the sources characterised them in a negative way: *mali usus, malae consuetudines*, which literally means »bad usage«, »bad customs« and were primarily used in the context of a lord who maintained his legal position to demand services or subjection from the rural communities that were defenceless in the face of his power. The archival records registered the documents produced by local communities, churches and monasteries, as they turned to secular or ecclesiastical authorities for protection against these »unjust prerogatives«, calling them *consuetudines*, customs. Therefore, Lauranson-Rosaz recently made the observation that in the sources custom by no means appears to be the ancestral patrimony of a community, but rather (in the worst case) represents the right exercised by a more or less legitimate power.[16] When these rights, of a jurisdictional nature, are adjusted at the request of the community – through pacts, *convenientiae* or letters of exemption – customs lose the negative character with which they were associated in the earlier documents and become the bases for a new social equilibrium.

It is a process that Gouron had already mentioned when he observed that the sudden blooming of customs in the 12th century does not mean the »emergence« of an ancestral law: »the apparent respect … regarding the ancientness of usages should not mislead: ›customs‹ are nothing else than new laws, for which one would look for remote precedents in vain«.[17]

Let's add another comment. If the sources show the customs as jurisdictional rights to collect taxes, administer justice, regulate commerce and the agricultural life of a community, it is obvious that their nature should change when these rights cease to be based solely on the physical power of the lord and, instead, become an agreements between a master (*dominus*, which can also be the commune)

14 See the research conducted since E. M. Meijers in Feenstra (1985). See more recent studies in Bezemer (2008). For more specifically on custom, see Waelkens (1990), which again takes up the same subject dealt with in the author's earlier book. See Waelkens (1984).

15 Gouron (1990, 1988a, 1988b, 1988c, 1988d).

16 Lauranson-Rosaz (2001).

17 »L'apparent respect … vis-à-vis de l'ancienneté des usages ne doit pas tromper: il s'agit bel et bien d'un nouveau droit, dont on chercherait en vain de lointains précédents.« Gouron (1990) 201.

and the people (*populus*) living in his territory. In these cases, the public power should limit its own liberty in order to respect the pact binding the whole community. This agreement should indicate the principles upon which the jurisdictional power will be administrated.

This is the process which more frequently leads to the compilation of written customs. These customs, as André Gouron said, were not descriptions of ancient popular traditions, but new laws arising from new political situations.

6 A Theory of Custom. Cino da Pistoia

During the 13th century, and under pressure to reach an agreement between the local powers and communities, the meaning of the very word *consuetudines* changed. Previously, it referred to a personal power »possessed« by someone who could use it in a discretionary way; later it came to mean, on the contrary, a series of power-limiting rules. Such local legislations were issued by local communities, regional states and kingdoms, so that legal scholarship, especially in Orléans, was concerned with the issue of the relation between the general law (i. e. the Roman and Canon law that formed the complex of *ius commune*) and the norms dictated by local authorities, often as a complex of rules to be followed in the exercise of their jurisdictional power. Thus, it was one of the principal issues dealt with by the scholarship of the matured *diritto comune*.

In the early 14th century, in Italy, it was Cino da Pistoia who provided the most complete picture of the advancements made by French jurists on this topic.

A space exists in which custom and law do not collide, but rather integrate with one another. The use of custom established within the context of a specific community did not mean that it – in and of itself – possessed any validity akin to a legislative norm: it is only a fact and not a law, and as such it cannot conflict with the *diritto comune*. In order to obtain the status and validity of law, the use of custom must become entrenched over time or by means of being written down: the people (that is the political institutions which represent it) may order that the local usage be put into writing – the creation of a *lex municipalis*. These local norms can regulate all matters not determined by the law, or may override prescriptions of the *ius commune* in the cases where preference is given to the parties' will, who under certain circumstances might be willing to give up some legal protections.

In these cases, custom is deemed *legum interpres*, interpreter of the law.

So the sources provide us with a picture of relations between complexes of customary rules and *diritto comune* quite different from the one presented by the German *Rechtsgeschichte*; a view still widely resisted not only in Germany (as we have seen), but also in France, Italy and Great Britain, where many legal historians portray themselves as still bound to the 19th-century scheme of the incurable disagreement between customary laws established »from below« and a *ius commune* »received« by the State power and thus imposed »from above«.

On the contrary, local rules are justified by the recurrent use of the concept of *consuetudo* by jurists – as found in Justinian's sources – and it recognises the legitimacy of local norms particularly when they are put into writing, by virtue of their ancientness, which is not always real, but nonetheless necessary in order to justify their validity.

7 Leaving Custom for Roman Law: Bologna Statutes on Serfdom

However, general legal theories elaborated by jurists cannot be said to reflect the extraordinary variety of relationships obtaining between local statutes and *ius commune* as contained in the sources. Let us take three examples.

There are cases where the *ius commune* is invoked by members of a city in order to dispense with a custom that no longer responds to the demands of a more or less substantial portion of the population. To give an example, a norm that had been valid in Italy for many centuries, and had been included in the collection of Lombard edicts since the 7th century, was taken up into Bologna's statute at the very beginning of the 13th century. It provided that if someone behaved like a serf (by matter of fact) for 30 years or more, then it would no longer be possible for this person to reclaim his/her own liberty. Around 1230, the statute of Bologna contained this rule – as the testimonies of two great law professors of the city in those years confirmed, namely Azo and Hugolinus. Both of them cited this norm, calling it a *consuetudo* or a *statutum*, and criticised it for its unfairness. Accord-

ing to their analysis of Justinian law, and contrary to this rule, a person's freedom is entitled to special safeguards, and the simple passage of time could neither be considered enough to constitute the servile condition, nor even serve as proof of serfdom in a trial.

In this case, the contrast between the customary law and the Roman law cannot be seen as an attempt to impose a »foreign« law on the will of the people; on the contrary, the communal society of Bologna, which was, at that time, experiencing great economic growth, was oriented toward restricting as much as possible the servile conditions, which slowed down the urbanisation of peasants and favoured the authority of the countryside noblemen over and against the power of the city. In 1250, the municipal statute was revised with the amendment of two new norms, which limited the effect of the pacts affecting the freedom of individuals. Despite being referred to as *consuetudo*, the city statute was in fact an innovation, which subverted the ancient custom by introducing a new, fairer rule. Then, in 1257, the famous Liber Paradisus ordered the emancipation of serfs – the so-called *manentes* – after a compensation for the damages suffered by the masters.[18]

The jurists' criticisms, therefore, interpreted the »spirit of the people« much better than the old custom, and the Roman law was, in this case, the instrument that led to the revision of a rule that the commune perceived as unjust.

8 The »Settlement of Crime« or Private Peace is Maintained Despite the Inquisitorial Procedure

In other cases, however, the »*ius commune*« was open to customary practices that reflected the demands of the medieval society. Let me give one example involving the criminal procedure.

Recently, historians have emphasised that in the 12th century many Italian communes achieved numerous innovations, introduced by the authority of Roman law and well-received within the sphere of ecclesiastical justice: via this process, they achieved a new model of trial that Vallerani correctly characterised as »public justice«.[19] With respect to the criminal trial, the same movement toward a public form of trial was studied by Mario Sbriccoli, who preferred to talk about »hegemonic procedure« in order to stress the increasing importance of the role taken by public authority in criminal trials.[20]

Despite this general tendency, some elements of the former judicial proceeding are integrated into the new public-law structure of proceeding and kept some elements of a very ancient system of conflict resolution based so as to retain the possibility of discharging criminal fault through settlement with money and thus to avoid private acts of revenge. Such a proceeding was called »private peace«, and it represented an obvious alternative to the idea of public, inquisitorial proceeding, where a violent offense is perceived as an attack on the public peace. Such public proceedings were prosecuted by public officials, conducted according to the procedure and, if found to be guilty, were punished correspondingly by means of a penalty imposed by the public authority.

Many municipal statutes, however, kept the provision of a possible settlement between the offended and the offender and still maintained the possibility for private individuals to bypass the public prosecution of the crime.[21]

9 The »*positiones*«. A Customary Exception to the System of Legal Evidence

In a private-law trial as well, custom finds its place within a new structure, sketched by the *ordines iudiciorum* and gradually put into practice between the end of the 12th and 14th centuries. The new judicial proceeding allows the plaintiff to request justice by means of a specific form of action. This specific act suggests – to the judge – a specific legal interpretation of the fact allegedly constituting a violation of the rights of the plaintiff, and it requests that the judge take action, e. g.

18 A more detailed description of the affair can be found in Conte (2009).
19 Vallerani (2005).
20 Sbriccoli (2002).
21 Cerrito (2015).

restitution or compensation. The defendant's reply, in the Middle Ages as well as today, is often based on a different construction of the fact, which obviously must be directed to another juridical qualification in regard to what the plaintiff suggests.

Of course, it is natural that the phase involving the collection of proof, which determines the facts, is decisive for the outcome of a trial. Regarding this point, the interweaving of presumptions and proof was a central topic of juridical publication since the 12th century.

Nevertheless, in the 13th century, a procedural instrument was established throughout Italy that moved away from this logic where the crucial reconstruction of fact is given back to the parties. We are talking about the system of *positiones* described in the 13th century by practice-minded jurists such as Roffredus Beneventanus, Hubertus de Bobbio, Martinus de Fano and others.[22]

It is a weird system in which the fact is not ascertained by means of objective proof, but *agreed on* among the parties who challenge each other: one of the parties presents the elements of the fact one by one, and the other party is asked to confirm. To illustrate, let us consider the following example: Titius entrusts Caius with the amount of 1,000 escudos. If the other party agrees, then he writes, »I believe«, and if not, then he writes, »I do not believe«. In such a case the claim can be changed. For instance, one could suggest a lower amount until agreement is reached by both parties.

The treatise previously attributed to Martinus de Fano (but about which there are now some doubts) begins by clarifying two important points: 1. that the *positiones* substitute for the system of evidence (»*posiciones succedunt in locum probationum*«), and that 2. it is introduced not by written law, but by custom (»*quod patet de consuetudine causarum potius quam de iure scripto*«).[23]

Actually, the *positiones* represent a break with the rational framework of Roman-canon proceeding by introducing a decisive procedure that deviates from the spirit of the legal evidence. The fact about which the parties argue is not to be proven by means of objective elements, but agreed on among the parties. So it is by definition not objective, but rather subjective. This deviation from the line of public proceeding, so significant for the practice of criminal trials, is clearly introduced by custom and not by law. But it was a very widespread practice, and it was rationalised to the extent that jurists wrote treatises in which it seems to be completely accepted by the system.

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If we looked at the extremely rich legacy of sources of medieval legal history in Europe, we would find a great number of similar examples. But these three small examples show how the intertwining of *ius commune*, customary laws and statutes was pretty complicated, or perhaps too complicated to be described in systematic terms. In certain cases, like Bologna, jurists criticised customary norms in the name of the principle of justice treated by Roman law in order to obtain their revision. In other cases, the same jurists would stand by customary practices, like private peace, and try to rationalise them within the light of their scholastic culture.

The role played by the jurists is central to our discourse. As consultants to the communes or to the ecclesiastical authorities, as employees of the king or as professionals in courts, the jurists elaborate the arguments that were applied in the clashes between general norms and custom. By applying their scholastic reasoning to the practical reality, they adopted a dialectical-argumentative, non-systematic logic: a logic which does not sketch general and abstract concepts, but rather »mobilises« principles »extracted« from authoritative norms, directing them toward concrete cases or controversial questions. Hence, the larger historical issue of the relation between local laws and the general law, between custom and Roman law or between autonomous authorities and centralised normativity should be resolved case by case. At its core, medieval legal thinking was not systematic: it was casuistic.

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22 Vallerani (2005) 85–87.
23 Nicolini (1935).

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